A

GANGA RAM

v.

REGINAM

B

[SUPREME COURT, 1974 (Grant Ag. C.J.), 22nd February]

Appellate Jurisdiction

Criminal law—traffic offences—driving under the influence of drink—Traffic Ordinance (Cap. 152) s. 39(1)—whether report of doctor properly admitted in evidence.

C

Criminal law—practice and procedure—whether medical textbooks evidence per se—whether magistrate entitled to have recourse to such textbooks.

Criminal law—traffic offences—driving under the influence of drink—Traffic Ordinance (Cap. 152) s. 39(1)—observations by Court of general application to such cases involving medical evidence.

D

On a trial for driving whilst unfit through drink, the magistrate allowed the doctor to put his written report in evidence. After hearing from the government analyst that the appellant's blood/alcohol level was 150 milligrams of alcohol per 100 millilitres of blood, the magistrate had recourse to medical textbooks to interpret this reading. Allowing the appeal, the judgment in the case of *Colin Raymond Langford v. Reginam* 20 F.L.R. 11 was followed and applied, in which the Court held that such practices were not permissable.

E

Observations of general application to cases of driving whilst unfit arising from the medical evidence called at the hearing.

Cases referred to:

R. v. Urech [1962] C.L.Y. 587.

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Sellars v. R. 19 F.L.R. 78.

R. v. Gray 1 Cr. App. R. 154.

R. v. Perry 2 Cr. App. R. 89.

R. v. Warren 14 Cr. R. App. R. 4.

R. v. Knox 20 Cr. App. R. 96.

R. v. Harding 25 Cr. App. R. 190.

G

R. v. Lomas 53 Cr. App. R. 256. [1969] 1 All. E.R. 920

Appeal against the conviction in the Magistrate's Court for driving a motor vehicle under the influence of drink.

GRANT Ag. C.J.: [22nd February, 1974]

H

On the 31st July 1973 at Suva Magistrate's Court the appellant was convicted after trial of driving a motor vehicle when under the influence of drink to such an extent as to be incapable of having proper control of the vehicle contrary to section 39(1) of the Traffic Ordinance.

The appellant appealed against conviction on numerous grounds of which I consider it necessary to deal only with: A

1. That the learned Magistrate erred in law and in fact in admitting in evidence the result of a medical examination carried out on the appellant when the proper consent for such examination was not obtained;

2. That the learned trial Magistrate erred in law in admitting in evidence a medical report tendered by the prosecution;

3. That the learned trial Magistrate erred in law and misdirected himself in B that he pronounced in his judgment without admissible evidence that "The best available medical evidence shows that a person with a 150 milligrams of alcohol per 100 millilitres of blood is obviously intoxicated.";

4. That the learned trial Magistrate erred in law and in fact in convicting the appellant without finding that he was incapable of driving a motor vehicle;

5. That the verdict is unreasonable and cannot be supported having regard C to the whole circumstances of the case.

On the night of the 17th March 1973 the appellant was taken in police custody to the out-patients department of the Colonial War Memorial Hospital with a view to his being examined by a doctor to ascertain whether or not he was under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle, at which time the appellant was suffering from serious injuries notably six fractured ribs. At his trial defence counsel objected to the evidence of D the doctor on the grounds that the proper consent of the appellant had not been obtained to the examination and a "trial within a trial" was held to determine the admissibility of the doctor's evidence after which the trial Magistrate held that the medical examination was not carried out without the consent of the appellant and exercised his discretion in favour of admitting the evidence.

It is most important for a doctor to obtain from any person brought to him by E the police his consent to being medically examined, and the purpose of the medical examination must be made clear to that person, particularly in circumstances such as arose here where the appellant may have believed that he was consenting to a medical examination for his injuries rather than for the purpose of ascertaining and disclosing whether he was under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle. He must also be told by the doctor that he may refuse a medical examination if he wishes, otherwise a F court may decline to allow the result of the medical examination to be given in evidence. This is well illustrated by the case of *R. v. Urech* [1962] C.L.Y. 587 in which, during the hearing of a charge of driving a motor vehicle whilst under the influence of drink, the police doctor stated "I did not ask the accused for his formal consent before commencing my examination. I said 'I had better have a look at you'." Despite evidence from a police officer that the accused had given him his consent to the examination, the Deputy Chairman of the Quarter Sessions on a G submission by defence counsel held that, whilst there was nothing in law to make the police doctor's evidence inadmissible, he had a discretion whether or not to admit it, and he ruled that the evidence should not be given, that as the accused was in police custody he was not a free agent and that when the doctor arrived the accused should have been told that he had a clear option of refusing to be examined.

However, as in the case the subject matter of this appeal the trial Magistrate H appreciated that he had a discretion and adopted the proper procedure, this Court will not interfere with the judicial exercise of his discretion, and the first ground of appeal accordingly fails.

A The doctor who examined the appellant at the request of the police to ascertain whether or not he was under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle was called as a witness by the prosecution and was permitted by the trial Magistrate to put in evidence his written medical report in which he gave as his opinion that the appellant was so affected. This medical report was wrongly admitted in evidence for the same reasons as those set out in the judgment of this Court in *Colin Raymond Langford v. Reginam* (20 F.L.R. 11).

B At the time of his medical examination a blood sample was taken from the appellant which was analysed two days later to determine the blood alcohol level, evidence of which was given at his trial. The trial Magistrate in his judgment stated: "The best available medical evidence shows that a person with 150 milligrams of alcohol per 100 millilitres of blood is obviously intoxicated." There is no evidence on the record of the lower court to this effect and the trial Magistrate went outside the evidence adduced at the trial in order to reach this conclusion, C apparently by having recourse to a medical text book. This is not permissible, medical text books not being evidence *per se*, and in this connection I would draw attention to the judgment of this Court in *Colin Raymond Langford v. Reginam* (supra).

The trial Magistrate in his judgment found beyond the shadow of a doubt that the appellant was driving a motor vehicle and was drunk, and he proceeded to D convict him of the offence charged. Drunkenness in lay terms is not synonymous with inability to properly control a motor vehicle (vide *R. v. Sutton* [1957] E.A.L.R. 812) 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 fell into error and misdirected himself in law as in *William Joseph Sellars v. Reginam* (19. F.L.R. 78.)

E As to the final ground of appeal, the appellant at his trial elected to call two witnesses, one of whom was available then and there but the other, a doctor, was not. Defence counsel applied for an adjournment in order to bring the doctor before the court, which application was refused, resulting in an application to this Court to call additional medical evidence on the hearing of this appeal under section 301(1) of the Criminal Procedure Code, which was not opposed by the Crown. Medical witnesses cannot be produced at the drop of a hat, and in the F circumstances and after a consideration of *R. v. Gray* 1 Cr. App. R. 154, *R. v. Perry* 2 Cr. App. R. 89, *R. v. Warren* 14 Cr. App. R. 4, *R. v. Knox* 20 Cr. App. R. 96, *R. v. Harding* 25 Cr. App. R. 190 and *R. v. Lomas* 53 Cr. App. R. 256, the application was granted.

The additional medical evidence established to the satisfaction of this Court that, discounting the blood alcohol content for the reason hereinbefore contained, all of the significant physical symptons manifested by the appellant upon his examination G by the doctor at the out-patients department of the Colonial War Memorial Hospital, other than the smell of alcohol on his breath, could be attributed to the severe injuries which he had sustained and that the reactions of the appellant to the tests carried out, particularly his manner of walking, were as compatible with his injuries as with intoxication.

The appeal accordingly succeeds on the second, third, fourth and fifth grounds H and as, after a consideration of all of the evidence, I am of the opinion that the particular circumstances of this case do not justify the application of the proviso the appeal is allowed, the conviction quashed and the sentence including the order of disqualification set aside.

Before leaving the matter, while the legislative provisions relating to driving under the influence of alcohol remain unchanged in Fiji, it may be of assistance to conclude with a number of observations of general application to cases of this type arising from the medical evidence called on the hearing of this appeal:— A

1. Any doctor who is requested by the police to carry out the examination of a person suspected of being under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle should not disregard his duty to the person he is asked to examine. The doctor is not an agent of the police and should not consider himself as such in any circumstances. The B duty which he owes to a person detained by the police is in all respects the same as to any other patient under his care.

2. Arising from the above observation, if the person in question is suffering from illness or injuries which require treatment these must receive priority, even if it means postponing or abandoning the examination requested by the police. The doctor's first obligation on examination is to satisfy himself that the person is not suffering from serious injury or other acute condition and if, C for example, the person has six fractured ribs he should be admitted to hospital for treatment forthwith and not put through tests which could, if the person was to fall, prove fatal.

3. The present system of asking doctors on out-patients duty at hospitals to carry out examinations of persons suspected of being under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle is unsatisfactory, firstly because an outpatients doctor is usually D extremely busy and cannot be expected to devote the time, normally not less than one hour, which is considered necessary for such an examination, and secondly because he may have little or no experience in dealing with cases of this nature. A better practice, as adopted in England and many other countries, is for certain medical practitioners to be appointed "police surgeons" and to undertake to examine such persons at the police station, subject of course to the persons' consent being obtained. This permits of sufficient time being E devoted to the examination and enables those doctors appointed police surgeons to accumulate considerable experience in this field, thereby providing both a safeguard to a suspected person, and a protection to other road users to whom a driver so drunk as to be incapable of properly controlling a motor vehicle is a menace.

4. The forms at present being used by the Royal Fiji Police Force for the purpose of a medical examination in this type of case are, from the medical F point of view, utterly inadequate and unsuitable.

5. The medical examinations that are being carried out in this type of case are inclined to be perfunctory and insufficiently detailed.

6. A medical examination and tests on the lines recommended by a specially appointed Committee of the British Medical Association (to be found in Taylor's Principles and Practice of Medical Jurisprudence (12th Ed.) Volume G II at p.394 to 397 under the heading " A Model Scheme of Medical Examination ") should be adopted, and printed forms setting out the requirements so recommended should be made available to all doctors charged with the responsibility of undertaking these examinations, so that a uniform procedure is followed and so that, if a person subsequently wishes to be examined by his own doctor or a later examination is considered desirable to ascertain whether certain symptoms are still present after the effects of alcohol have H ceased, the doctor carrying out the subsequent examination will know precisely what tests have been employed and can duplicate them.

Appeal allowed.