A

WILLIAM JOSEPH SELLARS

v.

REGINAM

B

[SUPREME COURT, 1973 (Grant J.), 4th October]

Appellate Jurisdiction

Road Traffic—driving while under the influence of drink—Traffic Ordinance (Cap. 152) s. 39(1)—incumbent on prosecution to prove that accused under influence of drink to such an extent as to be incapable of having proper control of his vehicle.

C

Appeal—misdirection on part of trial magistrate—whether Court should exercise the application of proviso to Criminal Procedure Code (Cap. 14) s. 300(1).

In order to obtain a conviction under Traffic Ordinance (Cap. 152) s. 39(1) the prosecution must prove not only that the accused when driving his vehicle was under the influence of drink, but also that he was under the influence to such an extent as to be incapable of having proper control of his vehicle.

D

Although there was a clear misdirection on the part of the magistrate, the particular circumstances of the case did not justify the application of the proviso to the Criminal Procedure Code (Cap. 14) s. 300(1).

Cases referred to:

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

Shiu Sharan v. Reginam, Fiji Cr. App. No. 38 of 1972—unreported.

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Mohan Prasad v. Reginam, Fiji Cr. App. No. 20 of 1973—unreported.

R. v. Hawkes (1931) 22 Cr. App. R. 172.

R. v. Cohen and Bateman (1909) 2 Cr. App. R. 197; 73 J.P. 352.

R. v. McBride (1961) 45 Cr. App. R. 262; [1961] 3 All E.R. 6.

R. v. Gosney [1971] 3 All E.R. 220; [1971] 3 W.L.R. 343.

F

Appeal from the Magistrate's Court against the conviction of the appellant for driving under the influence of drink and careless driving.

GRANT J. [4th October 1973]—

On the 25th day of July 1973 at Suva Magistrate's Court the appellant was convicted after trial of driving a motor vehicle whilst under the influence of drink contrary to section 39(1) of the Traffic Ordinance and also, on the same facts, was convicted of careless driving contrary to sections 37 and 85 of the Traffic Ordinance. He has appealed against the convictions on a number of grounds, the only ones which I consider it necessary to deal with being that the learned Magistrate misconstrued the wording of section 39(1) of the Traffic Ordinance, that he erred in law and fact and that the verdict cannot be supported having regard to the evidence as a whole.

G

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.....".

H

A In view of this wording it is necessary for the prosecution not only to prove that an accused was under the influence of drink, but also to prove that he was under the influence of drink to such an extent as to be incapable of having control of a motor vehicle. The former may be established by the evidence of lay witnesses (*R. v. Davies* [1962] 3 All E.R. 97) and the latter in a variety of ways, such as the manner of driving, or the circumstances of the accident, or the evidence of a duly qualified medical practitioner who has examined the accused and who as an expert witness is in a position to express an opinion that he was under the influence of
B drink to such an extent as to be incapable of having proper control of a motor vehicle (vide *Shiu Sharan v. Reg.* Fiji Crim. App. No. 38 of 1972; *Mohan Prasad v. Reg.* Fiji Crim. App. No. 20 of 1973).

In his judgment the trial Magistrate accepted the evidence of a police officer, who at the traffic office interviewed the appellant not long after a motor car which the appellant had been driving had come into contact with a drunken man who
C had been standing on the road, that the appellant was under the influence of drink and the trial Magistrate went on to state "in my view it follows that if a person is drunk he is incapable of having proper control of the vehicle". This is a non sequitur and by equating "being under the influence of drink" with "being under the influence of drink to such an extent as to be incapable of having proper control of a motor vehicle" the trial Magistrate misdirected himself in law. Should any authority be required for this proposition I refer to *R. v. Hawkes* (1931) 22
D Cr. App. R. 172.

The Crown concedes that this was a clear misdirection on the part of the trial Magistrate but submits that this Court should exercise the first proviso to section 300(1) of the Criminal Procedure Code which enables the Supreme Court, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, to dismiss the appeal if it considers that no
E substantial miscarriage of justice has actually occurred.

On the authority of *R. v. Cohen and Bateman* (1909) 2 Cr. App. R. 197 at 207 the burden of proof is upon the Crown to satisfy the Court that the proviso should be applied and it is not for the appellant to shew why it should not; and as there was a wrong decision of a question of law I have to be satisfied that on a right direction the trial Magistrate must have come to the same conclusion.

F Looking at the facts, no evidence was adduced as to the manner of driving prior to the impact nor subsequently. On the instructions of a police constable who attended the scene of the accident, the appellant drove from the scene to the traffic office in the company of a police officer, but the latter was not called to give evidence of the manner of the appellant's driving immediately after the accident; and no expert medical evidence was available.

G This leaves only the circumstances of the accident, combined with the evidence that when interviewed thereafter by a police officer the appellant was under the influence of drink. Although there was evidence that the area was well lit, as the person with whom the appellant's vehicle came into contact was not of Caucasian pigmentation and there was no evidence as to the colour of his clothing (factors which are relevant to his visibility) and as he was standing on the road where he should not have been and was drunk I am unable to conclude, merely from the
H fact that the car which the appellant was driving came into contact with him, that the appellant must necessarily have been under the influence of drink to such an extent as to be incapable of properly controlling the motor vehicle.

The fact that a driver is adversely affected by drink is a circumstance relevant to an issue of whether he was driving dangerously (or semble, carelessly) and a charge of dangerous driving (or semble, careless driving) may properly be coupled with a charge of driving whilst under the influence of drink, if the evidence regarding the influence of drink upon the driver is such as to justify it (*R. v. McBride* (1961) 45 Cr. App. R. 262) and if in fact he drove dangerously or carelessly (*R. v. Gosney* (1971) 3 All E.R. 220). I have considered the evidence from the point of view of careless driving but am unable to conclude, on the limited facts available, that the appellant was necessarily driving without due care and attention or that the trial Magistrate would have so concluded had he not wrongly directed himself that the appellant was incapable of having proper control of the vehicle. A B

The particular circumstances of this case do not, in my view, justify the application of the proviso. The appeal is therefore allowed, the convictions quashed and the sentences set aside.

Appeal allowed. C