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IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 45 of 1983

BETWEEN : DANIEL RAM s/o Rama — Appellant

A N D : R E G I N A M — Respondent

Mr. S. Khan — Counsel for the Appellant

Mr. M. Raza, Principal Legal Officer, — Counsel for the Respondent

J U D G M E N T

Cases referred to:

(1) Langford v R 20 F.L.R 11

(2) Sohan Ram v R Cr. App. No. 138/1977

(3) R v Campbell & Others 69 Cr. App. R.22

The appellant was convicted by the magistrate's court at Ra on a count of driving a motor vehicle when under the influence of drink and on a second count of dangerous driving, contrary to section 39(1) and section 38(1) respectively of the Traffic Act Cap. 152 (1967 Edition). He appeals against both convictions.

Two police officers gave evidence for the prosecution. Such evidence indicates that the 25 year-old appellant drove his vehicle very fast past the police station on the Korotale Valley Road in Ra on a Saturday night at 11.15 p.m. approximately, swerving somewhat. At a distance, the appellant turned the vehicle and drove back towards the police station still travelling very fast. A police Constable in uniform signalled the appellant to halt. The appellant failed to do so and carried on towards a single-line bridge in the general direction of Penang. The Constable gave chase on foot. At that stage a police Corporal was driving across the bridge towards the police station. He dipped his head lights but the appellant failed to do so. The appellant's vehicle passed him after he had cleared the bridge, approaching the bridge to the sound of brakes being applied, as it slowed down. The police Corporal stopped his vehicle to observe the progress of the appellant's vehicle. Both police officers heard a loud noise on the bridge, the Corporal observing that the appellant's vehicle had mounted the footpath, some nine inches above the roadway, on the bridge on the left side, then it came off the footpath and swerved to the opposite side of the bridge, where

it struck the cement pavement; it then drove off across the bridge. Both police officers gave chase in the police vehicle.

The appellant's vehicle, still swerving, stopped near a junction called Vatumani junction. The Corporal stopped the police vehicle beside that of the appellant and requested him to wait, but the appellant drove off into Vatumani road, a gravel road, and stopped about a chain down the road. The police vehicle caught up with that of the appellant and the Corporal stopped his vehicle, again beside that of the appellant, on the right hand side: the right hand wheels of the police vehicle were on the grass verge. Again the Corporal spoke to the appellant, apparently before either police officer had dismounted, but again the appellant drove off at speed: this time however, the right rear door of the appellant's vehicle struck the front left bumper of the stationary police vehicle, occasioning damage to both vehicles. The appellant drove to his house some two chains away. When the police vehicle caught up with the appellant he was still seated in his vehicle. The Corporal opened the door of the vehicle and assisted the appellant to emerge. His breath "smelt heavily of liquor" and he was staggering: the appellant was unable to walk and had to be assisted into the police vehicle. The Corporal opined that the appellant was drunk.

The appellant consented to medical examination and was, with some assistance, taken to the local hospital where he was examined by a Government medical officer after midnight. The doctor noted the appellant's pulse and blood pressure. He completed a police medical examination form in which he opined that the appellant was "drunk and incapable in controlling any moving vehicle." The doctor stated such opinion to the police in the appellant's presence, apparently without reaction from him. The appellant was taken into custody. The following morning he made a statement to the Corporal which was tendered in evidence without any objection thereto. Thereafter the Corporal drove him to the bridge where he showed the appellant an apparent tyre-mark stretching some six-metres along the footpath on the left side of the bridge (in the direction of Penang) and some slight damage to the pavement on the other side. The Corporal also observed a 14-metre apparent brake-mark on the roadway at the entrance to the bridge which had been approached by the appellant. The Corporal also drove the appellant to the latter's house where he pointed out to the appellant the damage to the latter's vehicle and also particles of yellow paint (apparently similar to yellow paint on the right side of the bridge) and cement on the right front tyre of the appellant's vehicle.

In his defence the appellant made an unsworn statement. He claimed that as he drove home on the Saturday night a vehicle following him "bumped me on my rear right. I got excited", he said, "and drove my car home." A police vehicle halted beside his vehicle; a police officer pulled him out of his vehicle, forced him into the police vehicle, brought him to the police station where he made a statement; from thence he was taken to the hospital where he complained to the doctor that he had been forcibly brought there; he demanded a blood-test but was not subjected thereto and was sent away by the doctor after five minutes.

The learned counsel for the appellant Mr. Khan has filed the following grounds of appeal -

"(1) That the Learned Trial Magistrate erred in law and in fact in admitting inadmissible evidence of the doctor.

(2) That the Learned Trial Magistrate erred in law and in fact in not evaluating all the defence case.

(3) That the verdict is unreasonable and unsafe having regard to the evidence as a whole."

) 20 F.L.R

Mr. Khan has referred me to the authority of Langford v R (1). The judgment in that case of Grant Acting C.J. (as he then was) reads in part as follows, at p.13 at A and B:

> "Turning to the main ground of appeal, the doctor like any other expert witness was called to assist the court on technical matters, but the court is not entitled to accept an expert's opinion blindly nor does an expert's opinion relieve the court from coming to its own conclusions based on all of the evidence, including the evidence of the expert witness. An expert gives evidence - he does not decide the issue. No one is infallible and no expert, however specialised his knowledge, would claim to be. The opinion of an expert is only as reliable as his reasons for reaching that opinion and the methods employed to establish his reasons. If the methods employed consist of tests, the court must look at the nature of the tests and the qualifications and experience of the person administering them. If the tests are themselves inadequate or the qualifications and experience of the person interpreting the results are limited, this must affect the weight to be attached to the reasons based on those tests and to the opinion reached."

Mr. Khan submits that the examination conducted by the doctor was insufficient for the purposes of determining the appellant's capacity to have proper control of his vehicle: furthermore the form of medical examination should not have been received in evidence. The doctor, who had been in Government service for 25 years, apparently based his opinion partly on his observations and also on what must be regarded as his somewhat limited medical examination. He testified that the appellant's eyes

were red but that this was possibly due either to the fact that he was crying or that he was under the influence of liquor. He also testified that the appellant's blood pressure of 130/90 was very high and that it was "more probable" that such high pressure was due to the consumption of alcohol. Quite clearly, the medical examination would have been more satisfactory had blood and or urine tests been taken. Under the circumstances it seems to me that the doctor's evidence could not take the matter any further than that of the ordinary lay witness, and that the second arm of his opinion could not be relied on to establish the appellant's capacity to have proper control of his vehicle. There was however sufficient evidence, that of the doctor and two police officers, that the appellant was under the influence of alcohol.

When it comes to the medical examination form, it will be seen that it was only admissible under the restricted provisions of section 191 of the Criminal Procedure Code, the relevant part of which reads as follows:

> "191.-(1) Any plan, report, photograph or document purporting to have been made or taken in the course of his office, appointment or profession by or under the hand of any of the persons mentioned in subsection (2) may be given in evidence in any inquiry, trial or other proceeding under the provisions of this Code unless such person shall be required to attend as a witness by -
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> (a) the court; or
>
> (b) the accused, in which case the accused shall give notice to the prosecutor not less than three clear days before the inquiry, trial or other proceeding:
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> Provided that in any case in which the prosecutor intends to adduce in evidence such plan, report, photograph or document he shall deliver a copy of such plan, report, photograph or document to the accused not less than ten clear days before the commencement of the inquiry, trial or other proceeding.
>
> (2) The following persons shall be the persons to whom this section shall apply:-
>
> (a) medical practitioners and medical officers;"

In the case of Langford v R (1) Grant Ag. C.J. had occasion to consider the above provisions, as illustrated by the following passage in his judgment (at p.12 at E):

> "After a traffic accident in which the appellant was injured he was examined by a doctor 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. This doctor 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 report if contemporaneous could certainly have been used by the doctor to refresh his memory but it should not have been produced in evidence unless, as a statutory exception to the best evidence rule, section 184A (now 191) of the Criminal Procedure Code applied, under the provisions of which certain documents may be produced in evidence in lieu of, but not in addition to, the oral evidence of a witness and subject to the requirements of that section being complied with, which was not the case here."

In the present case the medical examination form was clearly inadmissible. It was however introduced when the witness had concluded his evidence. There is no reference whatever to the form in the witness' evidence. There is no indication on the record that he ever refreshed his memory therefrom. The relevant evidence-in-chief is confined to the following bare statements:

> "I examined the accused. I came to the conclusion that the accused was under the influence of liquor. I did not think he was capable of driving a motor vehicle in that condition."

The witness was however clearly cross-examined on the contents of the medical examination form, a copy of which had been served on the appellant, when the witness gave additional evidence. The relevant matters stated in the form which were not adduced in cross-examination were that the appellant smelt "of liquor", that his pulse was "136 - strong and regular", and that he was staggering and was argumentative and talkative. The evidence of the pulse rate, in the absence of any evidence as to the significance thereof, can have been of no assistance and cannot have influenced the learned trial magistrate. The statement that the appellant smelt of drink and was staggering, whatever about the other aspects, must no doubt have influenced him. Such statement however went no further than to support the witness' evidence already adduced and his opinion as to the appellant's drunkenness. The witness' evidence and his opinion was in any event supported by that of the two police officers. In the light of all the evidence adduced at the trial I am quite satisfied that the learned trial magistrate would have reached the same conclusion had the form not been admitted. The appellant was represented by Counsel at the trial: the latter stated he had no objection

to the introduction of the form in evidence. In all the circumstances I cannot see that any miscarriage of justice was involved therein.

When it came to deciding on the appellant's capacity to have proper control of his vehicle the learned trial magistrate once again placed some reliance on the medical examination form, indeed on those very portions thereof not covered in cross-examination. That amounted to a misdirection. As I have indicated earlier, the doctor's opinion could not be relied upon to establish the issue in hand, that is, the appellant's capacity to have proper control of his vehicle. On close examination of the learned trial magistrate's judgment however, it seems that he placed no reliance on the second arm of the opinion, but carefully examined the available evidence. He very correctly directed himself upon the following dicta of Grant C.J. contained in his judgment in the case of Sohan Ram v R (2) at p.2:

) Cr. App. 8/1977

> " If a car has an accident where there is no hazard for a normal driver and the driver fails to give an explanation which is consistent with his having driven properly and which might reasonably be true, it is evidence that the car was not being driven properly. If in addition, there is evidence that the driver was under the influence of liquor then the conclusion may properly be drawn that the driver was under the influence of liquor to such extent as to be incapable of properly controlling the vehicle, and may be convicted under S.39(1) of the Traffic Ordinance."

With those dicta I respectfully agree . The learned trial magistrate's judgment reads :

> " The police evidence on this aspect of the case was detailed above, but the highlights would be the zig zag manner in which the accused drove his vehicle, the damage he caused both to the vehicle and the police vehicle, the damaged caused to the bridge, his unsteadiness, and staggering manner and not the least the statement made by the accused himself. In his statement the accused denied knowing what happened on the bridge, denied hitting the bridge, denied being aware that he was stopped by the police and denied any knowledge of causing any damage to the police vehicle.
>
> Although all the matters detailed above taken individually would not in my view enable a court to come to the conclusion that the accused was so drunk as to be incapable of having proper control of a vehicle, all these matters taken collectively, leads me to the irresistible conclusion that the accused was drunk to such an extent as to be incapable of having proper control of the vehicle he was driving."

while the learned trial magistrate did, as I have said, place some reliance on portions of the contents of the medical examination form, I consider nonetheless that had he disregarded such evidence he would inevitably have convicted the appellant.

After quoting the above dicta from Sohan Ram v R (2) the learned trial magistrate's judgment, continuing in the same paragraph, reads:

> ".....The accused gave no evidence and called no witnesses.
>
> Consequently, I find the accused guilty of the charge set out in count 1 and convict him."

Mr. Khan submits that the above passage contains two misdirections. Firstly that it was not correct to say that the accused "gave no evidence", and secondly that the use of the word "consequently" indicates that the learned trial magistrate considered that there was an onus upon the accused to give or adduce evidence. Coming as the word "consequently" did immediately after the quoted dicta of Grant C.J. in Sohan Ram v R (2), it seems to me that the learned trial magistrate was there saying no more than this, that in view of the evidence of the prosecution, particularly the evidence of an accident "where there was no hazard for a normal driver", there was a "burden of explanation" or an evidential burden upon the appellant, that as the appellant had failed, as will be seen, to discharge such burden he was satisfied with the prosecution evidence and as to the appellant's guilt.

While an unsworn statement does not carry the same probative value as sworn evidence, nonetheless it must be considered in relation to the evidence as a whole, the Court attaching to it such weight as it thinks fit. In the case of R v Campbell & Ors. (3) the Court of Appeal, Criminal Division, observed that a statement from the dock seemed to have taken on in current practice a somewhat shadowy character halfway in value and weight between sworn evidence and mere hearsay. Under the circumstances, I do not see that the learned trial magistrate's observation amounted to a misdirection. The question is not what name the learned trial magistrate placed on the appellant's unsworn statement but whether he considered it.

(1979) r. App.

The appellant's unsworn statement made no reference to the collisions on the bridge. Further, it introduced one aspect, that what must have been the police vehicle had collided into him from the rear, while he was driving home, which aspect he had not mentioned in his statement to the police. Quite the contrary, in that statement he had said that he had not hit the sides of the bridge: he didn't know what happened on the bridge: he admitted to having seen the damage on the police vehicle but when asked "How did you bump the Police landrover GJ289 on Vatumani Road

at about 11.25 p.m?," he replied "I don't know."

The learned trial magistrate had earlier observed that the two police officers had been "cross-examined at fair length." He observed:

> "Their evidence was not shaken. I came unhesitatingly to the definite conclusion that they spoke the truth."

That finding is supported by the record. Faced with such evidence, bearing in mind the evidential burden upon the appellant, bearing in mind that the appellant's statement to the police and unsworn statement from the dock were at variance and in effect offered no explanation for the collisions on the bridge, I am satisfied that if it is the case that the learned trial magistrate did not consider the appellant's unsworn statement, had he done so he must inevitably have rejected such statement and drawn the inference, as the only reasonable inference, that the appellant was under the influence of drink to such an extent as to be incapable of having proper control of his vehicle.

Finally, as to the second count Mr. Khan submits that there was no evidence of dangerous driving on Vatumani Road. I see little merit in his submission. The evidence as a whole must be considered, and the evidence against the appellant under the first count, that is, that he was adversely affected by drink, was relevant to the issue of whether he drove dangerously. Bearing in mind such evidence, that he was not in proper control of his vehicle, and the fact that he collided with a stationary police vehicle, I consider that the learned trial magistrate was fully justified in finding that the appellant drove dangerously. The appeal against both convictions is dismissed.

Delivered In Open Court At Lautoka This 4th Day of May, 1984

(B. P. Cullinan)

Judge