124

000380

IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

LABASA CRIMINAL APPEAL NO. 4 OF 1981

Between:

GHANA NAND s/o Bansi — APPELLANT

- and -

R E G I N A — RESPONDENT

Miss A. Prasad with Mr.A.K. Singh for the Appellant.

Mr. R. Lindsay for the Respondent.

J U D G M E N T

The appellant was convicted by the Magistrate's Court, Labasa, of driving a motor vehicle whilst under the influence of drink or a drug to such an extent as to be incapable of having proper control of his vehicle contrary to section 39(1) of the Traffic Act.

He was also convicted of dangerous driving contrary to section 38(1) of the Traffic Act.

He appeals against the convictions on the following two grounds :

(a) That the Learned Trial Magistrate erred in law and in fact in convicting your petitioner having regard to the nature of the evidence adduced.

(b) That the Learned Trial Magistrate erred in law and in fact in considering the medical evidence.

The appellant was involved in an accident at night on the date of the alleged offence.

A vehicle AZ458 had broken down on the road facing towards Nabouwalu about 3 chains from a bend in the road. Another vehicle in front of and facing AZ458 on the same side of the road was parked with its headlights on so as to enable a mechanic to effect repairs to AZ458.

The appellant driving his vehicle came from behind AZ458 and hit the rear right corner of it. He was on his correct side of the road. The accused stopped his vehicle after the accident.

There was evidence given by the person carrying out repairs to AZ458 who said the appellant was driving the vehicle which ran into AZ458. He said the appellant smelt of liquor and was bleeding from his face after the accident.

A police constable who went to investigate the accident said the appellant smelt of liquor and he was staggering.

The only other evidence adduced by the prosecution as to the appellant's condition that night was that of Dr. Lotika Prasad who examined the appellant that night.

The doctor's evidence as recorded by the Magistrate is as follows :

> " Fully conscious, apologetic. Satisfactorily dressed. Felt fit. Ate 2 p.m. Drank 6 to 6.30p.m. Not suffering from fits but complained of pain in knee joint. Not taking any drugs. Remembered the day and time (10.50p.m.) He said there was a accident. He has 120 per minute pulse rate. B.P. - 100/70. Normal temperature. Smelt of alcohol. Eyes were red and swollen. Conjunctive not present. Breath normal. Pupils were normal, regular and equal. Reaction to light was normal. Hearing was normal. Went slightly off balance. Turned immediately and kept balance. Stood normally with eyes closed and open. Finger and nose test was slightly incoordinated. Finger to finger test was normal. Reflexes were normal. All tests were normal.

I reserved my opinion after seeing blood and urine results. I saw the blood and urine results. On 22/4/80 I saw the results. I concluded accused was drunk and had inability to drive.

At 10.50 p.m. I examined accused. Accused's behaviour was satisfactory and apologetic. I waited for results. It was half way. 127 mg of alcohol per 100 ml. is high. Over 100 mg. is high from my point of view."

The learned Magistrate convicted the appellant on both counts.

I have found it difficult to ascertain where the learned Magistrate found the evidence to support some of his findings of fact. The only such finding of importance which relates to the accident is his finding :

"It was a long stretch of road. There was a bend about 3 chains in front from the scene of the accident."

The only witness to testify as regards the road was P.W.1. Mr. Pillay, who was repairing AZ458 that night. He said :

"There is a bend there. This motor vehicle had broken down about 3 chains away from the bend."

Under cross-examination he said "the road was quite straight".

There was no evidence recorded that the bend was in front of AZ458 as the Magistrate states. If it had been behind AZ458 the appellant would have come around the bend and run into AZ458 which could have put an entirely different complexion on the reasons for the accident.

There is also another finding of fact and an important one which does not appear to have the evidence to fully support it and which may have influenced the Magistrate. He said :

"I find as fact accused had consumed considerable amount of alcohol during the day".

The only evidence the Magistrate has recorded as regards the appellant's consumption of liquor that day is as follows :

(1) The doctor's record that appellant "Drank 6 to 6.30 p.m."

(2) Two witnesses who said he smelt of liquor.

(3) The results of the blood and urine tests which shows the presence of 127 mg. alcohol/100 ml. in the blood specimen and 169 mg. alcohol/100 ml. in the urine specimen. As regards the 127 mg. alcohol in the blood the doctor said that over 100 mg. was high in her view.

(4) The appellant's admission in a statement to the police that he and 3 others had drunk about 3 to 4 bottles of beer in the club (whether each drank that amount is not clear from the statement).

Those facts do not justify the finding the Magistrate made that the "accused had consumed considerable amount of alcohol during the day". I am left with an impression that he may have been influenced by the analysis report and assumed without any evidence that the amount of alcohol in the blood indicated considerable amount of liquor had been drunk by the appellant "during the day".

Apart from this criticism of the Magistrate's judgment, there was other evidence which I do not consider he properly considered or evaluated. There was the doctor's report. The doctor although she carried out a number of tests was apparently not in a position to say at the time of the examination whether the appellant was in a fit state to drive a vehicle or not. Apart from some very minor matters which the doctor mentions "all tests were normal". Many faculties which a driver would require to properly control a car were apparently normal.

The doctor took the unusual course in the circumstances of reserving her opinion until she saw the results of the blood and urine tests. She saw the result

of the blood tests on the 22nd April, 1980, 9 days after his physical examination and she then concluded the appellant had been drunk when she examined him. She said over 100 mg. was high from her point of view. She concluded the appellant "had inability to drive".

There is nothing in our Fiji law which states that it is an offence to be driving with more than a stated quantity of alcohol in 100 ml. of blood or urine. If Fiji had the facilities to carry out the tests such a provision might well reduce the number of cases where an accused is acquitted because of doubt as to his condition. Nor is there any law to state that a person is deemed incapable of driving or properly controlling a vehicle if his blood shows alcohol in excess of a stated amount per 100 ml.

Accepting that 127 mg/100 ml. is high what effect did that have on the appellant and his ability to drive ? In my view the effect on the appellant could only be what was found by the doctor when she examined him and put him through a series of tests designed to test his sobriety and whether the accident indicated he could not properly control his vehicle.

It is not sufficient for the medical witness merely to state that over 100 mg. was high in her view and to conclude merely from that fact that the appellant was drunk and unable to drive. She should have been asked to explain her view and give reasons why in the light of all tests indicating that the appellant was normal when she examined him she concluded the appellant was drunk and unable to drive a car.

The facts in the case of Subhash Chand v. Regina Labasa Cr. App. 9 of 1977 were very similar to the facts in the instant case. There the doctor reserved his opinion as to whether the defendant was capable of controlling a motor vehicle. The doctor's examination of the defendant indicated only that he smelt of liquor and his eyes revealedthat the pupils were dilated andnystagmus was present. The laboratory report revealed the defendant's blood contained 345 mg./100 ml. and on taking into account the clinical symptons previously observed the doctor came to the firm

opinion that the defendant was under the influence of liquor to such an extent as to be incapable of having proper control. He explained his reasons for coming to that conclusion quoting from and adopting in his evidence passages from an authoritative medical text book on the subject. By comparison with the doctor's evidence in Subhash Chand's case the doctor's evidence in the instant case was of little weight and assistance to the Magistrate.

It is of interest to note that in Subhash Chand's case the blood contained 345 mg/100 ml. whereas the appellant had 127 mg/ml. It so happens that I have to hear shortly another appeal Cr. App. No. 11 of 1981 Faiz Ali v. R. where the defendant was convicted of the same offence as the appellant. The record reveals that the medical evidence was of considerable assistance to the Magistrate. In particular the doctor testified that tests disclosed the defendant had 201 mg/100 ml. alcohol in his blood 267 mg./100 ml. in his urine equivalent to 4 large bottles of Fiji Beer. He said 1½ bottles would give a reading of 75-80 mg. alcohol/100 ml. blood.

The medical evidence given by the doctors in the two cases I have quoted were of assistance to the Magistrate.

In the instant case such assistance was virtually non-existent. The doctor was an expert witness but her opinion that the appellant was drunk and unable to drive should have been tested by the Magistrate against the other evidence. This the Magistrate obviously did not do.

As to evidence of the manner in which the appellant drove that night, all the evidence the Magistrate had was the bare fact of the accident. There was no evidence as to how the appellant was driving before the accident. The appellant made an unsworn statement explaining how the accident happened. In his statement to the police he also gave an explanation.

The Magistrate stated in his judgment that he did not "accept the evidence of the accused that he got confused when he saw the headlight from motor vehicle

No. BB816". This is another instance where the Magistrate refers to evidence which is not recorded.

The appellant's story in Court was that he did not see the broken down van and that a motor vehicle with headlights on was coming from the opposite direction and went on the wrong side. He said he could not see anything. His statement to the police was somewhat different. In it he related that an on coming vehicle did not dip its lights although he did and that it turned in front of him and parked in front of a broken down van. He said that due to the headlights he could not see the van and as he came near he applied his brake but still hit the van.

If the Magistrate considered these two statements he has not recorded that he has done so but he has recorded his disbelief of evidence which the record does not disclose.

There is in my view insufficient evidence to establish beyond reasonable doubt that the appellant drove in a dangerous manner or indeed that he was careless in not keeping a proper lookout.

Nor am I satisfied beyond reasonable doubt that the accident was caused because the appellant's driving ability was impaired by theliquor he had imbibed. The parked van with a vehicle in front of it at night with headlights on in the path of an approaching vehicle was a hazard not normally encountered. There is no evidence to indicate that any of those people on the scene took any steps to warn a driver approaching from behind of danger ahead. There is not even evidence that the van had its lights on and that its red tail lights were operating, which would have warned the appellant or, if it had hazard lights, that they were on.

A proper consideration of all the evidence should have left the Magistrate in some doubt as to whether the prosecution had proved its case. The findings of fact also that appear not to have any basis as far as the recorded evidence goes is also an unsatisfactory feature of the trial.

In my view it would not be safe to uphold the conviction.

The conviction on each of the two counts is quashed. The fines if paid are to be refunded to the appellant.

The order disqualifying the appellant from holding or obtaining a driving licence for 12 months is revoked. The endorsement on his licence is to be cancelled.

R G Kermode

(R.G. KERMODE)
ACTING CHIEF JUSTICE

SUVA,

9TH JUNE, 1981.