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IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Appellate Jurisdiction
Criminal Appeal No. 1 of 1982

BETWEEN : FOTORIRI ANDREA — Appellant

AND : REGINA — Respondent

Mr. I. Khan — Counsel for the Appellant
Mr. D. Williams — Counsel for the Respondent

JUDGMENT

The appellant was arrested on 6th September, 1980 following a motor accident in Tavewa Avenue at the entrance to the Northern Club, as the appellant was leaving the club about 9.00 p.m. It was a Saturday and the accused appeared in front of the magistrate on Monday, 8th October charged with driving under the influence of drink contrary to section 39(1) of the Traffic Ordinance and dangerous driving contrary to section 38. He pleaded not guilty to both charges. There followed a regrettable state of affairs which is not uncommon in Fiji. His trial did not commence until 28th May 1981 more than eight months after his appearance. Hearing dates on 8th October, 1980, 17th November, 1980 and 19th of January, 1981 were abandoned when the prosecution obtained adjournments on the ground that an important witness had not been summoned.

On the 29th May, 1981 the uncompleted trial was adjourned to 7th July but on 6th July it was put further back to 22nd September, 1981 creating a gap of 16 weeks in the middle of the trial. The prosecution case closed on 22nd September, 1981 and the trial was adjourned yet again for another month to 19th October, 1981 to allow the defence to subpoena a person called Moriti. On 18th November, 1981 Moriti had apparently not been traced and the defence was closed.

The trial was not completed until more than 14 months after the appellant's first appearance in Court.

On 27th November, 1981, the appellant was convicted of both offences. He was fined $100.00 and disqualified for 12 months for driving under the influence of drink and fined $40.00 for dangerous driving.

He appeals against both convictions and the fines.

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On 11th December, 1981, the learned magistrate suspended the appellant's disqualification pending the outcome of his appeal. That unprecendented step was in my respectful view beyond the magistrate's powers. A disqualification on a conviction for driving under the influence of drink is mandatory under section 39(1) of Cap. 152 unless there is a special reason connected with the incident for not imposing it. There is no power under the statute enabling a magistrate to suspend disqualification. The learned magistrate having convicted the appellant had no authority to suspend the automatic statutory disqualification.

The appellant in the course of the appeal submits that the evidence was such that no reasonable tribunal would have convicted him on it.

There was abundant evidence that the appellant was drunk provided the magistrate accepted it. It would then be for him to determine whether or not the appellant was capable of having proper control.

In so doing one would expect him to take into account the manner of the appellant's driving.

P.W.2, Peni Nasau, the other driver, was driving from Drasa Avenue along Tavewa Avenue towards the post Office when the appellant emerged from the Northern Club driveway into the ~~appellant's~~ P.W.2's path without pausing; thereby precipitating an accident. The learned magistrate made no reference to Peni Nasau's description of the accident but it is apparent that he accepted it. The appellant's unsworn statement claims that he was still in the club driveway when P.W.2, Peni Nasau, crashed into him. The learned magistrate accepted the evidence of P.W.3, police corporal Josefa, that he discovered broken glass in the centre of Tavewa Avenue opposite the club entrance and the magistrate found that the glass indicated the point of impact. He emphatically rejected the appellant's unsworn statement and regarded the appellant's two defence witnesses as liars. He found the appellant to be at fault and on the evidence there can be no doubt whatever that the appellant's mode of driving was dangerous. The appeal against conviction for dangerous driving has no merit.

Regarding the drink charge P.W.2, Peni Nasau, said he went to appellant who had reversed his car in the direction of the club drive immediately after impact. The appellant was still in his car. When he got out the appellant was staggering, loud of voice, aggressive and smelling strongly of drink.

P.W.3, police corporal Josefa (supra) said that the appellant smelled strongly of alcohol was talkative and refused to accept that Josefa was a policeman in spite of his uniform.

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P.W.4, P.C. Mahendra Prasad, accompanied the appellant to the hospital to be medically examined. At the hospital the appellant refused to be examined because the other driver was not being examined.

At the police station Police Supt. Chattar Pal, P.W.1 saw the appellant at 9.15 p.m. He noticed appellant's breath smelled of alcohol. He said the appellant was protesting that others were drunk - not him; he noticed the appellant was unsteady on his feet, had difficulty in keeping his balance when sitting down, and had difficulty in keeping his eyes open. He caused the appellant to try and carry out several "co-ordination tests" which the appellant failed to do. The police supt. concluded that the appellant was drunk.

The appellant's counsel submitted that evidence from the police as witnesses to the appellant's state of inebriation was not admissible on the ground that they were not medically qualified. There is no merit in that submission. It has been accepted for decades that a police officer of several years standing, whose duties have brought him into contact with bars, drinking, drunks, drunk and disorderlies, and incapables, is well experienced to describe a person's condition and may express an opinion from his own observations that some person was drunk. Of course being drunk is not in itself an offence. If medical evidence were essential to support a charge involving drunkenness no one would be convicted because they would exercise their right to refuse medical examination, just as the appellant did.

However, a lay witness may not express an opinion that a person was incapable by reason of drink of having proper control over a motor car because that is the very issue which the magistrate must decide. Even if that opinion is expressed by a doctor who may be entitled as an expert to offer it, the Court is not bound by it. If the magistrate accepts a doctor's opinion he should refer to the evidence of drunkenness showing why he agrees with the doctor's opinion.

The police witnesses' opinions were not limited to the appellant's state of intoxication, but improperly included their views as to his ability to have proper control. P.W.1, the Supt. said, "After forming my opinion in this case that the accused was incapable of driving a car through drink, the accused was locked ... ..."

P.W.3, Corpl. Josefa said "My view is that the accused was not capable of driving motor vehicle". In cross-examination, P.W.4 Constable M. Prasad gave his opinion that "the accused was not capable of proper control".

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The judgment did not refer to any of the evidence revealing the extent of appellant's intoxication such as the smell of his breath, inability to co-ordinate, unsteadiness, talkativeness and aggressiveness. It was the learned magistrate's duty to make his own finding thereon and demonstrate that he was not simply accepting the opinions of the police officers. If in the magistrate's opinion the appellant was under the influence of drink he should then have formed his own opinion as to whether or not he was capable of having proper control. The appellant's dangerous driving could have been indicative of a lack of judgment and concentration induced by intoxication.

The judgment only refers to the opinions of the prosecution witnesses. Of P.W.3 the learned magistrate said "In this witness's opinion the accused was affected by drink and incapable of proper control". With regard to the Superintendent's (P.W.1's) evidence the learned magistrate said, "... ... P.W.1 carried out extensive tests; his conclusion was that the accused was unfit to drive because of drink". Later in his judgment he said "P.W.1 is a proper officer to examine and testify on the second limb of the drunken driving charge".

Those prosecution witnesses were presenting as evidence the very finding of guilt which the magistrate had to determine.

The evidence adduced by the prosecution as to the appellant's behaviour would have been ample to justify his conviction but I cannot act upon that evidence myself and use it to uphold the learned magistrate's finding of guilt. The reason being that the learned magistrate did not indicate the extent to which he accepted their evidence of intoxication. His judgment demonstrates that he relied upon their inadmissible opinions that the appellant was not fit to drive.

I am obliged, reluctantly, to allow the appeal on the first count. The conviction for driving whilst under the influence of drink is quashed; the fine and disqualification are rescinded.

The conviction for dangerous driving is confirmed along with the fine.

29th Jan. LAUTOKA,
1982.

(J. T. Williams)
Judge

RECEIVED
5 FEB 1982
SUPREME COURT
REGISTRY.