A

LENAITASI VAKATORA

v.

REGINAM

B

[SUPREME COURT, 1974 (Grant Ag. C.J.), 7th February]

Appellate Jurisdiction

Criminal law—traffic offences—dangerous driving—Traffic Ordinance (Cap 152) s. 38(1)—whether the fact that driver affected by drink relevant to issues of dangerous driving and severity of sentence.

C

Criminal law—evidence and proof—unsworn statement by defendant at trial—weight to be attached thereto.

At his trial for dangerous driving, the appellant elected to make an unsworn statement which had little or no relevance to the charge. In his judgment the trial magistrate commented: " As I have said, the defendant has chosen not to give evidence and expose that evidence to the test of cross-examination, and so I do not have any explanation or contradiction of the evidence of P.W.6."

D

Held: 1. The appellant did not, in fact, explain or contradict P.W.6's evidence and the trial magistrate was simply drawing attention to the fact.

2. The trial magistrate's comments on this case were not synonymous with those in the case of *R. v. Gurmel Singh* (Fiji Cr. App. No. 123 of 1973 (unreported)) where it was stated: " The accused elected to give an unsworn statement and so I do not, fortunately have to decide which of the conflicting testimonies I accept."

E

3. It was clear that the appellant was adversely affected by drink which was relevant both to the issues of whether he was driving dangerously and the severity of sentence.

Cases referred to:

F

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

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

R. v. Worrell [1965] Crim. L.R. 561; [1965] The Times July 14th.

R. v. Sutton [1957] E.A.L.R. 812.

Appeal against conviction and sentence in the Magistrate's Court for dangerous driving.

G

GRANT Ag. C.J.: [7th February 1974]

On the 3rd December 1973 at Suva Magistrate's Court the appellant was convicted after trial of dangerous driving contrary to section 38(1) of the Traffic Ordinance and was sentenced to a fine of $50 and disqualified from holding a driving licence for six months.

H

The appellant has appealed against conviction on the ground of misdirection; and has also appealed against sentence as being excessive.

A The appellant was originally charged not only with dangerous driving but also with driving a motor vehicle whilst under the influence of drink contrary to section 39(1) of the Traffic Ordinance, but the trial Magistrate was not satisfied that the medical evidence, which he very properly subjected to critical scrutiny, established that the appellant was under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle, and he quite rightly acquitted the appellant on that count.

B The evidence of dangerous driving was that of a police officer (P.W.6) who was on mobile patrol at Walu Bay, travelling on Queens Road in the direction of Lami at 10.30 p.m. on the 26th October 1973 when a car driven by the appellant approached from the opposite direction on its incorrect side of the road. To avoid colliding with the police landrover the appellant then swerved his car to its correct side of the road, over-correcting to such an extent that his car nearly hit a lamp post. The police landrover turned round and followed the appellant's car for four chains, keeping it within the range of the headlights of the landrover and the police C officer saw the car being driven in a zig-zag manner, so much so that cars travelling in the opposite direction had to stop to avoid an accident. On reaching a round-about the appellant drove his car across lane dividers, instead of following the proper route, and stopped at a service station where the police officer approached him and removed the ignition key of the car. The appellant staggered when he alighted from the car, had bloodshot eyes and smelled strongly of liquor.

D The trial Magistrate, in his judgment, stated that the evidence of that police officer satisfied him completely that the appellant's driving was dangerous as anyone who drove a motor car in a zig zag fashion along Queens Road, Walu Bay, at 10.30 p.m. to such an extent that the free passage of on-coming traffic was impeded, was driving dangerously; and there is no doubt about the correctness of that decision as on the evidence of the police officer there was fault on the part of the appellant causing a situation which, viewed objectively, was dangerous E (*R. v. Gosney* [1971] 3 All E.R. 220).

The appellant at his trial, rather than giving evidence on oath, elected to make an unsworn statement in which he did not traverse the prosecution evidence or make any reference to the specific allegations of dangerous driving or of his condition at the service station. The only portion of his unsworn statement which had any relevance to these aspects of the prosecution evidence was one sentence in F which he said " I was sure that car was not driven dangerously on night of 26th, if it was I would have had an accident on way from Delainavesi three miles."

In his judgment the trial Magistrate, after having stated that the appellant elected to call no evidence and to give an unsworn statement, commented: "As I have said the defendant has chosen not to give evidence and expose that evidence to the test of cross-examination so I do not have any explanation or contradiction of the evidence of P.W.6.....".

G Counsel for the appellant submits that this amounts to a misdirection and seeks to draw an analogy with *R. v. Gurmel Singh* (Criminal Appeal No. 123 of 1973) where a conviction was quashed on the ground of misdirection, the trial Magistrate there having stated: " The accused elected to give an unsworn statement and so I do not, fortunately have to decide which of conflicting testimonies I accept ".

After careful consideration, I do not consider the passages synonymous. Certainly, H as mentioned in *R. v. Gurmel Singh* (supra) a statement from the dock is evidence, in the sense that a court can give to it such weight as it thinks fit; but it is clear from its context in the judgment the subject matter of this appeal that the trial Magistrate when commenting that the appellant had chosen not to give evidence

was referring to evidence on oath, as he went on to say specifically that the appellant chose not to expose that evidence to the test of cross-examination. No objection can be taken to the trial Magistrate's comment that he did not have any explanation or contradiction of the evidence of P.W.6 as indeed he did not, other than the vaguely worded sentence contained in the appellant's unsworn statement to which I have already referred and which in no way explained or contradicted the incriminating features of P.W.6's testimony. A

Even if that portion of the trial Magistrate's judgment to which counsel for the appellant takes exception was to be treated as a misdirection I would apply the first proviso to section 300(1) of the Criminal Procedure Code, as on a proper direction the trial Magistrate could not have come to any other conclusion on the evidence than that the appellant was driving dangerously. B

As to sentence, there is no doubt on the evidence that the appellant was adversely affected by drink, a circumstance which is relevant both to the issue of whether he was driving dangerously (*R. v. McBride* (1961) 45 Cr. App. R. 262), and to severity of sentence (*R. v. Worrell* [1965] The Times July 14) as a driver in that condition may actually constitute a greater danger to the public than one who can be classified as incapable of having proper control of a motor vehicle and convicted under Section 39(1) of the Traffic Ordinance (*R. v. Sutton* [1957] E.A.L.R. 812 at 816). C

Even if the element of drink is disregarded, the sentence is by no means excessive. D

The appeal is accordingly dismissed.

Appeal dismissed.