IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
CRIMINAL APPEAL NO. 22 OF 1981

Between:

ROSS THOMAS HOLMES — APPELLANT

v.

R E G I N A M — RESPONDENT

Mr. H. Lateef for the Appellant.
Mr. K.R. Bulewa for the Respondent.

J U D G M E N T

The appellant appeals on a number of grounds against his conviction by the Magistrate's Court, Suva, on the 10th February, 1981, of the offence of driving a motor vehicle whilst under the influence of drink or a drug contrary to section 39(1) of the Traffic Act. I need only consider grounds (c) and (d) which are as follows :

(c) That the learned trial magistrate erred in law and in fact when he found beyond all reasonable doubt that your Petitioner was incapable of exercising proper control of a motor vehicle.

(d) That the learned trial magistrate erred in inferring guilt beyond reasonable doubt on evidence of lay witness only when the evidence in respect of driving had been rejected and when the evidence of observations were not of a compelling nature.

The appellant was originally charged with a second count of dangerous driving. The Magistrate accepted a submission of no case to answer and dismissed the second charge.

The Magistrate's ruling on the submission is relevant in considering this appeal and is as under :

" I agree that P.W.1's evidence could never be relied on in so far as it stands by itself. It does stand by itself on the charge of dangerous driving and I do not feel that I would ever be in a position where I could say I was satisfied on this charge. So the dangerous driving charge is dismissed as I find that there is insufficient credible evidence on that charge.

So far as the drink charge is concerned, P.W.1 was corroborated by P.W.2 at least. Although I have considered carefully the submissions and authorities put to the court by Mr. Lateef, I feel there is sufficient credible evidence at this stage of accused's being under the influence to such an extent as to be incapable of driving properly. I find there is a case to answer on the drink charge.

P.W.1 referred to by the learned Magistrate was the police officer who arrested the appellant and was the only witness called by the prosecution to testify as to the manner in which the appellant drove his vehicle on the night in question.

With the rejection of P.W.1's evidence on the dangerous driving charge there was no evidence before the Court as to the manner in which the appellant drove his vehicle that night. He was not involved in any traffic accident that night.

The difficulty I have experienced in considering this appeal arises because the learned Magistrate while purporting to make findings as to facts did not state what those facts were.

Two paragraphs of the Magistrate's judgment will indicate what I mean. They follow a lengthy review of the prosecution and defence evidence. At page 37 of the Record the Magistrate stated :

" So much for my review of the evidence, my findings are that accused was in the condition described by P.W.1 and P.W.2 at about or shortly before 10.20 that night. Had P.W.1's evidence stood alone, I would, as I have already indicated, have found it difficult or impossible to rely on it. But, so far as Count 1 is concerned, it does not so stand. P.W.2 I found an excellent witness. I bear in mind there was a discrepancy between what he told me and what he told my colleague at the previous hearing, but I do not consider that this is of great significance."

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At page 38 the Magistrate stated :

> "Given the fact - and it is a fact - that I am satisfied beyond a reasonable doubt that P.W.2's evidence and, on Count 1, P.W.1's evidence also, are accurate in their descriptions of accused's condition at the different times they observed him, I go on to ask myself what inferences may be legitimately drawn with regard to accused's ability or otherwise to exert proper control over a motor vehicle. Even although I have acquitted accused of the dangerous driving charge, I am still left in no doubt at all that by reason of being under the influence of drink, he was incapable of driving properly, given the state I find he was in. I am satisfied that this is the only reasonable inference that can properly be drawn, even although, as I have already stated, I feel I cannot rely on P.W.1's evidence of accused's actual driving."

Although in both the extracts I have quoted the Magistrate refers to his findings as to the state the appellant was in that night he did not state his findings.

It is clear from the judgment that the Magistrate based his findings solely on the evidence of P.W.1 and P.W.2 both police officers. There was no medical evidence as to the appellant's condition because the appellant did not consent to being medically examined and there was no evidence at all as to the manner in which he drove his vehicle on the night in question which would have determined whether he had proper control of the vehicle or not.

While an appellate Court will not lightly disagree with a Magistrate's findings of fact, his finding of fact, that because of the 'state' he found the appellant in he was incapable of driving properly,was based on what he terms a "reasonable inference" that can properly be drawn from facts which he has not stated in his judgment.

The totality of P.W.2's evidence in his examination in chief as to the condition of the appellant that night is as follows :

> " I received accused there from P.W.1. He could not keep his balance. He could not walk properly. His eyes were red and bloodshot. His breath smelt heavily of liquor."

In cross-examination P.W.2 said :

" Accused could not speak properly because he had tongue retarded - he had a stutter. He has a bad stutter.

I could understand him. No difficulty. Accused dressed properly. Not talkative, not abusive, not abnormally behaved.

Accused taken to C.W.M. in van. Van has step at rear. Accused walked out of office without any assistance despite the fact I opened the door.

When accused got out he received no assistance."

There is no mention of the appellant not being able to walk properly when he left the police station to go to the hospital.

In his Ruling of no case to answer the Magistrate indicated that P.W.1 was corroborated by P.W.2 as regards the first count.

The totality of P.W.1's evidence as to the appellant's condition was a number of separate statements as under :

"He smelled heavily of liquor"
"He was murmuring"
"His eyes were bloodshot"
"He could not control himself"
"He was drunk"
"He was staggering".

P.W.1 did not go into the police station when the appellant was taken there and handed over to P.W.2.

There can be no doubt that the appellant smelt of liquor and that his eyes were bloodshot and that he was having some trouble at first keeping his balance and in walking properly. However, within a few minutes after arriving at the police station he was getting in and out of a vehicle without assistance. He was not talkative, abusive and was "not abnormally behaved" which I would understand as a statement that he behaved normally. This was evidence the Magistrate

does not refer to at all but it is evidence of P.W.2 relating to the appellant's condition that night.

P.W.2's evidence did not require corroboration and what the Magistrate probably meant was that he accepted P.W.1's evidence so far as it supported P.W.2's evidence as to the appellant's condition that night.

P.W.1 however, was discredited to such an extent that the Magistrate could not accept his evidence as to what happened that night. In my view he should have totally rejected his evidence. He was however, entitled to accept P.W.2's evidence.

Where the Magistrate erred in my view is in not considering whether the prosecution had established that the appellant was under the influence of liquor to such an extent as to be incapable of having proper control of his vehicle. He was of the view that given proof of the appellant's condition he was entitled to infer that the appellant was incapable of having proper control of his vehicle.

Grant J. in Sohan Ram v. Reginam Cr. App. 138/77 stated what the prosecution have to prove. He stated :

> " As this Court pointed out in R. v. Sellars (Cr.App. 73/73) the prosecution have to prove firstly, that the driver was under the influence of drink, on which the evidence of lay witness may be received; and secondly, that he was under the influence of drink to such an extent as to be incapable of properly controlling the motor vehicle, which may be established in a variety of ways, such as the manner of driving; or the circumstances of an accident, or the evidence of a duly qualified medical practitioner who has examined the driver and who, as an expert witness, is in a position to express an opinion that he was under the influence of drink to such an extent as to be incapable of having proper control."

Grant C.J. referred to a "variety of ways" the prosecution can prove a charge. He mentioned 3 ways. In the instant case the Magistrate had no evidence of any of those 3 ways of establishing that a person was incapable of properly controlling a vehicle.

The Magistrate had rejected all evidence as to the appellant's manner of driving. There was no accident and no medical evidence. It was certainly established that the appellant was under the influence of drink that night but due to the Magistrate rejecting P.W.1's evidence there was no evidence before him that the appellant was incapable of properly controlling his motor vehicle.

The Magistrate, having accepted that the appellant was under the influence of liquor was not entitled to come to a finding which reflects his own personal opinion or is the result of an inference based on his findings as to the condition the appellant was in that night (although not stated in his judgment) and that the appellant was therefore incapable of properly controlling his vehicle on the night in question.

P.W.2's evidence as to the appellant's condition properly considered should have left the Magistrate in some doubt as to the appellant's guilt if he had appreciated that there was no evidence before him as to the appellant's ability or inability to control a vehicle since he had rejected all P.W.1's evidence on that issue. Had P.W.1's evidence as to how he alleged the appellant had been driving that night been accepted by the Magistrate, there is no doubt there was ample evidence on which he could have convicted the appellant on both counts.

I allow the appeal and quash the conviction.

The fine if paid is to be refunded to the appellant.

The endorsement on the appellant's driving licence is cancelled.

It follows that the Magistrate's order disqualifying the appellant from driving a motor vehicle is set aside and his driving licence is restored.

(R.G. KERMODE)
ACTING CHIEF JUSTICE

SUVA,
7 JUNE, 1981