

Between:

BHAJAN SINGH s/o JORA SINGH

and

REGINAM

JUDGMENT

This is an appeal against the conviction of the appellant on the 10th July 1978 at Labasa Magistrates Court of driving a motor vehicle under the influence of drink contrary to section 39(1) of the Traffic Ordinance and dangerous driving contrary to section 38(1) of the Traffic Ordinance.

The facts on which the trial Magistrate relied were that at 11.25 p.m. on the 14th March 1978 the appellant was driving his car along Gibson Street when he turned right into Nasekula Road and drove in an erratic manner on the wrong side of Nasekula Road in the path of an oncoming car containing two police officers (P.W.1 and P.W.2). The oncoming car pulled as far over to the nearside as possible and stopped. The appellant's car nearly collided with it but swerved to the left and continued on slowly in a jerky manner. One of the police officers gave chase on foot and saw that the appellant was almost leaning on the steering wheel. The police officer

000203

managed to open the door of the appellant's car and switch off the ignition. He pulled the arm of the appellant, who was leaning on the steering wheel, in order to remove him from the car. The appellant got out of the car and promptly fell on the road. One of the police officers (with the help of a patrolling constable P.C.1338 who was not called as a witness) had to pick him up and help him into the police officer's car. He was driven to the police station where it took two police officers to assist him into the station. He smelled strongly of drink, his speech was slurred and he could not stand, or walk, without support. On being asked if he wished to be examined by a doctor he mumbled incoherently and then said he was a doctor himself and refused to be examined. In view of his drunken condition he was detained overnight and on the following morning was charged with driving a motor vehicle under the influence of drink which he denied. He maintained his denial at his trial, claiming that on the evening in question he had only shared three bottles of beer with a friend called Satish who was not called as a witness.

The first ground of appeal is that the trial Magistrate erred in accepting the evidence of the two police officers, in that his acceptance of their testimony was based solely on demeanour, he did not direct his mind to the inconsistencies in their testimony, did not advert to the fact that as they had consumed liquor that night it affected the reliance that could be placed on their testimony, and that

the evidence of one of the police officers conflicted with a question put to the appellant the following morning when he was briefly interrogated under caution.

In his judgment, after summarising the whole of the evidence, the trial Magistrate stated:-

"I have had the benefit of observing all the witnesses and the accused and I accept the evidence of the prosecution and reject the evidence of the accused. This is after considering the numerous inconsistencies between P.W.1 and P.W.2 which the defence had drawn to my attention in the closing submission ... I do not find their inconsistencies to be fatal to credibility or reliability."

The trial Magistrate's reference to having had the benefit of observing all the witnesses in the case is a statement of fact, and in no way suggests that he relied on the demeanour of the witnesses without testing same against their evidence (Yuill v. Yuill (1945) 1 All E.R. 183; R. v. Ambika Prasad Suva Cr.App. No.31 of 1978). Indeed it is quite clear from the trial Magistrate's judgment that he did not simply rely on demeanour.

As to the inconsistencies in the testimony of the two police officers it is obvious from the extract above quoted that the trial Magistrate did consider same before convicting

the appellant. In any event, having perused the record, I am satisfied that the so-called inconsistencies are more apparent than real, and that they throw no doubt on the reliability of the testimony of the two police officers nor on the propriety of the appellant's conviction.

As to the fact that the two police officers had themselves consumed liquor that night, the trial Magistrate was well aware of this and took it into account before making his findings, stating: "I note carefully the amount of liquor and grog they had consumed that night." On the hearing of the appeal it was suggested by counsel for the appellant that as the police officers failed to reveal in examination-in-chief that they had consumed liquor it diminished the probative value of their evidence, but this is unworthy of an experienced counsel who is well aware that in examination-in-chief witnesses answer the questions they are asked and do not volunteer information. It was under cross-examination that the police officers were asked if they had taken liquor that night, and they frankly admitted to having done so and gave full details.

On the morning after the incident a police constable on questioning the appellant under caution asked him: "You have been examined by the Deputy Police Commander Northern and found not capable of driving. What you have to say to that?" to which the appellant replied: "I do not know that and I was not taken to hospital for examination." According to the evidence of the

Deputy Police Commander (P.W.2) he did not examine the appellant, in the sense of carrying out tests, and in his evidence the appellant confirmed that no tests were conducted. Consequently there is no real conflict of evidence, and had the police constable used the word "observed" instead of "examined" the point would not have arisen. The police constable was not asked about this by counsel who represented the appellant at the trial, and on the facts of the case I do not consider it to be material. The first ground of appeal accordingly fails.

The second ground of appeal is that the trial Magistrate wrongly permitted one of the police officers to state his opinion concerning the appellant's capability to drive a motor vehicle and did not exclude this inadmissible evidence from his mind.

This arises from the fact that at the end of his examination-in-chief one of the police officers (P.W.1) stated: "Both I and P.W.2 thought the accused was incapable of driving. He was not in his normal senses." Because a witness says something in his testimony which, under the rules of evidence, is not admissible, it does not follow that the trial Magistrate wrongly permitted him to do so. A Magistrate does not know in advance what a witness is going to say, and unless a question is framed in such a way as to indicate that counsel is seeking to elicit inadmissible evidence it is not always possible to prevent a witness from stating his opinion or saying something that is hearsay. So long as it is clear that the Magistrate is aware of the inadmissible nature of what has been said and has

000207

excluded it from his mind no prejudice arises, and that is the case here. The trial Magistrate stated in his judgment:

"I fully appreciate neither P.W.1 or P.W.2 are expert witnesses and cannot say whether the accused was incapable of driving."

He also stated that he had considered, inter alia, the judgment in R. v. Sohan Ram (Suva Cr.App.No. 138 of 1977) from which he could have been in no doubt as to the proper approach. This ground of appeal accordingly fails.

The third ground of appeal is that the quantity and quality of the evidence was not such as to establish the offence of driving under the influence of drink beyond reasonable doubt, and that some element of doubt must have remained in the trial Magistrate's mind as he would have liked to have had additional evidence.

As to the first limb, having considered the evidence on which the trial Magistrate relied I am in no doubt that it was sufficient to ground a conviction for driving under the influence of drink. As to the second limb, the trial Magistrate stated in his judgment:-

"Summing up I would comment I would like to have seen various tests carried out on the accused, but as he was 'falling down drunk' this was not practicable. In addition, he refused to be examined.

" I would have preferred to have seen both Satish and P.C.1338 called as witnesses to give evidence, for the defence and prosecution respectively, although I am happy to reach a verdict without them.

I find the prosecution has proved its case beyond all reasonable doubt on both counts, the onus being upon them, and I convict the accused as charged."

From this it is quite clear that no doubt remained in the trial Magistrate's mind and that there is no substance in this ground of appeal.

The fourth and fifth grounds of appeal are that the trial Magistrate wrongly held that because the appellant was drunk he was incapable of having proper control of the motor vehicle and that he made no finding that the appellant was under the influence of drink to such an extent as to be incapable of having proper control of a motor vehicle.

Having perused the trial Magistrates judgment I am satisfied that he did not fall into the error of equating "being under the influence of drink" with "being under the influence of drink to such an extent as to be incapable of properly controlling a motor vehicle". The trial Magistrate considered, inter alia, the judgment in R. v. Sellars (Suva Cr.App.No. 73 of 1973) in which the distinction is clearly drawn; and, in my view, he adopted the correct approach. On the hearing of the appeal counsel for the appellant conceded that if the facts establish that a driver is under the influence of drink to such an extent as to be utterly incapable of controlling himself it follows, as a matter

of course, that he is incapable of properly controlling a motor vehicle - and that is the case here. After setting out the facts the trial Magistrate's finding of incapability was in the following terms: "Having heard [P.W.1's and P.W.2's] evidence as to the accused's behaviour and his driving, I am left in no doubt whatsoever he was totally incapable of driving through drinking too much liquor"; and in the circumstances of this case was adequate.

The sixth ground of appeal is that the trial Magistrate wrongly rejected the appellant's evidence, purely on the ground that he was not impressed with his demeanour, or because he accepted the evidence of the prosecution witnesses, or because there was an absence of motive on the part of the two police officers to tell lies.

I have already rejected the submission that the trial Magistrate relied solely on demeanour. If as in this case a trial Magistrate, after considering the whole of the evidence, states that he accepts the evidence of the prosecution and rejects the evidence of the accused, it does not mean that he rejects the evidence of the accused because he accepts the evidence of the prosecution. It means exactly what it says and it is a perfectly proper and a normal way for a Court to express itself. The trial Magistrate did comment that he could find no motive for the two police officers committing blatant perjury to obtain a wrongful conviction against the accused, but this does not mean, as counsel for the appellant maintains, that the trial Magistrate was placing an onus on the defence to prove a motive for the prosecution witnesses to lie. A trial Magistrate, in considering credibility and whether witnesses have any reason to lie, is entitled to take

into account such matters as a witness' station in life and whether or not he is a disinterested party; and in this case the trial Magistrate's comment was evoked by an apparent suggestion from the defence that a previous incident furnished a motive for the police officers to lie.

The seventh ground of appeal is that the trial Magistrate erred in not taking into account that the appellant gave a consistent and reasonable account of himself to the police and to the court; but as it is clear from the trial Magistrate's judgment that he gave full consideration to the appellant's version of events this cannot be sustained.

The final ground of appeal is that there was insufficient evidence on which to convict of dangerous driving.

The evidence established that when the appellant turned into Nasekula Road he was so negligent as to drive on the wrong side of the road, in the face of an on-coming car, thereby creating a dangerous situation; and this is dangerous driving (R. v. Rajendra Singh Suva Cr.App. No. 74 of 1978 at p.2).

The appeal against conviction is dismissed.

Raw C.J.

Chief Justice

Suva,

24th November 1978.