IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction
Criminal Appeal No. 6 of 1982

201
000341

Between:

BERNARD CHARLES WOOD

and

REGINAM

Mr. D.C. Maharaj for the Appellant
Mr. J. Sabharwal for the Respondent

JUDGMENT

Appellant was charged in the Suva Magistrate's Court on two counts; first count with driving a motor vehicle while under the influence of drinks contrary to section 39(1) of the Traffic Act (Cap.152) and second count with dangerous driving contrary to section 38(1) of the said Act. He was found guilty and convicted on the first count and sentenced to a fine of $100 or in default three months' imprisonment. He was also disqualified from holding a driving licence for a period of twelve months. With reference to the second count of dangerous driving he was found not guilty thereof but guilty of the lesser offence of careless driving and was fined $30 or one month imprisonment.

The appellant appeals against his conviction on both counts but at the hearing of the appeal I indicated to counsel that I could not possibly see how he could succeed in regard to the conviction for careless driving. There was ample evidence to support that finding. Counsel agreed not to pursue the matter.

Two grounds of appeal (4) and (5) were put forward with respect to appellant's conviction under section 39(1) of the Act. These grounds read:

"(4) That the learned trial Magistrate erred in law and in fact in drawing inference that the 'accused was also so under the influence of alcohol as to be incapable of controlling the vehicle he was driving' when there was ample evidence before him of your petitioner's condition and particularly, when he says he was tired and it may be that this played on part in his not being able to walk steadily.'

(5) The learned trial Magistrate erred in law and fact in arriving at the decision when the evidence as to the manner of your petitioner's driving and condition was no more than that of a tired person driving at that time of the night."

The facts which were largely undisputed showed that at about 11.45 p.m. on the 20.6.81 a police van driven by PC Sharma was driving on the left lane along Brown Street and was approaching the junction to Rewa Street. A white Subaru van BI249 driven by the appellant came from behind and was travelling on the adjacent lane. As appellant's van drew up alongside and past the police car it suddenly swerved to the left lane forcing the police car to pull up in order to avoid what could have been an accident. Appellant turned left at the junction and headed towards Samabula. The police car caught up to appellant and stopped him at a point more than 500 feet from the junction. Appellant had had some drinks during the earlier part of the evening at the Defence Club.

On the question of drinks the learned Magistrate made the following specific findings:

"1. Accused had been drinking prior to having driven.

2. His breath smelt of liquor after he was stopped at Rewa Street.

3. He was unsteady on his feet in Rewa Street.

4. He was unsteady on his feet later in the police station.

5. His eyes were red.

6. He could not walk straight.

7. He could not touch his own nose.

8. He was considerably under the influence of alcohol, if not actually drunk."

As is clear from Sohan Ram s/o Jag Roop v. Reginam (Cr.App.No. 138/77) and other cases the above findings would not by themselves be conclusive on the issue of the state of drunkenness of a person such as to render him incapable of

having proper control of a motor vehicle. Other evidence must be considered and evaluated in the light of such findings before a Court can properly arrive at a just and fair verdict as to whether there has been a breach of section 39(1) of the Traffic Act under which an offence would only arise if the person concerned was "under the influence of drink to such an extent as to be incapable of having proper control of the vehicle". Sohan Ram's case referred in particular to such evidential factors as manner of driving, the circumstances of an accident and the opinion of a duly qualified medical officer who had examined the suspected drunken driver. In the present case as was pointed out by the learned Magistrate there was no evidence of an accident nor was there any medical evidence on the fitness of the appellant to drive. Evaluation of evidence in the present case must therefore mainly focus on the manner of driving of the appellant.

It is not disputed that appellant had driven his motor vehicle from a house in Extension Street at about 11 p.m. on his way home to Samabula. He drove at a speed of 40 kph up along Amy Street and thence into Brown Street at the junction of which the incident of careless driving occurred and for which he was properly found guilty by the learned Magistrate. As already noted appellant made a left-turn manoeuvre at the junction which brought him onto Rewa Street whence he drove in the direction of Samabula. He was stopped by the police 500 feet from the junction for being under suspicion of drunken driving and taken to Samabula Police Station. If appellant had not been stopped by the police there was every reason to believe that he would have reached his home safely without any mishap. His speed was normal and safe and there was no evidence that he was driving along in a zig-zag or grossly erratic manner. I think it is fair to say that there was nothing in the actual manner of his driving as would inevitably induce a reasonable and objective onlooker to conclude that he was incapable of properly controlling his vehicle between the time he left the house in Extension Street and when he was stopped by the police in Rewa Street.

In these circumstances I do not think the learned Magistrate was justified in the view he took that on the night in question the appellant was so drunk as to be incapable of having proper control of his motor vehicle. In such cases as this the evidence of the suspect's general demeanour after taking drinks and evidence of tests carried out on him at a police station comprise only one side of the coin, so to speak; the other side of course would be the manner of his driving, the occurrence of an accident (if any) and so on. The evaluation of such evidence must necessarily be composite in nature and in carrying out such exercise the trial Court must always bear in mind that the burden of proof is on the prosecution throughout the case and that the standard of proof is one of proof beyond all reasonable doubt. In this connection it needs to be said that it was accepted by the learned Magistrate that appellant was fairly tired when he was called upon to undergo the tests at the police station and that had affected to some extent his performance. Given that concession the value of the tests carried out on appellant could not have been very helpful in proving this charge.

Having regard to the whole circumstances of this case I am satisfied that this was no more than a borderline case so far as an offence under section 39(1) of the Traffic Act is concerned. In my respectful opinion the evidence presented by the prosecution in this case was not sufficiently cogent as to justify the trial Court to conclude beyond any reasonable doubt that on the night in question the appellant was so drunk as to be incapable of having proper control of his vehicle.

The appeal will be allowed to the extent that the conviction entered against appellant under section 39(1) and the sentence must be set aside.

T.U. Tuivaga

(T.U. Tuivaga)
Chief Justice

Suva,
26th March 1982.