IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 77 of 1983

BETWEEN : SURESH CHAND s/o Kamta Prasad — Appellant

A N D : R E G I N A M — Respondent

Mr. S. R. Shankar — Counsel for the Appellant

J U D G M E N T

Cases referred to:

(1) R v Khan (1981) Crim. L.R. 330

(2) Turnbull & Others v R (1976) 3 All E.R. 549

The appellant was originally charged before the magistrate's court at Sigatoka with a count of careless driving of a motor cycle contrary to section 37 of the Traffic Act, Cap. 152 (1967 Edition), a second count of driving the motor cycle whilst disqualified, contrary to section 30(4) of the Traffic Act and a third count of using the motor cycle whilst uninsured in respect of third party risks, contrary to section 4 of the Motor Vehicles (Insurance) Act Cap. 153 (1967 Edition). The appellant was acquitted of the first count but convicted on the second and third counts.

The learned Counsel for the appellant Mr. Shankar has filed the following grounds of appeal:

"(1) That the learned trial Magistrate erred both in law and in fact in not directing himself upon the burden and standard of proof required by the prosecution.

(2) That the learned trial Magistrate erred both in law and in fact in not directing his mind upon the dangers of convicting on a weak identification.

(3) That the learned trial Magistrate erred both in law and in fact in rejecting the evidence of the complainant who was positive in her identification that the appellant was not the driver of the vehicle.

(4) That the learned Magistrate had prejudged the credibility of Prosecution Witness 4 in that he stated inter alia that he expected that particular witness to give evidence in that particular way.

(5) That the sentence is excessive and harsh in all the circumstances of the case."

There is no basis for the first ground of appeal. There is a clear direction as to the onus and standard of proof at page 30 of the typescript copy record.

It will prove convenient to deal jointly with the second and third grounds of appeal. The learned trial magistrate relied solely upon the evidence of the third prosecution witness in the identification of the appellant. He rejected the unsworn evidence of the first prosecution witness, a child of tender years. He should never have admitted it, at least not without conducting a voire dire, as implicitly required by the provisions of section 10 of the Juveniles Act Cap. 56.

The relevant part of section 10 reads as follows:

"10.'(1) Where in any proceedings against any person for any offence or in any civil proceedings any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may proceed not on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth; and the evidence though not given on oath but otherwise taken and reduced into writing so as to comply with any law in force for the time being, shall be deemed to be a deposition within the meaning of any law so in force:

Provided that where evidence is admitted by virtue of this section on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated."

There is no authority as to the meaning of the expression "tender years". In this respect the report of the case R v Khan (1) before the Court of Appeal, Criminal Division, is of note. In that case sworn evidence was received from a girl aged 12 years without any voire dire being conducted. The report reads in part:

".....although there was no direct authority on the meaning of "tender years" that was understandable because what it meant differed according to the child about to give evidence. As a general working rule, for a proffered witness who was under the age of 14, the precautions which had been well established, became necessary.

> Where there was an inquiry about the child's understanding of the nature of an oath, the questions should be recorded so that they appeared in the official manuscript."

The "precautions" there referred to were the provisions of section 38((1) of the Children and Young Persons Act, 1933 on which the provisions of section 24 of the Children and Young Persons Act Cap. 15 (1967 Edition) (forerunner of the present Juveniles Act Cap. 56) were based. The present day provisions differ from those contained in Cap. 15 (1967 Edition) and the English Act of 1933, in that the words,

> "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth"

have been replaced by the words,

> "is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth."

It seems to me that the present day provisions if anything place greater emphasis on the court's duty to ascertain whether the child is intelligent enough to understand the duty of speaking the truth, and also is intelligent enough to give evidence. It may be that the court my conclude that the child is not possessed of sufficient intelligence in the matter, in which case it may not allow the child to give even unsworn evidence. All of this, as the report in R v Khan (i) indicates, is a matter of record. The Court must record the voire dire, that is to say, the questions asked of and the answers given by the child. There are a number of matters for determination and record by the court. The court must first determine the child's age, as that is relevant to the issue of whether or not he is of tender years. If the child is of tender years, the court must then ascertain whether the child understands the nature of an oath. If the court is of the opinion that the child does understand the nature of an oath, such opinion should be recorded, in which case the child may be sworn. If the court is not of such opinion, that again is a matter of record. The court must then ascertain whether the child is possessed of sufficient intelligence to understand the duty of speaking the truth and to justify the reception of his evidence. Again, if the court is of the opinion that the child is so possessed of sufficient intelligence, the court's opinion in the matter should be recorded, and the child may then give unsworn evidence. If the court holds the contrary opinion, that should also be recorded and the child may not give evidence at all.

In the present case, if the learned trial magistrate conducted a voire dire he never recorded it: he did not even record the witness's age, other than to observe, in his judgment, that she was a child of "very tender years". Under the circumstances this court is not in a

position to say whether even the witness' unsworn evidence was properly admitted. The learned trial magistrate did not however, as I have said, rely on such evidence in convicting the appellant. It was the witness' evidence indeed that it was apparently the appellant's brother who rode the motor-cycle. The question arises therefore, as to whether such evidence, if it had been properly admitted after a voire dire, would have raised a reasonable doubt in the mind of the learned trial magistrate. The child was in fact injured in a collision with the motor cycle and was immediately admitted to hospital, suffering from a head injury. She volunteered in her brief evidence that "the defendant was not the driver". At the end of her examination-in-chief she stated ".....Name of motor cycle driver is Dalip." In cross-examiantion she was asked the sole question "Driver of motor cycle put (you) in car and brought (you) in as far as home?" She answered: "No, parked motor cycle and sent the defendant to take (me to) hospital, in a car." It is difficult to conceive how the injured child could have observed all this, if it was the case that the appellant was at that time in his house. It is not contested that the appellant did in fact travel in the back of the vehicle, in which the child was conveyed to hospital. As will be seen, the prosecution witness, who drove the child to hospital, testified that the rider of the motor cycle rode off after the accident and that the appellant only appeared on the scene when he hailed his vehicle en route to the hospital near the appellant's house. It was the evidence of the child's father that the appellant's brother Dalip approached him after the accident saying "I have an accident with daughter," and paid him $200 by way of compensation. The father testified that Dalip was genuinely sorry for what had occurred. If that be the case it is difficult to appreciate why his brother the appellant and not he should go with the child to hospital. The appellant had already been disqualified from holding or obtaining a driving licence for 18 months, arising out of two convictions, one for driving whilst under the influence of drink and the other for dangerous driving, in April 1982, and faced serious consequences if found driving by the police. Under the circumstances the learned trial magistrate understandably found it difficult to appreciate the appellant's alleged altruistic motives in deputising for his brother. In all the circumstances of the case, the learned trial magistrate rejected the child's evidence. Even had it been properly admitted I consider that he would have been justified in doing so.

The second prosecution witness arrived at the scene of the accident in his vehicle shortly thereafter. He observed the injury to the child's head and the motor cycle on the ground. He knew the appellant and his father.

He testified "boy there with a helmet on head, big man had helmet on head." "I did not see face", he said, "he had helmet." Thereafter he testified that

> "I saw defendant that day when I was taking girl to hospital. He got into my car from house, 30-40 chains away. He said he wanted to go to hospital. He was in front and the girl was crying in back. Driving to hospital, he stopped me near house, on way to hospital. The man wearing helmet left before put girl in car."

When questioned by the Court the witness said that the "man in helmet" treated him as a stranger, but that Dalip was not a stranger. In particular, when asked how far ahead was the motor cycle after the accident, he answered "yes, went to house accused lived", where according to the witness it thereafter disappeared.

The witness' evidence was obviously contradictory and somewhat vague thereafter. The learned trial magistrate rejected the evidence out of hand. It will be seen however that the witness in the least testified that the brother of the appellant did not drive the motor cycle, which was driven to the appellant's house and that thereafter the appellant was sufficiently involved to wish to accompany the child to hospital.

The fourth prosecution witness failed to attend court. He was eventually punished for non-attendance. He at first testified that he had part-observed the accident. "I saw the driver Suresh," he said, "I recognized motor cyclist it must have been him, it was very far. I did not pay much attention." Then he said that "I have known the accused for 5-6 years I recognized motor bike not person driving." Thereafter the witness was declared hostile on the basis of a previous inconsistent statement to the police. On that basis the learned trial magistrate rejected his evidence.

As to the fourth ground of appeal, the learned trial magistrate did indicate a pre-conceived notion of the manner in which the fourth prosecution witness might give his evidence, due no doubt to the unreliability of the evidence of some of the witnesses, and the fact that the particular witness had failed to attend court. That may well be. The point is however that the magistrate's prediction turned out to be an accurate one: the witness was declared hostile. No doubt the learned trial magistrate should have resisted any pre-conceived notion and should certainly not have given expression thereto. Nonetheless, I do not see that any miscarriage of justice arose thereby.

To return to the second and third grounds of appeal, the learned trial magistrate was left then with the evidence of the third prosecution witness. Mr. Shankar submits that the latter's evidence was contradictory. I cannot say that it was. At one point in the cross-examination, however, at that stage covering over seven manuscript pages, the evidence reads:

"Q: He drove motor cycle away?

A: He drove off.

Q: Toward highway first?

A: Car (first).

Q: Car went ahead and (motor cycle) followed?

A: Yes, half a chain behind, did not know I was at back.

Q: Started behind car?

A: Yes.

Q: You are telling lies?

A: Yes."

Many of the answers recorded up to that, and thereafter, were either "Yes" or "No", as is often the case in cross-examination. The latter answer by the witness is completely at variance with the rest of his evidence: I do not consider that he was anywhere shaken in cross-examination. It may well be that the word "Yes" amounted to an inadvertence, either by the witness in reply or the learned trial magistrate in recording the answer. It seems to me that, if the witness had made such admission, Counsel would no doubt have been quick to make capital thereof and to ascertain what specific lies had been told. The ensuing question is however

"Q: Related to accused?

A: B.I.L. (Brother-in-law) brother Bernard."

Thereafter further questions on such relationship were asked. Even if it is the case that the witness did tell a lie, the nature of any such lie was not determined, so I do not see that his whole evidence was thereby undermined. Apart from the police officers, he was easily the most impressive witness at the trial and the learned trial magistrate clearly found him so. The judgment reads:

> "I therefore paid particular note to the way P.W.3 gave his evidence and I was most impressed with his demeanour and have no hesitation in accepting him as a witness of the truth. I found his responses to suggestions of bias because of employment arrangement frank and without any attempt of evasion, contrasting remarkably to P.W.2 and P.W.4.
>
> He had any easy frank manner in responding to vigorous cross-examination of 8 pages. The Court Record is 23 pages and so I had ample opportunity to assess his credibility....."

As to the witness' evidence he testified that he was related, somewhat at a distance, by marriage to the appellant. He had known him for 5 to 6 years. On the date in question the appellant approached him on a motor cycle travelling very fast, slowed down,

braking, in order to speak to the witness who kept walking. The appellant invited him to "come and sit down" on the motor cycle with him. The witness observed that the appellant was drunk. He also observed that there was no spare helmet on the motor cycle and so declined the invitation. Thereafter the appellant sped off, shortly after which he heard a noise, apparently that of the accident about 2½ chains away. When he arrived at the scene of the accident the motor cycle was on the ground, the injured girl having been placed in the car.

Quite clearly, the opinion as to the appellant being drunk was inadmissible as the witness detailed no observations leading to such conclusion. The evidence does tend to establish however not that the appellant was drunk, but that the witness had opportunity to observe the appellant. When it came to such opportunity the learned trial magistrate observed:

> "I am satisfied beyond reasonable doubt that his knowledge of and contact with the accused coupled with the circumstances surrounding indentification through recognition of face as well as brief talk (is) such that there is no mistake."

When it came to his defence the appellant made the following unsworn statement:

> "The allegation about driving the motor cycle is not true. I was not driving it."

The appellant called no witnesses in his defence.

While the learned trial magistrate made no specific reference to the authority of Turnbull & Others v R (2), nonetheless he effectively followed the guidelines therein. He was clearly satisfied as to the witness' credibility: more importantly, he was satisfied that the witness was not mistaken. It is not absolutely clear from the record whether the witness saw the appellant at the scene of the accident. He did however, say in cross-examination "(The appellant) went down to Natadola side first and came back." Counsel then asked him, "Saw him first, where were you?" It appears then that the witness saw the appellant not once, but twice, either twice on the roadway as he passed, or once on the roadway and again at the scene of the accident. In any event, despite the fact that the appellant was wearing a helmet and the opportunity to observe was but brief, he was well known to the witness and his visual recognition of the appellant was confirmed by their brief conversation. I consider such evidence of identification was good in quality. It was in any event supported by the very fact that a motor-cyclist, passing-by at an excessive speed, would hardly brake and slow down to offer a complete stranger a lift on his cycle. Again, the learned trial magistrate was fully conscious of the possibility of mistake

and obviously took it into account.

Mr. Shankar has raised by way of submission at the hearing, the aspect that he apparently made an application, just before delivery of judgment, to re-open the defence case and call additional evidence. The record indicates that the learned trial magistrate had already prepared his judgment: as he had not delivered, it he decided to grant the application. At the adjourned hearing no evidence was called for the defence, the appellant being represented by another Counsel. At the next adjourned hearing Counsel did not attend and the learned trial magistrate adjourned once more "for judgment". At the adjourned hearing, when another Counsel attended, judgment was delivered when the learned trial magistrate recorded.

> "The Court having written a judgment and having considered it further I would not allow defence to re-open case as I had already made up my mind reflected in the judgment."

As I see it, the learned trial magistrate exercised his discretion judicially in the matter. He had already made his decision on the evidence and possibly felt that it would in the circumstances not be proper for him to hear additional evidence. It cannot be said that the defence seized the opportunity to adduce additional evidence with alacrity. Any such evidence should have been immediately available on the date when the application was made and at the further adjourned hearing. There was in any event a failure to adduce such evidence and the learned trial magistrate was therefore justified in delivering his judgment.

I have little hesitation in saying that the learned trial magistrate's judgment falls far short of being a model of perfection. It is in places couched in terms which, in my view, have no place in the judgment of any court. Again the learned trial magistrate indulged in places in speculation which did not serve his purpose and in observations which were largely irrelevant. In the circumstances of the case however, the learned trial magistrate was presented with great difficulties: nonetheless throughout all these difficulties there is very much in evidence his desire to establish the truth. Having been presented with prosecution evidence which was contradictory and vague in places and hostile in another, he was obliged to consider the evidence as a whole, including the appellant's unsworn statement, and decide where the truth lay. This he did with care in accepting the evidence of the third prosecution witness. In all the circumstances of the case I consider the learned trial magistrate was justified in doing so. At the end of the day I consider the appellant got a fair trial. I cannot see that any miscarriage of justice was involved. The appeal against conviction is dismissed.

As to sentence, the appellant was sentenced to three months' imprisonment on the second count. He was fined $75 and ordered to serve 3 months' imprisonment in default of payment thereof on the third count: the learned trial magistrate also ordered that the appellant be disqualified from holding or obtaining a driving licence for 18 months. Section 30(4) of the Traffic Act provides for a punishment of

> "imprisonment for a term not exceeding six months or if the court thinks that having regard to the special circumstances of the case, a fine would be an adequate punishment for the offence, to a fine not exceeding (one hundred dollars), or to both such imprisonment and such fine ....."

The legislature obviously there indicated a preference for a custodial sentence in respect of anyone ignoring an order of disqualification. The learned trial magistrate did not find, nor can I find any "special circumstances" meriting a fine. Indeed, the appellant's two previous convictions were very serious driving offences, that is, as I have said, driving under the influence of drink and dangerous driving. Under the circumstances, the learned trial magistrate's custodial sentence was entirely appropriate.

As to the fine on the third count, the learned trial magistrate could have imposed a fine of $400 and or a sentence of one year's imprisonment. The fine of $75 was then quite lenient. Section 4(2) of the Motor Vehicle (Insurance) Act provides for a mandatory disqualification for a period of twelve months "unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification." As I said earlier in this judgment, the appellant was previously disqualified in April 1982 from holding or obtaining a driving licence for a period of 18 months. In all the circumstances I consider the present order of disqualification to be lenient. I do not however consider it to be manifestly inadequate and I am not at liberty to disturb it. The appeal against sentence is also dismissed.

Delivered In Open Court At Lautoka This 1st Day of June, 1984

(B. P. Cullinan)

Judge