

A

## SAYAD MURTHJAN

v.

B

## REGINAM

[SUPREME COURT, 1969 (Hammett C.J.), 1st August, 26th September]

## Criminal Jurisdiction

C

*Criminal law—traffic offences—driving while under the influence of drink—medical opinion evidence limited to state of accused fifty minutes after accident—whether sufficient alone to support conviction—Traffic Ordinance (Cap. 152) s.39(1).*

*Road traffic—driving while under the influence of drink—medical opinion evidence limited to state of accused fifty minutes after accident—whether sufficient to support conviction—Traffic Ordinance (Cap. 152) s.39(1).*

D

There was evidence that at 8.30 p.m., when the appellant's motor car was involved in a collision, that the appellant was unsteady on his feet and smelled of liquor. A policeman who saw him at 8.40 p.m. did not arrest or charge him. At 9.20 p.m. he was examined by a doctor, whose opinion was that at the time of the examination the appellant was intoxicated to an extent rendering him unfit to drive a motor vehicle safely. The doctor was not asked to express an opinion as to the state of the appellant at 8.30 p.m., but said that in general the effect of taking five or six whiskies at quick intervals would come in about thirty minutes.

E

On appeal from the appellant's conviction of driving a motor vehicle while under the influence of drink —

*Held:* The medical opinion that the appellant was so drunk as to be incapable of having proper control of a car at 9.20 p.m. was insufficient evidence that at 8.30 p.m. on the same evening he was in a similar state; it was not, therefore, safe to support the conviction.

F

Appeal against a conviction in the Magistrate's Court of driving under the influence of drink.

*H. A. L. Marquardt-Gray* for the appellant.

*T. U. Tuivaga* for the respondent.

The facts sufficiently appear from the judgment.

G

HAMMETT C.J.: [26th September 1969]—

The appellant appeals against his conviction by the Magistrate's Court of the Second Class of the offence of driving a motor vehicle whilst under the influence of drink contrary to section 39(1) of the Traffic Ordinance.

H

Traffic Ordinance, s.39(1): Any person who when driving or attempting to drive or when in charge of a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle shall be guilty of an offence and shall be liable upon conviction to imprisonment for two years or to a fine or to both such imprisonment and fine.

The only ground of appeal is stated to be —

“*THAT* the learned trial Magistrate erred in his findings in that he failed to take into consideration evidence adduced by the prosecution.” A

The evidence accepted in the Court below led to the following findings of fact.

On 13th February, 1969, at 8.30 p.m. as the appellant drove his taxi down Edinburgh Drive he collided with the side of another taxi coming in the opposite direction driven by one Masih Prakash. Masih Prakash immediately turned his taxi round and followed the appellant's taxi which stopped near the Phoenix Theatre. B

Masih Prakash told the appellant to inspect the damage he had done and the appellant said he would pay for it. According to Masih Prakash the appellant smelt of liquor and was unsteady on his feet. A police van arrived and the policeman in it (who was not called to give evidence by either side) upon being told what had happened nevertheless left the scene without arresting the appellant. This policeman was apparently quite satisfied that the two men should settle the matter by the payment of compensation. C

The two men then went in Masih Prakash's taxi to his father's house where unsuccessful discussions took place about a monetary settlement. Masih Prakash thereupon took the appellant to the Police Station, which they reached at about 9.10 p.m., and reported the matter. The appellant was sent for medical examination. D

The medical officer, whose evidence was accepted, said that it was at 9.20 p.m. when he examined the appellant. He said the appellant was then, in his opinion, suffering from alcoholic intoxication to such an extent as to be unfit to drive a motor vehicle safely. The doctor was not, however, asked whether, in his opinion, he was in that same state at the time he had been driving which was nearly an hour earlier. E

It was the appellant's contention at the trial that his condition when he was examined by the doctor was due to liquor he had drunk, after the accident, when he was discussing a settlement in the house of the father of Masih Prakash. This was not believed by the trial Magistrate who must therefore have held that the state of the appellant, when seen by the doctor, was due to liquor he had drunk before the accident. F

The only evidence of the appellant's condition at the time he was driving and was involved in this accident is that of Masih Prakash. He said the appellant then smelt of liquor and that he was unsteady on his feet. His opinion upon the appellant's condition would not, however, be admissible in evidence. That the appellant had been drinking before the accident cannot, in these circumstances, be doubted. He would naturally, in that event, have smelt of liquor at the time of the accident. It is not every person who smells of liquor, however, that is under the influence of drink to such an extent as to be incapable of having proper control of a motor car. G

The point that causes me some concern is the inference that must be drawn from the medical evidence. Dr. Campbell said, in the course of his evidence, “In general the effect of taking 5 or 6 whiskies at quick intervals will come in about 30 minutes”. H

- A It appears to me to be consistent with the facts before the Court below that the appellant had drunk liquor shortly before 8.30 p.m. that night and did at the time of the accident therefore smell of liquor. In this event, according to the medical evidence, the effect upon him of the liquor he had consumed may not have become apparent at the time he was driving his taxi. In other words, at 8.30 p.m. the appellant may not have been in the same condition he was in when the doctor saw him later at 9.20 p.m. This might well account for the fact that
- B the police officer who saw the appellant at about 8.40 p.m. did not consider him to be drunk and did not, therefore, arrest him on the spot. This policeman was content to leave him to settle the cost of the damage he had caused as a matter of compensation. He did not apparently consider the circumstances merited arresting him and charging him with this offence of drunken driving.
- C It is in these circumstances that I have come to the conclusion that the medical opinion that the appellant was so drunk as to be incapable of having proper control of a car at 9.20 p.m. that night, on its own, was insufficient evidence that at 8.30 p.m. that evening he was in a similar state. The omission to obtain the doctor's opinion on this vital issue appears to me to be a lacuna in the case for the prosecution which was not filled by the evidence of Masih Prakash. Certainly the
- D failure of both counsel to raise the point either in this Court or the Court below and the absence of any reference to it in the judgment of the trial Magistrate makes it abundantly clear to me that this point has not in fact been considered at all. It is not possible for me to say now whether, if it had been considered by the Court below, a conviction would inevitably have followed on the evidence before it.
- E In these circumstances, after careful consideration and with some misgivings, I have come to the conclusion that it would not be safe to uphold this conviction.
- F I do therefore allow this appeal. The conviction and sentence and order for disqualification imposed on the 1st Count are set aside and it is directed that an acquittal be entered in lieu thereof. The conviction of Dangerous Driving on the 2nd Count is not disturbed and the order for \$5.00 costs made in the Court below is not therefore varied.

*Appeal allowed.*