VINOD PRASAD v STATE (AAU0011 of 2004S)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, EICHELBAU and GALLEN JJA

22, 29 July 2005

Statutes — interpretation — intoxicated while driving causing accident — Magistrates Court charged Appellant with two offences based upon readings from breathalyser machine — charges withdrawn before start of trial and without opposition — single charge substituted — Appellant convicted, fined and disqualified from holding drivers licence for 12 months except from 6 am and 6 pm on working days — High Court dismissed appeal against conviction and imposed full disqualification — Land Transport Act 1998 ss 1, 59, 83(1), 102(1), 102(5), 103.

The Appellant was driving while intoxicated and caused an accident. The Magistrates Court charged the Appellant with two offences pursuant to s 103 of the Land Transport Act 1998 (the Act), based upon readings obtained from a breathalyser machine. The charges were withdrawn before the start of the trial and without opposition. A single charge based on s 102 of the Act was substituted which alleged that the Appellant at the time of the offence charged was incapable by reason of intoxication of proper control of the motor vehicle he was driving. The Appellant was convicted and was fined. He was also disqualified from holding a drivers licence for 12 months except between 6 am and 6 pm on working days.

The Appellant appealed to the High Court against the conviction and questioned the validity of the limited disqualification imposed on him. The High Court dismissed the appeal against the conviction and concluded that the Magistrates Court had no power to impose the disqualification and replaced it with a full disqualification over the same period. The Appellant appealed against both the dismissal of the conviction and the decision in respect of the full disqualification. The issues were whether the learned judge erred in: (1) the interpretation of the interrelationship of ss 102 and 103 of the Act; (2) failing to hold that conviction under s 102 was impossible unless s 83(1) of the Act was complied with; and (3) regarding the interpretation of s 59 of the Act.

Held — (1) The requirements of a conviction under s 102 was proof that the person charged was under the influence of intoxicating liquor or drug. The remaining provisions of the section were designed to ensure the safety of the public by preventing a person driving who, in the opinion of a police officer and backed up by the expert evidence contemplated by the other parts of the section, was unfit to drive that vehicle. The breathalyser evidence was less significant than the evidence of observation from the police officers.

(2) The purpose of s 83(1) was to ensure that the person confronted with a charge under s 102 has notice of the intention of the authorities to initiate the prosecution under it. There was no requirement for such notice in the case of a prosecution under s 103. A failure to comply with s 83 would mean a need for the case to be subject to another proceeding. Any comment that the Court of Appeal would make could not be taken as expression of any concluded view with regard to the question raised. The Appellant was at risk of prosecution action under one or the other of the sections.

(3) The provisions of s 59 imposed the disqualifications under the Act. It allowed the court in certain circumstances to reduce the period of what would be a mandatory disqualification. It did not give any other latitude in determining the disqualification. The disqualification under the Act prevented a driver from obtaining or holding a licence during the disqualification period.

Appeals dismissed.

No cases referred to.

A. K. Singh for the Appellant

K. Tunidau for the Respondent

[1] Ward P, Eichelbau and Gallen JJA. The Appellant was charged in the Magistrates Court with two offences contrary to s 103 of the Land Transport Act, based upon readings obtained from a breathalyser machine. Sometime after they had been filed those charges were withdrawn, before the start of the trial and without opposition.

[2] A single charge based on s 102 of the Land Transport Act was substituted which alleged that the Appellant at the time of the offence charged was incapable by reason of intoxication of proper control of the motor vehicle he was driving. At the conclusion of the case the Appellant was convicted, a fine imposed and he was disqualified from holding a drivers licence for 12 months except that he was permitted to drive between 6 am and 6 pm on working days.

[3] The Appellant appealed to the High Court against his conviction and in addition to the correctness or otherwise of the conviction, the question arose during the court hearing of the validity of the limited disqualification which had been imposed on him.

[4] There were a substantial number of grounds of appeal raised before the judge in the High Court and she dealt with them in three groups.

[5] At the conclusion of the case the judge in the High Court dismissed the appeal with regard to conviction but indicated that she had doubts as to the validity of the limited disqualification which had been imposed as part of the sentence.

[6] After hearing argument and in a subsequent judgment she arrived at the conclusion that there was no power to impose such a disqualification. She accordingly quashed the disqualification which had been imposed and replaced it with the full disqualification over the same period.

[7] The Appellant now appeals against both the dismissal of the conviction and against the decision in respect of the disqualification.

Background facts

[8] The appeal being limited to questions of law it is appropriate to accept the facts as found by the judge in the High Court and on which she based her decision.

[9] There was evidence that on 16 November 2002 at about 4.30 pm a driver driving past the Yat Sen School saw a black sports car coming behind him, being driven very fast. It hit the side of the footpath. The witness thought the car would hit his car and he moved forward also hitting the footpath and stopped. He stated that the black car came to a stop on an island made of concrete in the middle of the road opposite the school. He then saw the Appellant come out of the driver's seat and fall on to the grass. He said that the Appellant had stood up with the help of a taxi driver. A constable attended on a report that there had been an accident. He said that he saw a vehicle grey in colour, with the number plate SHAVIN, parked in a way that blocked the traffic lane running from the University to Flagstaff. He was told that a man who was sitting in a taxi had been the driver of the car. He approached that man and saw that it was his superior officer, Inspector Vinod Prasad the Appellant in these proceedings. The constable said Mr Prasad smelt heavily of alcohol and could not control himself when he stood up. He said that he had helped him to the police post and then told the traffic

branch to check. Another police constable a traffic officer drew a plan of the scene which shows that the Appellant's vehicle had parked diagonally across the right lane of the Laucala Bay Road. The plan also shows the way the car travelled prior to the accident. The witness had not witnessed the accident, although he did say he saw the dried marks of the tyres on the grass verge and scattered soil and was able to deduce its path. Another constable gave evidence that he attended and was instructed to visit the scene. He saw the car concerned parked on the road blocking other cars. He went to the Flagstaff Police Post and saw the Appellant sitting on a bench. He was told by the Appellant that he was the driver of the accident car. The Appellant was than asked to blow into an alcotest machine. He was said to have blown six times but produced insufficient breath samples. He was than asked to go to Central Police Station where he was handed over to another police officer who tested his breath using a Draeger test machine. The constable carrying out the test gave evidence that he used the Draeger 7001 test machine to test the Appellant's breath and according to the reading the Appellant had 134 micrograms of alcohol in his breath. He said that Appellant smelt heavily of alcohol and was staggering but agreed that he had not said that in his previous statement. He also gave evidence that the machine was tested every year in Australia. Under cross-examination he said he did not know the machine should have been retested in Fiji and that only one person in Fiji was qualified to read the test machines.

[10] A Senior Superintendent also interviewed the Appellant under caution. In that statement taken on 17 November 2002, the Appellant said that on 16 November he had drunk a few beers at the Palm Club in Nasese. He left the club at 5 pm. in the vehicle SHAVIN and said that his nephew one Nilesh Chand was driving. He denied that he was the driver and said that he did not know what had happened because he was asleep at that time. When he was charged he said again that he was not the driver of the vehicle. The charging officer was an inspector who said that he saw the Appellant on the 16 November at the Central Police Station. He said that the Appellant then needed to be supported by two police officers when he was brought into the station, that the Appellant was so drunk that he could not control himself. The inspector then instructed that the breathalyser test be carried out and he locked the Appellant in a cell over night because he was considered to be too drunk to be interviewed at that time. He said that he had not recorded any statement. He also said that the Draeger machines were tested in Australia but because of Fiji's different climatic conditions ought to be retested in Fiji.

[11] The Appellant was originally charged under the provisions of s 103 of the Road Transport Act and on 9 December 2002 pleaded not guilty. There were several adjournments of the case and on 19 August 2003 the magistrate considered that as the result of representations made by the defence the charges should be withdrawn and an amended charge filed. The amended charge was brought under the provisions of s 102. That charge was read to the Appellant and he pleaded not guilty. At the conclusion of the prosecution case the defence made submissions that there was no case to answer. The magistrate concluded that there was and put the Appellant to his defence. The Appellant did not himself give evidence but called a technical engineer, the managing director of Safeway Electronics Limited. That engineer said he was licensed to repair the breathalyser machines and to recalibrate them and have them verified by the Weights and Measures Department. He said that he used to test annually until 3 years previously when the department decided to have them tested in Australia. He said

that in his opinion the machines ought to be retested in Fiji because the climatic conditions, temperature, humidity and atmospheric pressure affected the accuracy of the readings. He said that such inaccuracy might lead to a variation of 10–15 grams. Under cross-examination he agreed that the certificate of verification of the machine had been signed by the chief inspector of Weights and Measures and he had not been involved with the machines for the past 3 years.

[12] The magistrate after summarising the evidence which had been called before him concluded that the evidence of the prosecution witnesses showed that the Appellant was incapable of having proper control of the vehicle due to intoxication, that he was driving the vehicle SHAVIN, that he caused the accident, that the breathalyser test proved that he had in his blood an excess amount of alcohol and that the Appellant had received proper notification of the prosecution. He convicted the Appellant and fined him the sum of $1000 in default 3 months' imprisonment and disqualified him from driving for 12 months on the condition that he should only be allowed to drive his car to work from 6 am to 6 pm on working days with effect from the date of imposition of the sentence.

The judge's decision

[13] In the High Court the Appellant relied on eight grounds in support of the appeal. The judge considered these seriatim but in three groups. The judge found that the magistrate was entitled to rely on the prosecution evidence and was entitled to come to the conclusion which he had. She made the comment, on the reading of the court record, the evidence of intoxication and the manner of driving appeared to be both consistent and compelling. The judge concluded that there was no reason to allow the appeal.

[14] At the conclusion of her decision she specifically stated "in his amended grounds of appeal, the Appellant does not pursue the issue of the notice of intended prosecution".

[15] The judge then dismissed the appeal against conviction.

[16] She then considered the appeal against sentence. She expressed the view the sentence was in the circumstances of the case far from excessive. She went on to state however that she was concerned as to the lawfulness of the order of partial disqualification.

[17] The judge then indicated she intended to give counsel an opportunity to make submissions on this aspect of the matter and adjourned the case for such submissions.

[18] Having heard submissions the judge expressed the view that there was no power under the section under which the disqualification had been imposed to impose a partial disqualification of the kind of which had been imposed. She accordingly set aside the order which had been made in the Magistrates Court and substituted for it one of 12 months' disqualification to run from 18 September 2003.

The appeal

[19] The notice of appeal indicated five grounds on which the Appellant sought to bring the matter before this court.

[20] After a hearing before the President of this court the grounds of appeal were reduced to three which are as follows:

(a) that the learned judge or learned resident magistrate erred in law regarding the interpretation of the interrelationship of ss 102 and 103 of the Land Transport Act No 35 of 1998.

(b) That the learned judge erred in law when she failed to hold that conviction under s 102 was impossible unless s 83(1) of the Land Transport Act No 35 of 1998 was complied with.

(c) That the learned judge erred in law of respect of her interpretation of s 59 of the Land Transport Act No 35 of 1998.

[21] Although the President in giving leave for the appeal to be brought had indicated that the second ground with regard to s 83 remained open for consideration we do not consider that we had jurisdiction to hear it, in view of the fact that the point had been abandoned in the argument before the judge in the High Court. We note that the judge specifically recorded this, so that she had not made any ruling in respect of it and accordingly it was not open to us to consider any appeal against a non-existent decision. Mr Singh was concerned about this aspect of this matter both because he considered the point was a valid one on which the Appellant was entitled to rely and because he considered that the provisions of s 83 had a bearing on other aspects of the case.

[22] While not without sympathy for Mr Singh's argument we cannot see that a point which had been abandoned in the court below and not ruled on could now be the subject of appeal in this court and we rule accordingly. In doing so we note also that in any event whether notification had been given or not was a question of fact and one on which the magistrate had ruled. Nevertheless, we have to the extent that we consider possible to do so taken the point into account in connection with Mr Singh's other argument.

Ground 1

[23] Mr Singh's argument may be summarised by saying ss 102 and 103 of the Land Transport Act of 1998 must be considered together and interpreted in the light of the history of the penal provisions relating to alcohol and driving. Mr Singh submitted that s 103 requires, for proof of an offence, evidence taken from a breathalyser machine. Section 102 requires proof of an offence to be established by the means contemplated by subs 5 of s 202. It is his contention that in the absence of such evidence a conviction under the provisions of s 102(1) cannot follow.

[24] He drew attention to the fact that the provisions which s 102 replaced were generally proved by such evidence.

[25] We cannot accept this contention. It is clear on the reading of s 102(1) that this constitutes the offence and that the remaining provisions of the section (contained in the following subsections) are designed to ensure the safety of the public by preventing a person driving who, in the opinion of a police officer backed up by the expert evidence contemplated by the other parts of the section, is unfit to drive that vehicle.

[26] An offence contemplated by subs 1 may be proved by any evidence which the court required to hear a charge initiated under the subsection considers sufficient. This may or may not include evidence which would justify action under the other subsections.

[27] Mr Singh submitted that the use of the breathalyser was limited to the purpose of proving offences charged under s 103. He also contended that in any event the evidence established in the case that the instrument had not been checked or calibrated in a way which made it reliable in Fiji conditions. He considered it ought not to have been used by the magistrate or in the High Court to support a conviction under s 102.

[28] We cannot accept this submission. One of the requirements of a conviction under s 102 is proof that the person charged was under the influence of intoxicating liquor or a drug. We cannot see why the breathalyser may not be used to establish that a person is under the influence of intoxicating liquor. Although the extent of the influence may not be so established it is only one means by which the requirement of the section of being under the influence can be satisfied. In any event, in the circumstances of this case, the matter is not important as we agree with the conclusion of the judge that the breathalyser evidence was less significant than the evidence of observation from police officers.

[29] The analysis of the evidence carried out by the judge in the High Court makes it plain that she considered that the magistrate had sufficient evidence before him to come to the conclusion which he did and the conviction could therefore stand. We agree with this. The Appellant cannot succeed on ground one.

Ground 2

[30] As we have already indicated we do not consider we have any jurisdiction to hear or consider or determine the points raised by this ground since it was clearly before the judge in the High Court and not proceeded with. Nevertheless, we note that the purpose of the section appears to be to ensure that the person confronted with a charge under s 102 has notice of the intention of the authorities to initiate the prosecution under it. We note as Mr Singh pointed out that there is no requirement for such notice in the case of a prosecution under s 103. The effect of a failure to comply with s 83 it will need to be the subject of other proceedings. Accordingly, any comment we make cannot be taken as expressing any concluded view with regard to the question raised. In the circumstances of this case, the Appellant could have been in no doubt that he was at risk of prosecution action under one or other of the sections.

Ground 3

[31] Mr Singh contends that it was open to the magistrate under the appropriate statutory provisions to impose a partial disqualification that is a disqualification that would allow the Appellant to continue to use his car for the purpose of getting to and from work.

[32] Disqualifications under the Act are imposed under the provisions of s 59. That section allows the court in certain circumstances to reduce the period of what would otherwise be a mandatory disqualification but it does not give any other latitude in determining the nature of the disqualification which the Act contemplates. A disqualification under the Act prevents the obtaining or holding of a drivers licence during the period of disqualification.

[33] Previous legislation did allow some latitude which is not contained in s 59 and we feel obliged to hold that the legislature, by not repeating it, must have intended to restrict the power of varying the effect of disqualification to one of shortening a period of mandatory disqualification.

[34] The judge in the High Court analysed the statutory provisions and came to the same conclusion. She also drew attention to a decision in the High Court which had adopted that view.

[35] We cannot see on the wording of the section and its scope any reason for coming to a conclusion other than that which the judge in the High Court did.

Conclusions

[36] The appeals against both conviction and sentence are dismissed.

Appeals dismissed.