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IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA

Appellate Jurisdiction

Criminal Appeal No. 90 of 1979

BETWEEN: SAKATAR SINGH s/o Bukshi Singh — Appellant

AND : REGINA — Respondent

Mr. Sahu Khan — Counsel for Appellant
Mr D. Williams — Counsel for Respondent

JUDGMENT

The appellant was convicted in the magistrate's court for driving a motor vehicle whilst under the influence of drink C/S.39(1) of the Traffic Ordinance Cap.152. He appeals against that conviction. There are three grounds:-

1. That the finding is unsafe and unreasonable having regard to the evidence as a whole.
2. Failure to consider and to evaluate the evidence of the defence witness.
3. Failure to consider inconsistencies in the prosecution case.

The brief facts are that about 9.45 p.m. on 21/4/79 the appellant stopped his car in Vatukoula Road, Tavua, near the Apsara Theatre. He then reversed on to a nearby traffic island in a manner which attracted police attention. He was apprehended and taken to Tavua Hospital and medically examined by Dr. Susanna Bernal, a female Phillipine citizen, who formed the opinion that he was under the influence of alcohol to the extent that he would not have proper control of a car.

The inconsistencies complained of include references to times given by prosecution witness. Thus the doctor P.W. 2 said she spent more than an hour examining the appellant whereas the policeman who arrested him said they were about 10 minutes at the hospital. However, P.W. 2, who made notes of her examination showed therein that the examination lasted from 21.50 hours until 10.20 p.m. The appellant was arrested about 9.45p.m. according to the constable, P.W.1. Therefore the doctor could not have been examining him for an hour. The police report Exhibit 2 indicates that the examination commenced at 21.50 hours but there is no evidence as to who recorded that time. P.W. 3 a police inspector said he first saw the accused at the Tavua police station at 9.55p.m. In my view nothing turns on those variations. P.W. 2 did examine the appellant in the course of which she prepared two reports Exhibit 2 and Exhibit 3 and it is apparent that her examination was methodical and of a greater duration than 10 minutes.

The appellant also says that there were inconsistencies in the doctor's (P.W. 2) evidence as to appellant's reactions when compared with the evidence of police witness.

P.W. 3 the police inspector told appellant to walk along a white chalk line but the appellant failed to stay on the line and "zig-zagged" and then began to run along the line and ran back although requested to walk. P.W. 3 said he caught the accused to prevent him bumping into the window frame. In cross examination, P.W.3 said the accused would have fallen if a constable had not hold him. The appellant argues that that evidence contrasts with that of the doctor's, P.W.2's report Exhibit 2 that the appellant swayed when asked to turn. In cross-examination, P.W. 2 agreed a swaying motion might arise on walking

quickly. The appellant argues that people may sway for a variety of reasons. There was no evidence from the defence that the accused habitually sways when he walks quickly. People under the influence of alcohol often sway or stagger and walking quickly may reduce the swaying.

The Inspector, P.W. 3, did not suggest that the accused was continuously supported by a constable to prevent his falling. There was probably an occasion when P.W. 3 was testing him on which the appellant may have fallen had he not been supported momentarily. Such differences did not reflect inconsistencies in evidence. P.W. 3 saw the appellant at the police station whereas P.W. 2 saw him at the hospital. They were not purporting to give evidence about the same incident.

Mr Sahu Khan for the appellant stated that in Exhibit 3 the tests for co-ordination received ticks from P.W. 2 as though the appellant's responses had appeared normal.

There were, in my view, no inconsistencies in the evidence of the prosecution witness as to the appellant's condition which called for any special deliberation by the learned magistrate. Ground 3 fails.

Ground 2 is completely inaccurate and is an unfair criticism of the learned magistrate's judgment. He received the prosecution evidence and then went on to review that of the defence with same care. According to P.W. 1(constable) the accused's car grounded itself on the island. The appellant said that on leaving a hotel where he had consumed two cans of beer he found himself in the theatre car park with which he is not familiar and P.W.1 began to direct him out of it. In following P.W.1's directions the appellant said he finished up on the

island but denies that his car grounded itself on the island. The learned magistrate mentioned that evidence. He omitted a direct reference to the appellant's allegation that the P.W.1 had directed him on to the island but that does not mean that he ignored or overlooked the appelant's evidence. In the course of the trial the learned magistrate visited the scene. He saw the island. He found as a fact that the appellant's car had stopped on "its belly" on the island and he said he believed P.W. 1. There was obviously no failure to consider the appellant's evidence.

The appellant submitted that the evidence of defence witness No. 2, Dr. Karim was not carefully considered as against that of P.W. 2. Dr Karim declared that the condition "nystagmus" is invariably present when a person is drunk. P.W. 2 in her evidence and in her report Exhibit 2 found an absence of nystagmus. In cross-examination, P.W. 2 said that nystagmus would occur if there had been excessive drink but if consumption had been moderate (presumably as opposed to excessive -) it was not bound to occur. D.W. 2, Dr Karim was referred to P.W.2's report. He had not examined the appellant on the night in question. He stated that nystagmus would be present in a person who was drunk and he would expect it in a person who was sufficiently under the influence of alcohol as not to have proper control of a car.

Unfortunately the court library is very limited in its selection of reference books on medical matters. "The short Encyclopaedia for Medicine" by Levitt describes nystagmus as a rapid movement of the eyeballs occuring in certain nervous disorders. In "Medical Jurisfrudence and Texicology" by Glaister, 10th edition, 596 to 604, the diagnosis of insobriety" is considered and at page 599 there is a refernce to the condition of the eyes as a factor. The condition of the extrinsic eye muscle

includes nystagmus and the author suggests that a lateral movement i.e. a lateral nystagmus may be regarded as strongly indicative of alcoholic intoxication but its absence is not proof of an absence of alcohol. Clearly P.W.2's views were consistent with those of the learned author in refusing to accept that nystagmus is a necessary sign of consumption of alcohol. D.W.2 Dr. Karim referred frequently to a person who "was drunk". As the learned magistrate stated, the issue was not whether the appellant was drunk but whether he was sufficiently under the influence of alcohol so as not to have proper control of his car.

At the foot of page 595, Glaister, (supra) the author says that it is unwise for a doctor to express an opinion as to the possible state of the subject as to his insobriety or sobriety, at any time other than that of the examination. It may be that Dr. Karim had this in mind when he said, "Can't venture an opinion that the accused unable to have proper control". Mr, Sahu Khan on the appeal, submitted that what Dr. Karim (D.W. 2) really meant to say was that on the evidence in the reports of P.W. 2 he would not venture to express the opinion that the appellant was so far under the influence of alcohol as not to have proper control.

P.W. 2 in her examination noted the following signs in the appellant's condition as consistent with his being under the influence of alcohol:- Uneo-operative; talkative; she had to repeat things to him; swaying; swollen eye-lids; eyes reddish and conjunctival congested, high pulse rate, pupils dilated, breath smelled strongly of alcohol. P.W.2 was on the spot and saw and examined the appellant. She personally noted all those signs along with the appellant's general behaviour and based her opinion on them. The appellant was mistaken as to what day of the week it was. In my view there was no good

reason why the magistrate should not have noted P.W. 2's findings and accepted her expert opinion based on them.

As pointed out in Shukat Ali v. R. Criminal Appeal 88/79 the weight to be attacked to P.W.2's medical opinion turns upon all the circumstances of the case. The learned magistrate quoted that approach in his judgment and indicated that he regarded the fact that the accused's car finished up on "its belly" on the island as a manifestation of the accused's lack of control of the car. Other evidence of the accused's condition came from the police witness 1 & 3 who said accused was unsteady, very talkative and kept asking to see his doctor but refusing to give his doctor's name.

The defence evidence had to be considered in the light of that evidence and the learned magistrate devoted three quarters of a page of typescript to a consideration of the defence evidence.

Ground 2 fails.

With regard to ground one the appellant says that the magistrate failed to critically examine P.W.2's medical evidence. In my view the magistrate examined all the medical evidence and accepted that of P.W. 2. She was obviously aware of the signs to be looked for and did not fail to check on them. Her opinion as the appellant's condition was formed on the spot at the time of examination. It is fully supported evidence of the police witness and the other surrounding circumstances.

There was ample evidence pointing to the accused's guilt which the magistrate was fully justified in believing.

Ground 1 fails

The appeal is dismissed.

LAUTOKA
1st February, 1980

(J.T. WILLIAMS)
JUDGE