IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
CRIMINAL APPEAL NO. 103 OF 1983.

Between:

BEN TAUSIA APPELLANT

- and -

R E G I N A M RESPONDENT

Mr. A. Ali for the appellant.
Mr. G.E. Leung for the respondent.

J U D G M E N T

The appellant on the 14th day of April, 1983, was convicted by the Magistrate's Court, Suva, of the offences of Driving a Motor Vehicle under the influence of drinks or drugs contrary to section 39(1) of the Traffic Act and Dangerous Driving contrary to section 38(1) of the Traffic Act.

In respect of the first offence he was fined \$50 and was disqualified for a period of 12 months from driving any vehicle. In respect of the second offence he was fined \$40 and disqualified from driving for a period of 9 months, thi. period to be concurrent with the longer period in respec of the first offence.

He appeals against conviction and sentence in respect of both offences but at the hearing Mr. Ali did not mention the sentences or disqualification.

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The grounds on which the appellant appeals are as follows :

"(a) That the learned trial Magistrate erred in law and in fact when he held "Neither D.W.2 nor D.W.3 gave the evidence in a convincing manner. Indeed D.W.3 appeared to search for support at each question and changed his reply to a number of them as soon as he spoke. I reject their evidence where it conflicts with P.W's 1,2 and 3" and he failed to individually alalyse the evidence of the witnesses. Hence there has been a substantial miscarriage of justice.

(b) That the learned trial Magistrate erred in law and in fact in considering the opinion of three Police Officers when they did not qualify themselves and/or were not experts to gauge the level of intoxication of the accused. Hence there has been a substantial miscarriage of justice."

There is no merit in the first ground of appeal. The Magistrate considered the evidence of the two defence witnesses and rejected their evidence where it conflicted with the evidence of three prosecution witnesses. The Magistrate saw the witnesses and assessed their credibility and this Court cannot interfere with his finding that the two defence witnesses were not credible witnesses.

As regards the second ground, it does appear that the Magistrate took into account opinion evidence given by three police officers that the accused (appellant) was drunk at the relevant time in considering whether the accused was at the relevant time incapable of having proper control of his vehicle.

The Magistrate considered the evidence and listed the salient facts he accepted as establishing that incapability as follows :

"1. Zig-zag driving;
2. Smell of alcohol;
3. Inability to stand without support;
4. Speech impairment;
5. The opinion of the three officers that he was drunk in their experience of the matter;
6. The inspector's evidence that in his opinion he could not carry out the usual tests because the accused could not stand up."

He considered that all the 6 items he listed evidenced the accused's inability to properly control his vehicle and he duly convicted the appellant on the first count.

The second ground of appeal relates to the Magistrate's acceptance of the opinion evidence of the three police officers that the appellant was drunk. The officers did not express any opinion as to the appellant's ability, or lack of it, to properly control a vehicle. Had they done so that evidence would not have been admissible as that issue was for the Magistrate to decide on the evidence before him.

The evidence of police officers, however, as to their impressions whether the accused had taken drink and the condition of th accused, if the facts on which they base their impressions are stated, is admissible in evidence.

Grant C.J. in R. v. Chaudhary Cr.App. 95 of 1978, one of the cases quoted by Mr. Ali, quoted from R. v. Sohan Ram Cr. App. No. 138 of 1977 as follows:

> " '..... the prosecution have to prove firstly, that the driver was under the influence of drink, on which the evidence of lay witnesses may be received; and secondly, that he was under the

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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'.

'... the case of R. v. Davies is authority for the proposition that a witness who is not an expert can give his impression as to whether a person is under the influence of drink. What he is not permitted to do is give his opinion as to whether the person was under the influence of drink to such an extent as to be incapable of properly controlling a motor vehicle, as that is the very matter which the court has to determine with the assistance, if it be available, of the expert opinion of a medical witness'. "

The Magistrate referred in his judgment to the opinion expressed by the three police officers that the accused was drunk. In fact only two of them, so far as the record indicates, stated the accused was drunk. Only one of them in evidence in chief stated he was drunk. Under cross-examination the other did state the accused was drunk.

The statements that the accused was drunk were made by the prosecution witnesses to explain why they believed the accused was not in a condition to be questioned or tested. They were not attempting to express any opinion, in my view as to the accused's ability to drive a vehicle.

There was not sufficient evidence in my view on which the Magistrate could have convicted the accused on the first count. When considering the vital issue whether the accused was capable of properly controlling his vehicle he made a list of his findings which he stated supported his finding that the accused was incapable.

Only one of those findings was related to the manner in which the appellant drove his vehicle and that was "zig zag driving". That was an element he also found in the dangerous driving offence. The appellant was not involved in an accident and the record discloses that he overtook a number of cars at a relatively high speed. His driving was dangerous

as the Magistrate found and the accused was properly convicted of the offence of dangerous driving.

In any case such as the instant case where an accused person is charged with the two offences with which the appellant was charged, the Magistrate is placed in a difficult position if there is not evidence adduced which enables him to judge whether the accused was at the relevant time incapable of properly controlling a vehicle.

There was no medical examination of the accused and no medical opinion as to the accused's capability of properly controlling a vehicle - an opinion the Magistrate could accept.

There is in any event no legislative provisions regarding alcohol content in the blood or urine of an accused person which would make it unnecessary to determine whether a person was capable or not. The offence is committed if a person drives with such alcohol content in excess of the statutory limit.

There was no accident which coupled with the evidence of the accused's condition could have established beyond any reasonable doubt the accused's inability to drive.

The Magistrate in the instant case had some evidence of driving which he held established the offence of dangerous driving but that evidence could also raise doubts as to the commission of the first offence.

He should have ignored the opinion of the police officers that the accused was drunk at the time and considered whether there was sufficient evidence to establish beyond reasonable doubt the commission of the first offence.

There is no doubt that the appellant at the

relevant time was well under the influence of alcohol, very much so. The Magistrate may have been of the view that any person in that condition could not possibly properly control a vehicle. That may have been the case but there can be degrees of intoxication and there are some people who are capable of properly driving vehicles while under influence of alcohol while others at the same level of intoxication are quite incapable.

The tendency is, and it is a natural one, for a Magistrate in cases such as the present one to assume, given a man who is clearly intoxicated, that he is incapable of properly handling a car. He must, however, consider whether the prosecution has established by evidence that the accused is incapable of properly controlling a vehicle due to drink. It is to be regretted that doubts in such cases can sometimes only be resolved if there is an accident.

Until Fiji is in a position to bring in legislation which makes it an offence to drive a vehicle with an alcohol content in the blood above a stated limit, people like the accused will have to be given the benefit of any doubt.

Had the police called in a doctor, there might have been expert evidence available. The police inspector considered the accused too drunk to be put through any tests. The doctor had he been called could have expressed the same opinion but he could as an expert witness go further and state his opinion as to whether the accused was capable of properly controlling a car.

The acceptance of the police officers' opinions even though they did not go as far as expressing opinions on the ability of the accused to properly control a car, raises a doubt in my mind as to whether those opinions influenced the Magistrate's decision. He confined his consideration of the appellant's manner of driving to the zig zag driving. That in my view was insufficient evidence

to establish beyond reasonable doubt that he was incapable of properly handling the vehicle although it was in the circumstances dangerous driving.

The appellant passed a number of vehicles which necessitated steering the vehicle from one side of the road to the other. The Magistrate when considering the second count referred to "the general zig zag pattern". The use of the last three words, "zig zag pattern" tends to paint a picture which negates erratic driving by a drunken driver and indicates some measure of proper control. It certainly raises a doubt as to the appellant's inability to drive.

There was in my view not sufficient evidence before the Magistrate to establish the commission of the first offence beyond all reasonable doubt. The appeal succeeds so far as the conviction for the first offence is concerned.

The conviction for the offence of driving under the influence of drinks or drugs is quashed and the sentence and disqualification cancelled.

The conviction and sentence and 9 months disqualification for the offence of dangerous driving is confirmed.

(R.G. KERMODE)
JUDGE

SUVA,

10th JANUARY, 1984.