A

SOHAN RAM

v.

REGINAM

[SUPREME COURT, 1978 (Grant C J.), 31st March]

B

Appellate Jurisdiction

Criminal Law—Evidence and proof—traffic offences—driving under the influence of drink—inference that may be drawn from unexplained accident when driver has been drinking—Traffic Ordinance (Cap. 152) s. 39(1).

C *Criminal Law—Evidence and proof—admissibility of expert evidence given by layman.*

The appellant had been drinking and drove his car into collision. At the trial he offered no explanation for the accident.

Held: Where there was evidence of drunkenness coupled with evidence of dangerous driving for which there was no explanation it was perfectly proper to D draw the conclusion that the appellant had been driving while under the influence of liquor to such an extent as to be incapable of properly controlling his vehicle.

Per Curiam: (1) There is no objection to a non expert giving evidence as to whether an accused has been drinking; what he may not do is offer an opinion as to whether the extent of the drinking was E such that the accused was incapable of properly controlling his vehicle.

(2) There is no objection to a charge containing separate counts of driving under the influence of drink and dangerous or careless driving.

(3) On conviction for dangerous or careless driving the fact that a F driver was adversely affected by drink is an aggravating element relevant to sentence.

Cases referred to:

R. v. Sellars 19 F.L.R. 78;

R. v. Pon Sami Pillai Fiji Cr. App. 101/77—(unrep.)

G *R. v. Amar Prasad* Fiji Cr. App. 85/76—(unrep.)

R. v. Davies [1962] 1 W.L.R. 1111; [1962] 3 All E.R. 97

R. v. Lenaitasi Vakatora Fiji Cr. App. 166/73—(unrep.)

Appeal against conviction in the Magistrate's Court.

H *K. C. Ramrakha* for the appellant.

A. H. C. T. Gates for the respondent.

GRANT C. J. :

This is an appeal against the conviction of the appellant by Suva Magistrates' Court on the 12th September 1977 of driving a motor vehicle whilst under the influence of drink contrary to section 39(1) of the Traffic Ordinance.

The relevant portion of section 39(1) of the Traffic Ordinance reads: "Any person who when driving a motor vehicle on a road .....is under the influence of drink to such an extent as to be incapable of having proper control of the vehicle shall be guilty of an offence. . .".

As this Court pointed out in *R. v. Sellars* (Cr. App. 73/73) 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 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.

If a car has an accident where there is no hazard for a normal driver, and the driver fails to give an explanation which is consistent with his having driven properly and which might reasonably be true, it is evidence that the car was not being driven properly. If in addition there is evidence that the driver was under the influence of liquor, then the conclusion may properly be drawn that the driver was under the influence of liquor to such an extent as to be incapable of properly controlling the vehicle, and he may be convicted under section 39(1) of the Traffic Ordinance.

That is precisely the case here. In the early hours of the morning in Rodwell Road, which is a dual carriageway with a prominent island separating the opposing flows of traffic, a police inspector came upon a car which had been driven by the appellant on to the island, the whole of the vehicle apart from the nearside rear corner being off the road and on the island, three posts on the island having been smashed by this encroachment. The appellant told the police officer that he had ended up on the island when trying to avoid hitting another car. He was unsteady on his feet, smelled heavily of liquor and the police officer formed the impression that he was drunk.

The appellant was taken to the police station where he refused to be medically examined and said that he had only had three bottles of beer. A senior inspector of police saw that he was supporting himself on a table, and that his eyes were red and half closed. The senior inspector then put him through some tests, which he was entitled to do with the consent of the appellant, as a police officer's impression as to whether or not a driver is under the influence of liquor can be founded on the manner in which such tests are performed, and from which the Court can draw its own conclusions (*R. v. Pon Sami Pillai* Cr. App. 101/77). However as the trial Magistrate was not satisfied that the appellant had agreed to take part in these tests he disregarded them.

The appellant at his trial declined to give or call any evidence, and his statement to the police inspector at the scene that he had tried to avoid hitting another car was in no way an explanation consistent with his having driven the car properly. The

trial Magistrate relied upon the evidence of the police officers as to the drunken condition of the appellant, which combined with the fact that the appellant had driven the car off the road was sufficient to justify his conviction.

The grounds of appeal alleged that the trial Magistrate shifted the onus of proof and misapplied the law to the facts, but having carefully considered his judgment I am satisfied that there is no basis for these submissions.

During the hearing of the appeal my attention was drawn to the judgment in *R. v. Amar Prasad* (Cr. App. 85/76) in which the learned Judge stated that a special police constable "also told the appellant that he the appellant was drunk and could not drive his car properly which the Magistrate accepted. This witness was not an expert witness and no weight should have been given to any expression of his opinion. *R. v. Davies* (1962) 1 W.L.R. 1111 a case where the opinion of a non-expert witness was wrongly admitted as in this instant case." I am given to understand that this is being read as a pronouncement that one who is not an expert witness cannot give his impression that a person was drunk. That is not what the learned Judge said, and indeed the case of *R. v. Davies* which the learned Judge cites 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, and it is this aspect of the matter to which the learned Judge was referring, 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.

To make this clear beyond any doubt I quote the following extract from the judgment of Lord Parker C. J. in *R. v. Davies* (supra, at 1112—1113):

> "The very first prosecution witness, the bombardier, found these vehicles in collision, and he gave evidence about a conversation which he had had with the appellant and how the appellant appeared to be behaving. He then said: 'I formed the impression that the accused was under the influence of drink and at that time he was in no condition to handle a motor vehicle.' . . .
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> It is to be observed that the witness was allowed to speak about two matters which are quite distinct; one is what his impression was as to whether drink had been taken by the appellant, and the second was his opinion as to whether as the result of that drink he was fit or unfit to drive a car.
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> The court has come clearly to the conclusion that a witness can quite properly give his general impression as to whether a driver had taken drink. He must describe of course the facts upon which he relies, but it seems to this court that he is perfectly entitled to give his impression as to whether drink had been taken or not. On the other hand, as regards the second matter, it cannot be said, as it seems to this court, that a witness, merely because he is a driver himself, is in the expert witness category so that it is proper to ask him his opinion as to fitness or unfitness to drive. That is the matter which the court itself has to determine."

I might add that in the instant case, after the senior inspector had given evidence of the tests that he had conducted he stated: "I then believed he was incapable of controlling or being in charge of a motor vehicle at the time". The senior inspector's

opinion on this aspect of the matter was clearly inadmissible, and the most that he was entitled to say was that he then believed that the appellant was under the influence of liquor. However as the trial Magistrate ruled out the tests and the conclusions to be drawn therefrom, the wrongful admission of that evidence is of no significance.

My attention has also been drawn to the fact that some Magistrates may be under the impression that it is improper or duplex for the prosecution to charge a driver both with driving under the influence of drink and with dangerous or careless driving. So long as the charges are by way of separate counts and the facts warrant it, it is perfectly in order for the prosecution to do so (*R. v. Sellars* supra). Further, on conviction for dangerous or careless driving, the fact that the driver was adversely affected by drink is an aggravating element, justifying a heavier sentence *(R. v. Lenaitasi Vakatora* Cr. App. 166/73). The appeal is dismissed.

Appeal dismissed.