IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

000212

Criminal Appeal No. 11 of 1981

Between:

FAIZ ALI s/o Nur Ali — Appellant

and

REGINAM — Respondent

Mr. I. Khan for the Appellant.
Mr. D. Fatiaki for the Respondent.

JUDGMENT

The appellant was on the 27th October 1980 convicted of driving a motor vehicle whilst under the influence of drink or drugs contrary to section 39(1) of the Traffic Ordinance and fined $125. He was disqualified from holding or obtaining a driving licence for 12 months.

He was also on the same day convicted of the offence of dangerous driving contrary to section 38(1) of the Traffic Ordinance and fined $80. He was also disqualified from holding or obtaining a driving licence for a period of 2 months consecutive to the period of 12 months in respect of the first conviction.

He appeals only against the convictions on the following grounds:-

(1) The evidence adduced by the prosecution was insufficient to prove that the appellant was drunk to such an extent as to be incapable of having proper control of a motor vehicle.

(2) The learned trial magistrate erred in law and in fact in taking into account evidence of subsequent driving, to that alleged in the particulars of offence.

(3) The learned trial magistrate erred in law and in fact in not properly evaluating the evidence given by prosecution witnesses.

(4) The learned trial magistrate erred in law when he said "Accused remained mute and did not call witnesses. Accordingly I have little option but to find accused guilty of the offence of dangerous driving and I do so".

(5) The learned trial magistrate erred in law when he said, "for some extraordinary reason accused chose (as was his right) to remain mute, and he therefore gave no explanation for or attempted to deny the allegation".

On the night of the 16th June 1980 the appellant was seen driving his vehicle in Victoria Parade with no lights on by a party of police officers in a landrover. They tried to get the appellant to stop but he speeded up, swerved to the wrong side of the road and back to his left and then turned into Gladston Road which he went up at high speed in a zig zag manner. He finally stopped at Williamson Road and got out of his vehicle when requested by the police. To the police party he denied driving without lights and/that he had not seen them. He said smelled of liquor and was unsteady on his feet and was very talkative. PW2, PC Simpson, estimated the appellant's speed at 80 k.p.h. Special Corporal Ram Murti however made no estimate of speed but said appellant was travelling fast.

The appellant was arrested and taken to the police station and later to the CWM Hospital where he was examined by Dr. R. Ram.

Dr. Ram who was called as a witness produced his record of the medical examination. He took blood and urine

samples from the appellant and sent them to the analyst.

In his report the doctor originally recorded the following remarks:-

> "Patient is in early stages of drunkenness vide overcautious and talkative. Fit to drive".

In view of those remarks the police released the appellant and he was allowed to drive his vehicle away. A week after the medical examination the doctor received the analyst's report.

The appellant's blood contained 201 milligrams of alcohol in 100 millilitres and his urine contained 267 milligrams of alcohol to 100 millilitres.

The doctor on receipt of the analyst's report deleted the words 'fit to drive' in his report and substituted 'unfit to drive'. He added a note to his report dated 24.6.80 which reads:-

> " On second opinion he is certainly unfit to drive with alcohol level of 201 mg % in the blood".

In Court the doctor said that after the medical examination of the appellant he reserved his opinion and left his report with the police. He said as regards his remarks that appellant was fit to drive:-

> " There is an error of fitness. I did not think he was fit. I made a writing mistake".

It is perhaps fortunate for all concerned that the appellant did not have an accident when he drove away after being medically examined. The mistake the doctor made, and the magistrate accepted it was a mistake, was one which should not have happened.

The doctor said his opinion that the appellant was unfit to drive a vehicle was based on the level of alcohol. He explained that tolerance to alcohol varies and he gave his views on the blood/alcohol for the average man weighing 70 kilograms. At a level of 150 milligrams a person becomes talkative. His co-ordination would not be 'proper' and his reflexes - hearing, vision and response "would be wrong".

The analyst's report discloses that the alcohol content in the appellant's blood and urine was considerably higher than the 150 mg/millilitre the doctor gave as an example.

The magistrate accepted the evidence of the prosecution witnesses. In the course of his written judgment the magistrate did make the remarks quoted in the 4th and 5th grounds of appeal. It is convenient to deal with those two grounds first. Mr. Iqbal Khan for the appellant quoted R. v. Mutch [1973] 1 All E.R. 178 where an appeal was allowed and the conviction quashed where the judge commented on the accused's failure to give evidence.

That case however was a jury trial where different considerations apply but then in that case Lawton L.J. stated at p. 181:

> " Judges who are minded to comment on an accused's absence from the witness box should remember, first, Lord Oaksey's comment in Waugh v. R;
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> > 'It is true that it is a matter for the judge's discretion whether he shall comment or not on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment.' "

The magistrate's comment quoted in the fourth ground of appeal arose after the magistrate had fully considered the

evidence against the appellant on the second count. He found as a fact that the swerving from side to side in Victoria Parade clearly amounted to dangerous driving. Then follows the statement quoted which in its context is factual. Having held certain facts constituted dangerous driving and there being no explanation by the appellant for the way he was driving the magistrate had no option but to convict. That however is a very different situation from commenting on an accused's failure to give evidence to assessors who have to decide on the accused's guilt.

The magistrate's comments quoted in the fifth ground of appeal followed immediately after his review of the evidence on the first count and his finding of fact that the accused was quite unfit to drive a vehicle at the time he was seen driving by the police.

I do not profess to understand why the magistrate considered there could be some extraordinary reason for the appellant remaining mute. He clearly recognised the appellant's right to remain mute.

I do not consider that the magistrate's comments in any way prejudiced his consideration of the evidence and his findings of fact. There is not in my view any merit in the fourth and fifth grounds of appeal.

The only other ground I need comment on in particular is the second ground where the appellant complains that the magistrate took into account evidence of the appellant's subsequent driving after he turned off Victoria Parade on which road he was alleged to have driven dangerously.

The police certainly described the manner in which the appellant drove after turning off Victoria Parade but the magistrate clearly confined his finding of fact to the manner in

which the appellant drove in Victoria Parade. There is no merit in this ground of appeal.

The other grounds refer to the sufficiency of evidence and the magistrate's failure to properly evaluate the evidence As to evaluation of the evidence, there was very little conflict of evidence which the magistrate had to consider. In my view he did properly consider and evaluate the evidence before him.

I am satisfied that there was ample evidence which the magistrate accepted to establish that the appellant was guilty of both offences.

Driving at night on Victoria Parade, albeit there are street lamps at up to 80 k.p.h. or what was described as fast and swerving from side to side was clearly dangerous driving

On the first count there was the evidence of two police witnesses as to the appellant's condition, the manner in which he drove his vehicle that night and the doctor's opinion which the magistrate accepted.

The appellant was in my view properly convicted on both counts.

The appeal is accordingly dismissed.

(R.G. Kermode)
JUDGE

SUVA,
17 July, 1981.