TEMATANG ROTARIA versus REGINAM

HIGH COURT OF THE GILBERT ISLANDS

(O'BRIEN QUINN C.J.)

Betio: 9th April 1979

Criminal Appeal No 11 of 1979

Criminal Appeal - appeal against conviction and sentence - drunken driving - section 26(3) of Cap 71 - putting onus of proof on accused in certain circumstances - whether terms of section 26(3) of Cap 71 applied to the facts - mechanical report not properly put in evidence - evidence too weak - appeal allowed - convictions, sentences and disqualification set aside.

The appellant's car left the road near the Otintai Hotel, Bikenibeu, and crashed into a tree which was leaning over the road. Two policemen pulled him out of the car, smelt alchohol from his breath, carried him to the Hotel, and told him not to leave but the appellant, after lying on the ground, walked away and could not be found that night. On being charged, the appellant, denied that he was drunk and maintained that he was driving normally when the steering became stuck causing the accident. The prosecution relied on section 26(3) of the Traffic Ordinance (Cap 71) which puts the onus on an accused who consumes alcoholic drink within two hours of driving (where he commits a driving offence or where he becomes involved in a motor accident where it is reasonably believed that the manner of driving contributed to the accident) of proving that he was not drunk. The Magistrates' Court found the appellant guilty and fined him $100 for the motoring offence, $5 for escape from lawful custody and disqualified him from driving for 6 months.

HELD:(1) That the evidence was such that the Magistrates ought to have had a reasonable doubt as to the appellant's guilt and ought not to have convicted him;

(2) That with regard to the terms of section 26(3) of Cap 71 the mere taking of alcoholic drink within two hours of driving is not absolute as, over and above the consumption of alcohol there must have been a driving offence or there must have been an accident which would give a Court reasonable grounds to believe that it was caused by the manner in which the vehicle was driven, while no motoring offence was proved in this case and no evidence was given that the appellant's manner of driving contributed to the accident;

(3) That the mechanical report on the car was not properly put in evidence, as it should have been produced by the maker of the report, but as the prosecution did not object to its production and as it favoured the appellant it was not excluded on the appeal.

Authorities referred to:

The Traffic Ordinance (Cap 71) section 26(3)

Appellant in person
A.S.P. Iotua Tebukei for the Crown

O'BRIEN QUINN C.J.:-

This is an appeal against the decision of the Magistrates' Court for the Bikenibeu Magisterial District made on 12th January 1979 in which the appellant was found guilty of drunken driving contrary to section 26(1) of the Traffic Ordinance (Cap 71) and escaping from lawful custody contrary to section 117 of the Penal Code (Cap 8) and sentenced to pay a fine of $100 on the first count and a fine of $5 on the second count and disqualified from driving for six months from 12th January 1979.

2. The facts, as found by the Magistrates' Court, were that on the evening of 16th December 1978 the appellant drove his motorcar into a tree near the Otintai Hotel Bikenibeu causing the car to turn upside down, that two policmen in plain clothes pulled him out of the car, smelt alcohol from his breath, carried him to the Hotel telling him not to leave, and that the appellant, after lying on the ground, walked away and could not be found that night.

3. The appellant maintained that he was not drunk at the time and that the accident was caused by his steering wheel becoming stuck while he was driving near the tree which was leaning over the road. He maintained that he did not know that the two people who took him from the car were policemen and that at no stage was he arrested but that he walked home as he was ashamed when lots of people at the Hotel were looking at him.

4. The appellant submitted lenghty grounds of appeal and argued further points on the hearing of the appeal itself. He admitted that he had had two cans of beer before leaving his house for the Hotel but insisted that he had driven the car properly, negotiating two sharp bends, and driving without accident near the Hotel before his steering became stuck.

5. The Crown in reply, argued that while the evidence was not very strong it was clear from the appellant's own evidence that he brought himself within the meaning of section 26(3) of Cap 71 which states:-

> "Where in any proceedings for an offence under this section in connection with drink it is proved that the accused person drove or attempted to drive or was in charge of the motor vehicle in question within two hours after consuming any liquid containing alcohol and it is further proved that within that same period:-
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> (a) the accused person committed any offence under this Ordinance in connection with the manner in which he drove any motor vehicle (whether the moter vehicle in question or any other motor vehicle), or
>
> (b) the accused person was involved in an accident in circumstances which give the court reasonable ground to believe that the manner in which he drove any motor vehicle (whether the motor vehicle in question or any other motor vehicle) contributed to the accident,

the court shall presume that the accused person drove or attempted to drive or was in charge of the motor vehicle in question, as the case may be, whilst his efficiency as a driver was impaired by drink, unless the contrary is proved." The Crown argued from this that the Magistrates were correct to presume that the appellant was drunk at the time of the accident. On the question of the escape the Crown did not argue strongly as it was not clear from the evidence that the appellant had been arrested.

6. I have carefully considered the evidence and the arguments and it is clear from the Record that the only person who actually saw the appellant driving the car was the first Police witness and he said that his driving was normal. The Magistrates, in their judgment stated that the appellant was "zig-zagging" on the road but this does not appear in the evidence. The appellant's evidence has been consistent throughout and the mechanical report on the car bears out that the steering was stuck. In passing, I would mention that the mechanical report should not have been admitted as evidence without the maker of the report having been called to give evidence and produce it, but as the Prosecution made no objection and as it was favourable to the appellant, I will not now exclude it. With regard to the terms of section 26(3) I would point out that the mere taking of alcoholic drink within 2 hours of the accident is not absolute as, over and above the consumption of alcohol there must have been a driving offence or there must have been an accident which would give a court reasonable grounds to believe that it was caused by the manner in which the vehicle was driven. In this case no motoring offence was proved and no evidence was given that the manner in which the appellant drove the car contributed to the accident.

7. There was evidence given that the appellant wished to fight with someone but it was not supported by other evidence. There was evidence that the appellant had to be carried from the car and that he lay on the ground for a while afterwards but these two points are equivocal and could be explained, as the appellant did, by the fact of post-accident shock.

8. On the whole of the case, I consider that the evidence was too weak to support the charges laid and I consider that there ought to have been a reasonable doubt in the minds of the Magistrates as to the appellant's guilt.

9. Accordingly, I set aside the convictions and sentences passed in the Magistrates Court Bikenibeu on 12th January 1979 and remove the 6 months' disqualification.

10. The appeal against the convictions and sentences are, therefore, allowed.