IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 47 of 1984

Between:

JAI NARAYAN s/o SHIU NARAYAN Appellant

and

REGINAM Respondent

Mr. A. Singh for Appellant

Mr. S. Singh for Respondent

JUDGMENT

This is an appeal from the Magistrate's Court at Suva where on 6th October, 1983 appellant was convicted on a charge containing two counts, namely -

1st Count - driving a motor vehicle whilst under the influence of drinks or drugs contrary to section 39(1) of the Traffic Act and was sentenced to a fine of $80 and was disqualified from holding or obtaining a driving licence for a period of twelve (12) months; and

2nd Count - dangerous driving contrary to section 38(1) of the Traffic Act and was sentenced to a fine of $30 and disqualified from holding or obtaining a driving licence for a period of three months concurrent with the first count.

The prosecution evidence was that on Sunday, 16th

January 1983 at about 1.30 a.m. a police officer (P.W.1) saw appellant's car D7074 which was travelling in a zig-zag manner on the King's Road 4 Miles towards Suva. The police officer who was going in the same direction in a police van tried to stop appellant's car by tooting his horn several times but the appellant did not stop. P.W.1 did not try to overtake appellant as the road ahead was winding and was not safe to do so. He managed finally to stop him at the junction of the road at Pikeu Street. Upon confronting appellant P.W.1 found him to be smelling heavily of liquor. He also found five bottles of beer in the car and a glass. They were large bottles - one of these bottles was empty and one had been drunk down to a quarter whilst three were still full and unopened. Under cross-examination P.W.1 said at one stage appellant almost collided with an oncoming vehicle which was forced off the road. Appellant had a passenger with him.

Appellant was taken to Samabula Police Station where he was received by a police constable (P.W.2). According to P.W.2 appellant when he saw him smelt heavily of liquor and his eyes were bloodshot. P.W.2 took him to C.W.M. Hospital for medical examination and there he was seen by Dr. Qadriu. At the hospital no blood or urine samples of appellant were taken because he did not consent for any samples to be taken. P.W.2 brought appellant back to Samabula Police Station where appellant was given certain tests by the duty officer, Sergeant Ben Dyer (P.W.3) to ascertain whether he was drunk and incapable at the material time.

According to P.W.3 appellant smelt of liquor and from the tests he gave appellant he concluded appellant was drunk and

incapable. An element in that opinion was the fact that during his interview with him appellant kept dozing off to sleep. P.W.3 expressed his opinion in these words: "I found then that he was so drunk that he couldn't be in charge of a motor vehicle."

Dr. Qadriu was called by the prosecution to give evidence but he was found by the trial Magistrate to be an unsatisfactory witness and for that reason his evidence must be disregarded including his medical report which was in any event inadmissible (see Langford v. R. /1974/ 20 F.L.R.11). Similarly, the expression of opinion by P.W.3 that appellant "was so drunk that he couldn't be in charge of a motor vehicle" was inadmissible and of no evidential value (see R. v. Davies /1962/ 3 All E.R.97).

In his sworn evidence appellant said on 16.1.83 he attended a wedding ceremony at Koronivia where he had three glasses of beer and some grog. According to him he finished drinking beer at 7.30 p.m. He explained that the bottles of beer found in his car were there because his brother-in-law (D.W.2) had been drinking in the car with some friends at the wedding. D.W.2 gave evidence in support of appellant's evidence that appellant had little to drink that night.

The following grounds of appeal were argued on behalf of appellant:

"a) The learned trial Magistrate erred in law in admitting the findings of Doctor Akuila Qadriu and relying on such findings when the tests carried out by Dr. Qadriu were incomplete and inconclusive;

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b) The learned trial Magistrate erred in law in admitting the tests carried out by Sgt. Ben Dyer and relying on such tests inasmuchas the said tests were not carried out with the consent of your Petitioner."

As already noted in the foregoing observations about the evidence of Dr. Qadriu and Sgt. Ben Dyer, their evidence being inadmissible cannot be of much assistance to the prosecution.

It was contended further by counsel for appellant that if their evidence was left out as they must, the case for the prosecution would then be reduced to the evidence of P.W.1 alone who said appellant drove in a zig-zag manner from 4 Miles on King's Road all the way to the junction of Pikeu Street and who on being confronted about his driving was found to be smelling heavily of liquor. P.W.1 also stated and this was not in dispute that beer bottles were found in appellant's car. On the question whether appellant was in fact driving in a zig-zag manner and once almost got himself involved in an accident along the way, counsel for appellant complained that the trial Court gave no reasons why he accepted P.W.1's evidence on the point against appellant's denial. Counsel contended that the trial Court was under duty to give reasons for accepting prosecution evidence on the issue. Counsel for appellant relied on the recent case before Cullinan J. of Hassan Ali s/o Ismail v. R. (Lautoka Criminal Appeal No. 73 of 1983) and the reported case of Chandra Pal v. R. 20 F.L.R.1 which was cited in that judgment.

The following passage from Hassan Ali's case is pertinent:

"Section 155(1) of the Criminal Procedure Code which, subject to sections 156 and 299 of the Code, applies also to the Supreme Court, reads as follows:

> '155.-(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it:"

Quite clearly Grant Ag. CJ had those provisions in mind in the above passage. In the least a court is statutorily obliged to give reasons for its decision, if for no other purpose it seems than to provide a basis for review on appeal: it may be also that the legislature considered that to oblige a court to set down its reasons in writing would have the salutary effect of causing the court to carefully examine and consider such reasons. It seems to me that those reasons may well be, on occasion, inevitably inter-linked with the reasons for accepting a particular witness's evidence. I do not see that the passage reproduced above from the judgment in Chandar Pal v. Reginam necessarily directs magistrates that there is no need to record the reasons as to why they believe or disbelieve a witness.

In my view, it is simply not enough for a magistrate to state that he believes or disbelieves a particular witness. He should give his reasons therefor, for example, whether the witness' evidence was contradictory, or was contradicted by other independent evidence, or his evidence was intrinsically unrealistic or plainly incredible, or the witness proved evasive or his demeanour was not impressive etc. or completely to the contrary. Such reasons are obviously vital where, for example, the only issue is one of credibility between say, the complainant and the accused, as might occur in an assault case: if the magistrate simply accepts one version, without giving reasons, and convicts the accused thereon, then it cannot in my view be a sufficient compliance with the provisions of section 155(1) simply to say that the accused is convicted because the complainant is believed and the accused is disbelieved: that approach begs the question. The example I have chosen is not, I believe, an uncommon one: in any event it serves to illustrate an underlying principle."

After reviewing the evidence in the case the trial Magistrate recorded his main findings in the following passages from his judgment:

> "The onus is on the prosecution to prove this matter beyond reasonable doubt. I was not impressed with the accused or his witness. The accused made much of his weak leg but did not have any difficulty in walking into the witness box. He called no medical evidence on that point. I reject the evidence of accused and D.W.2 when it conflict with the prosecution evidence.
>
> The accused had clearly been drinking. He was in the opinion of the arresting officer P.W.1 and the sergeant P.W.3, drunk and incapable of driving and as the evidence of his driving itself and the evidence of P.W.1 and P.W.3 and such of the report of the doctor as was completion and his observations I am satisfied beyond reasonable doubt that he was drunk to such an extent as to be incapable of controlling a motor vehicle."

Referring to the above passages counsel for appellant submitted that they did not comply with section 155(1) of the Criminal Procedure Code. He further submitted that the trial Magistrate misdirected himself in accepting the inadmissible opinion evidence of P.W.1 and P.W.3 in holding that the appellant was not at the material time capable of having proper control of his motor vehicle. With regard to section 155(1) of the Criminal Procedure Code, it was said that the trial Magistrate gave no reasons for accepting the evidence of P.W.1 against that of appellant on the manner of his driving other than saying he was not impressed with appellant or his witness. Counsel submitted that the Court in keeping with the requirement under section 155(1) should have explained why he wa impressed with P.W.1 whose evidence was crucial to the case.

In my opinion in a case like this where the question of guilt depends largely on the competing credibilities of the witnesses on both sides, it was clearly incumbent on the Court to evaluate carefully the evidence of the witnesses and the circumstances surrounding the case. This is another way of saying that the Court must act fairly and reasonably in arriving at its decision. The onus was on the prosecution to satisfy the Court beyond any reasonable doubt concerning appellant's manner of driving that night.

One of the aspects of the evidence given by P.W.1 in respect of which the trial Magistrate might well have paused and pondered over was the fact that in his examination-in-chief, P.W.1 made no mention that appellant had almost collided with an oncoming vehicle. Because of the material nature of this evidence for the prosecution one would expect it to be brought out by the prosecution and not by the defence in cross-examination. The failure of P.W.1 to mention it in his evidence in chief must raise some questions as to his reliability as a witness. But the Court accepted his evidence without any comments as to the unsatisfactory manner in which such evidence was elicited. The trial Court was obviously much affected by that evidence when it convicted appellant on the dangerous driving charge as is clear from the following statement in his judgment:

> "The dangerous driving is in my view the zig-zag driving combined with the forcing of the oncoming vehicle off the road."

Another question the trial Court might well have

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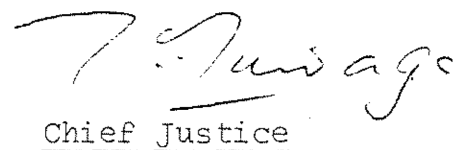
asked concerning credibility was how it was that appellant's vehicle was driven without mishap from Koronivia all the way to his door-steps in Pikeu Street where he stopped his car. While the lack of any mishap could be explained by the absence of traffic and so on, at least the Court should have given some indications in deference to the requirements of section 155(1) of the Criminal Procedure Code that it had taken them into account.

Bearing in mind that it was for the prosecution to establish the case against appellant beyond any reasonable doubt, I think enough has been said to indicate that such a standard of proof did not appear to have been satisfied. In these circumstances I feel it would not be right to uphold appellant's conviction.

In the result the appeal is allowed and the conviction and sentence entered against appellant are set aside and also the orders of disqualification.



Chief Justice

Suva,

30th July 1984.