IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 5 of 1984

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

and

BEN TAUSIA — Respondent

Mr. G.E. Leong for the Appellant
Mr. A. Ali for the Respondent

Date of Hearing: 11th July, 1984

Delivery of Judgment:

JUDGMENT OF THE COURT

Mishra, J.A.

The respondent was convicted by the Magistrate's Court, Suva, of driving while under the influence of drink contrary to section 39(1) of the Traffic Act and also of Dangerous Driving contrary to section 38(1) of that Act. On appeal, the Supreme Court set aside his conviction on the first count.

The Director of Public Prosecutions appeals against that decision of the Supreme Court. Being a second appeal, it is confined to issues of law.

The grounds of appeal are :-

"4. THE Appellant appeals on the grounds that the learned Appellate Judge erred in law -

(a) in not holding that the learned trial Magistrate's findings of fact on count one when taken together, were sufficient to support a conviction on count one; and

(b) in not taking into account on count one the learned trial Magistrate's findings of fact on count two, which were also relevant to the issue of incapacity properly to control the vehicle. "

The prosecution evidence indicated erratic driving on the part of the respondent which caused the traffic officers to follow his car at some speed to stop him. He was then unable to come out of the car. When helped out he almost fell to the road and had to be assisted to remain on his feet. The Magistrate, in his judgment said :-

" Dealing with Count 1 the accused admitted that he drank a few jugs and a few bottles over a period of an hour 4-5 p.m. He was then seen by P.W.1 to be driving in a zig-zag fashion prior to the first overtaking manouevre - they also observed that zig-zagging fashion after that. No reasonable explanation was advanced for the zig-zag driving. Then P.W.1 and P.W.2 and P.W.3 gave the evidence I have outlined about the necessity for assistance to the accused to enable him to stand. The evidence of P.W.2 in the charge room that the accused could not stand without support is also significant. Taking these factors together I find that the accused was driving under the influence of alcohol and further that thereby he was incapable of having proper control of the vehicle.

The second limb (that is that he was incapable) is I find supported as I have said by

1. Zig-zag driving;
2. Smell of alcohol;
3. Inability to stand without support;
4. Speech impairment;
5. The opinion of the three officers that he was drunk in their experience of the matter;
6. The inspector's evidence that in his opinion he could not carry out the usual tests because the accused could not stand up.

I find from all six items evidence that the accused was incapable. The accused is convicted as charged on Count 1. "

The learned appellate Judge cited the following passage from the judgment of Grant C.J. in R. v. Chaudhary (Cr. App. 95 of 1978) :-

" '..... 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'.

'..... the case of R. v. Davies 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 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'. "

The appellant accepts that to be a correct statement of the law.

In Davies /(1962) 3 All E.R. 97/ Lord Parker C.J. held that any witness could properly testify to behaviour of a person from which he had formed the impression that he was under the influence of liquor. He then went to say :-

> "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 very matter which the court itself has to determine. "

In Davies, however, there had been an accident and the Court held that the facts of the accident, properly taken into consideration, were sufficient to support a verdict of guilty. The appeal was dismissed.

The learned appellate Judge in the present case said :-

> " There was no accident which coupled with the evidence of the accused's condition could have established beyond any reasonable doubt the accused's inability to drive. "

And again :-

" The tendency is, and it is a natural one, for a Magistrate in cases such as the present one to assume, given a man who is clearly intoxicated, that he is incapable of properly handling a car. He must, however, consider whether the prosecution has established by evidence that the accused is incapable of properly controlling a vehicle due to drink. It is to be regretted that doubts in such cases can sometimes only be resolved if there is an accident. "

Later again :-

" Had the police called in a doctor, there might have been expert evidence available. The police inspector considered the accused too drunk to be put through any tests. The doctor, had he been called, could have expressed the same opinion but he could as an expert witness go further and state his opinion as to whether the accused was capable of properly controlling a car. "

We accept the appellant's submission that neither Davies nor Chaudhary (supra) attempts to close the categories of evidence required to establish inability to drive. Neither case supports the proposition in law, put forward on behalf of the respondent, that a person facing this charge is entitled to an acquittal where there has been no accident and no medical examination.

Davies merely laid it down that a person could not become an expert on fitness to drive by acquiring a driving licence. It did not deal exhaustively with the question of who could be treated as an expert for this purpose. In New Zealand, experienced police and traffic officers are accepted as experts to express an opinion on ability to control a motor vehicle (Blackie v. Police 1966 N.Z.L.R. 409). That decision, however, has not yet been

adopted in Fiji and the Magistrate was correct in not admitting in evidence any such opinion from Senior Inspector Swami.

Davies is authority for the proposition that in the absence of expert evidence, facts of an accident, where an accident has occurred, may be considered to ascertain ability to control a vehicle but it does not exclude all other kinds of evidence from consideration. In Chaudhary (supra) Grant C.J. stated that manner of driving might be considered but, there again, no attempt was made to catalogue exhaustively classes of evidence admissible for this purpose.

The basic principle, however, is that it is for the Court eventually to decide, with the assistance of opinion evidence where experts are available or without it, on other admissible evidence, where they are not, whether the accused was unfit to drive. The evidence of an expert even of a doctor, need not necessarily be accepted (see Blackie v. The Police; supra). Nor is there any rule of law that, in the absence of medical opinion, a reasonable doubt must necessarily remain in cases where there has been no accident. The special advantage of medical opinion, of course, is that, where there is strong evidence of erratic driving coupled with a condition suggesting overwhelming drunkenness, it can, in addition to giving opinion as to fitness to drive, assist the Court in deciding if the condition was possibly due to some other factor such as shock, fatigue, diabetes which might produce similar behaviour.

No such factor is suggested in this case by any part of the evidence. Indeed, the appellant's own evidence was that his ability to drive had remained unimpaired despite the drinks he had admittedly taken.

The attention of the police was, in this case, first drawn to the appellant's car by its highly erratic behaviour. It had careered along the road at considerable speed, swerving from side to side, overtaking other cars, once nearly going off the road on its off side and again nearly colliding with a bridge. The Magistrate and the learned appellate Judge both accepted that that was an obvious case of dangerous driving. From such evidence, however, if it stood by itself, no inference could be drawn of inability to drive due to drink. A highly skilled driver, perfectly sober, if in a desperate hurry, may be able to drive in that manner without causing an accident.

In this case, however, when the car was eventually stopped, the driver was unable, of his own volition, to come out. When helped out, he nearly fell to the road. Later at the police station Senior Inspector Swami found him so bereft of power of automotion as to make any of the usual tests impractical. He said :-

> "He could not walk on his own and I could not give tests. "

The learned Magistrate accepted this evidence and the appellate Judge did not criticise that finding. The Judge said :-

> "There is no doubt that the appellant at the relevant time was well under the influence of alcohol, very much so. "

He then said :-

> "The Magistrate may have been of the view that any person in that condition could not possibly properly control a vehicle. "

With the greatest respect to the learned Judge there is nothing in the Magistrate's judgment to indicate that he held that view or that he acted on that evidence alone. On the contrary, it is clear from his judgment that he took into account his condition, as described by Inspector Swami, together with the evidence of his manner of driving. He said :-

> "Taking these factors together I find that the accused was driving under the influence of alcohol and further that thereby he was incapable of having proper control of the vehicle. "

As a matter of law, he was, in our view, entitled to come to that finding in the present case even though there had been no accident and medical evidence was not available. The opinion, or impression, evidence, such as it was, related only to the condition of the appellant at the police station, and the learned appellate Judge, quite correctly, treated it as admissible. No opinion evidence was admitted as to fitness to drive.

The appeal, therefore, must be allowed.

The appellant's conviction and sentence on the first count, including the order of disqualification, are restored.

Before taking leave of the matter we would like to comment that the police should, wherever facilities are available, afford a person apprehended for this offence the opportunity of having himself medically examined if he so chooses and, if he declines, the evidence of his choice should be before the court as was in the case of Sohan Ram v. R. (Sup. Ct. Cr. Appeal 133 of 1977).

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL