NALINDA KUMARA

v

OFFICER-IN-CHARGE TRAFFIC POLICE KANDY AND ANOTHER

SUPREME COURT
BANDARANAYAKE, J.
MARSOOF, J.
SOMAWANSA, J.
SC 57/2006
SC Spl LA 31/2006
HC KANDY 141/2006
MC KANDY 53583
MARCH 21, 2007
MAY 23, 2007
JULY 19, 23, 2007

Motor Traffic Act as amended by Act 40 of 1984 – section 151 (1) (B), section 214, section 216– Regulations – Breathalyzer test – Quantum of alcohol in the blood – Procedure to befollowed– Death caused by driving a motor vehicle after consumption of alcohol – Penal Code section 298 – Driving after consuming alcohol and driving under the influence of liquor?

The accused was charged with (i) driving a private car on a public highway negligently and causing the death of one R. Offence punishable under section 298 – Penal Code (ii) driving after consuming liquor – under section 215 of the Motor Traffic Act –read with section 151 (1) B of Act 31 of 1979 – Punishable under section 216 of the Act and 5 other counts.

The Magistrate found the accused guilty on all counts. The High Court in appeal varied the sentence imposed in respect of counts 2, 3 and 4. The appellant appealed against the conviction and sentence on count 2. Special leave was granted on the questions.

(i) Does the evidence led to establish that the consumption of alcohol was above the quantum contemplated by regulations?
(ii) Does the evidence establish that the appellant caused the death by driving the motor vehicle after the consumption of alcohol?

Held:

(1) In order to establish the concentration of alcohol in the blood the police officer was required to carry out a breathalyzer test using an alcolyser. The procedure to carry out a breathalyzer test using the Alcolyser is found in IG Circular 697/87.

(2) For a positive reading, it is necessary to read that, the yellow crystals have changed to green and the green stain has extended to the red line at the centre of the tube.
There is no mention in the observations of the police officer regarding the green stain extending to the red line at the centre of the tube.

(3) In terms of the circular the parties in question should blow only once and should not blow thrice as alleged. In order to ascertain as to whether a suspect driver had been under the influence of liquor, it is apparent that, 15 second period of one continuous blowing is extremely important to obtain the reading of an assume content of 0.08 gms per 100 millilitres of blood.

Per Shirani Bandaranayake, J.

"It is evident that a serious doubt has been created as to the concentration of blood in the appellant's blood at the time of the accident.

Held further:

(4) Section 151 (1)B of the Motor Traffic Act was introduced by the Motor Traffic Act 31 of 1979 (amended), with the amendment to section 151, "any person who drives a vehicle on a highway after he has consumed alcohol or any drug and thereby causes death or injury to any person shall be guilty of an offence under the Act".

Prior to the amendment which came into effect in 1979 the known concept was on the basis of "under the influence of liquor – section 151(1) read as "no person shall drive a motor vehicle on a highway when he is "under the influence of liquor" or any drug.

(5) The question whether the ingredients that has to be proved under section 151 (1) B be limited to the appellant having consumed alcohol, driving on the highway and causing the death – a mere statement to indicate that a person had consumed alcohol is not enough. Section 15(c), section 151(1)B.

Section 151(1c) (a) and section 151 (1C) (c) clearly have provisions for the police either to obtain a breath test or a medical report to ascertain and establish that the driver, whom the police officer suspects had consumed alcohol/drug and in order to facilitate the process of these tests, the amendment had made provision to make regulations – section 151 (1D).

Such regulations in terms of the Motor Traffic Act were introduced under I.G. Circular 679/87 of 1.9.87. The circular clearly stipulated the need for a breath test.

Per Shirani Bandaranayake, J.

"It is evident that when a person is charged in terms of sections 151 for having committed an offence under the said section having consumed alcohol the prosecution has to prove that the said person had a minimum concentration of 0.08 grams of alcohol per 100 millilitres in his blood Regulations 1.3, 1.4, 1.5, 1.6.

(6) The prosecution has failed to prove that the appellant had a minimum concentration of 0.08 of alcohol per 100 millilitres in his blood – the appellant should be acquitted on count 1.

APPEAL from the Judgment of the High Court of Kandy.

Faiz Musthapha PC with *Amarasiri Panditharatne* and *Neomal Perera* for accused-appellant-appellant.

Riad Hamza SSC with *Harshika de Silva* SC for respondent-respondent-respondent.

December 12, 2007

SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the judgment of the Provincial High Court of the Central Province holden in Kandy dated 09.12.2005. By that judgment the learned Judge of the High Court acquitted the accused-appellant (hereinafter referred to as the appellant) from counts 1 and 5 and affirmed the convictions in respect of counts 2, 3, 4, 6 and 7. The learned Magistrate had found the appellant guilty of all counts and in respect of count 1, the Magistrate has imposed a sentence of one year's rigorous imprisonment and on counts 6 and 7, a fine of Rs. 1000/- each with a default sentence of 3 months simple imprisonment had been imposed.

The appellant had appealed from that order against the conviction and sentence to the Provincial High Court of the Central Province. The High Court varied the sentences imposed by the learned Magistrate in respect of counts 2, 3 and 4 and imposed the following sentences.

count 2 – mandatory sentence of two (2) years rigorous imprisonment and cancellation of his driving licence.

count 3 – Rs. 500/- fine with a default sentence of three (3) months simple imprisonment.

count 4 – Rs. 1000/- fine with a default sentence of three (3) months simple imprisonment.

There was no variation in regard to the sentences imposed by the learned Magistrate in respect of counts 6 and 7. The appellant appealed to this Court for which special leave to appeal was granted on the following questions:

(1) Does the evidence led in the trial establish that the concentration of alcohol in the appellant's blood was above the quantum contemplated by regulations framed under the Motor Traffic Act?

(2) Does the evidence led in the trial establish that the appellant caused death or injury by driving the motor vehicle after the consumption of alcohol as contemplated by section 151(1)B of the Motor Traffic Act?

The facts of his appeal, *albeit* brief are as follows:

The appellant, a 24-years old junior executive of a Bank, at the time of the alleged offence, was charged in the Magistrate's Court, Kandy for the following offences:

(1) driving private car No. 17-0332 on a public highway negligently, *viz.*, at an excessive speed and without due care and control and consideration for other users of the road and causing the death of one Saraswathi Rajendran and thereby committing an offence punishable under section 298 of the Penal Code.

(2) driving on the highway after consuming liquor and thereby committing an offence under section 214 of the Motor Traffic Act, read with section 151(1)B of Act, No. 31 of 1979 and punishable under section 216 of the said Act;

(3) driving a vehicle on a highway negligently, *viz.* –
  (a) at an excessive speed under the circumstances,
  (b) without necessary control,
  (c) without due care,
  (d) without due consideration for other users and colliding with a pedestrian crossing the road and causing her death

and thereby committing an offence under section 214(1)A of the Motor Traffic Act read with section 151(3) of the Motor Traffic Act read with section 271(2) as amended by Act, No. 40 of 1984.

(4) failing to avoid an accident due to -

(a) driving at an excessive speed,

(b) without due precaution,

(c) without taking due care and colliding with a pedestrian crossing the road and thereby committing an offence under section 214 of Motor Traffic Act punishable under section 224 as amended by Act, No. 24 of 1984.

(5) failing to drive the vehicle on the left side thereby committing an offence under section 214(1) of the Motor Traffic Act punishable under section 224 of the said Act.

(6) not possessing a valid third party insurance cover for the vehicle an offence punishable under section 218 of the Motor Traffic Act.

(7) not possessing a valid revenue licence for the vehicle an offence punishable under section 214(A) of the Motor Traffic Act.

The incident relevant to this appeal took place near Royal Mall Hotel on the William Gopallawa Mawatha, Kandy around 11.30 p.m., on 06.07.2001. Ramaiah Rajendran, the husband of the deceased had attended a function of the Lions Club with his wife at the Royal Mall Hotel situated along William Gopallawa Mawatha, Kandy. After the function, Rajendran had walked across the road with his wife to get into their car parked on the opposite side, close to the rail road. While Rajendran had been in the process of opening the car door, his wife was hit by the appellant's vehicle and was thrown 6 feet forward. The appellant had also attended a function on that night at the Earls Regency Hotel in Kandy, where the Rotary Club had presented scholarships to selected students and the appellant had been one of the recipients. He had been returning with his friend, one Samitha Wickramaratne, and was driving towards the said friend's home at Pilimatalawa, when this incident had occurred.

Having stated the facts of this case, let me now turn to examine the questions on which special leave to appeal was granted.

(1) Does the evidence led in the trial establish that the concentration of alcohol in the appellant's blood was above the quantum contemplated by regulations framed under the Motor Traffic Act?

Learned President's Counsel for the appellant contended that, to establish the concentration of alcohol in the appellant's blood the police officer was required to carry out a breathalyzer test using the apparatus known as an Alcolyzer. It was further contended that the procedure to carry out a breathalyzer test using the Alcolyzer was stipulated in I.G. Circular No. 697/87. Learned President's Counsel for the appellant therefore submitted that among the procedures contained in the said Circular, the following were extremely vital and crucial to the case in question.

(a) Clause 3.7 of I.G. Circular 697/87

Order shall be given by the police officer conducting the test to the person concerned to first take a deep breath and continuously without a break, blow into the breathing bag for 15 seconds.

(b) Clause 3.9 of I.G. Circular 697/87

At the conclusion of such a test the police officer is required to provide the person concerned with a report containing the details of the breathalyzer test bearing the signature and rank of the said police officer.

Learned Counsel for the appellant submitted that the aforementioned procedures were not followed by the police officer, as the police officer had got the appellant to blow into the Alcolyzer breathing bag three (3) times in succession and on the third time, a positive reading had been obtained. The contention of the learned President's Counsel for the appellant was that the procedure adopted by the police officer had created a serious doubt as to the accuracy of the reading.

It was also contended that the police officer had not provided the appellant with the signed test report containing the details of the breathalyzer test carried out, in terms of the I.G. Circular No. 697/87.

Further learned President's Counsel contended that the breathalyzer test carried out by the police officer in question had

not followed the procedure laid down in the I.G. – Police Circular of 07.09.2002, as the evidence led at the trial does not establish that the concentration of alcohol in the blood of the appellant at the time of the accident had exceeded 0.08 grams of alcohol per 100 millilitres of blood.

Learned President's Counsel for the appellant strenuously contended that the Provincial High Court had erred in failing to give due consideration to a serious doubt that was created as to whether the appellant could have been intoxicated to a level reflecting a reading of 0.08 grams per 100 millilitres of blood. His contention was that the appellant in his evidence had stated that he had suffered a head injury, which required him to undergo medical treatment for five (5) years. Due to this injury the appellant on medical evidence had been requested to abstain from consuming alcohol.

Learned State Counsel for the respondents conceded that the breath test should be carried out in terms of the provisions stipulated by I.G.'s Circular No. 697/87 dated 01.09.1987 and 28.11.1988. She also submitted that in terms of the applicable regulations, if the concentration of alcohol in the appellant's blood was at or above 0.08 milligrams of blood per 100 millilitres of blood then it should be established that the concentration of alcohol in the appellant's blood was above the quantum contemplated by the regulation made under the Motor Traffic Act. Having made that submission, learned State Counsel for the respondent contended that such a position could be established only if the breath test for alcohol had revealed that result.

Based on the aforementioned submissions two questions arise, which are as follows:

(A) did the police officer carry out the relevant test in terms of the I.G.'s Circular No. 697/87?

(B) did the police officer, who carried out the test give the appellant a written statement stating the concentration of alcohol in the appellant's blood?

Admittedly, the breathalyzer test had been carried out by Police Sergeant 6589 Weerasinghe (hereinafter referred to as Weerasinghe) of the Kandy Police who, in his evidence (Magistrate's Court Proceedings pp. 163-176) had stated the

manner in which he had carried out the test. Describing the steps he had taken after visiting the scene of accident, Weerasinghe had stated that he had observed a difference in the appellant's behaviour. At that stage Weerasinghe had smelled his mouth wherein Weerasinghe had found that his breath was smelling of liquor. He had thereafter arrested the appellant and had brought him to the Kandy Police Station.

At the Police Station Weerasinghe had carried out a breathlyzer test on the appellant. He had described the procedure he had followed in carrying out the said test, which was as follows:

> "2004/12 මසට වලංගු අංක 313005 දරණ ශ්වසන පරීක්ෂණ නලය ගෙන්වා ඔහුට කට සේදීමට ජලය ස්වල්පයක් දී විනාඩි 15 ක් පමණ ගිය පසු ශ්වසන පරීක්ෂණ නලය පිඹීමට දුන්නා. ඒ අනුව මධ්‍යසාර යාන්ත්‍රණය මි. ලි. 100 ට 0.08 ක් බවට පෙනී ගියා. ඉන් පසුව ශ්වසන පරීක්ෂණය සම්බන්ධයෙන් පවත්වන ලද ..... මුල් පිටපතක් රියදුරුට බාර දුන්නා."

Weerasinghe's evidence thus describes that he had carried out the breathalyzer test in terms of the provisions laid down by the I.G. Circular and further that he had handed over the original of the report to the appellant.

Learned President's Counsel for the appellant strenuously contended that the police officer, who conducted the breathalyzer test had not followed the procedure stated in I.G. Circular No. 697/87. Referring to clause 3.7 of the said Circular referred to above, learned President's Counsel for the appellant stated that in terms of the said clause a suspect driver should only blow once into the alcolyzer and in this instance the appellant was asked to blow three (3) times against the procedure laid down by the said Circular.

Clause 3:7 of the I.G. Circular No. 697/87 specifically stated that the person in question should 'blow through the mouthpiece into the bag by one deep continuous exhalation for 15 seconds'. It is thus apparent that the person in question should blow only once and should not blow thrice as alleged by the appellant.

Learned State Counsel for the respondent submitted that the contention of the appellant is contrary to the evidence of the police officer and that the appellant had taken this position only at the point, when he was cross-examined.

It is however to be borne in mind that the appellant in his evidence had stated that the police officer in his effort to determine the appellant's blood alcohol concentration had got the appellant to blow into the alcolyzer breathing bag three (3) times in succession and only on the third consecutive attempt a positive reading was obtained. In his evidence, the appellant had clearly stated that,

"මට ස්වසන නලයක් දුන්නා. ස්වසන පරීක්ෂණ නලය පිඹින්න කිව්වා. ඊට පසු එක පාරක් පිම්බා. ඒ වෙලාවේ මොනවත් තිබුනේ නැහැ. 3 න් පාරත් පිම්බා."

The learned State Counsel for the respondent has not denied the fact that the appellant in his evidence has stated that he blew three (3) times continuously into the breathing bag. It is also not denied that this position is contrary to the evidence of Weerasinghe. Considering the test carried out in order to ascertain as to whether a suspect driver had been under the influence of liquor, it is apparent that 15 second period of one continuous blowing is extremely important to obtain the reading of an assumed content of 0.08 grams per 100 millilitres of blood.

In the circumstances, it is evident that a serious doubt has been created as to the concentration of alcohol in the appellant's blood at the time of the accident.

The contention of the learned President's Counsel for the appellant is further strengthened on an examination of the position regarding the aforementioned question on the observation of the breathalyzer test.

The police officer Weerasinghe in his evidence had stated that he had given the original of the report to the appellant. The appellant however in his evidence had clearly stated that he was not given the said report. It is common ground that the report in question was not produced before Court. The importance of the report is that it should contain the observations of the police officer regarding the test and should state that,

(i) the time at which such test was carried out,

(ii) the place, where such test was conducted, and

(iii) the concentration of alcohol in that person's blood as was reflected by the device used.

Clause 3:9 of the I.G. Circular No. 697/87 had explained as to what the police officer should state under (iii) above. Accordingly it should be stated that,

> *" '0.08 grams per 100 millilitres of blood'*
>
> *If the yellow crystals have changed to green and the green stain has extended to the red line at the centre of the tube."*

With regard to the breathalyzer test the said Circular in clause 3:8 had further stated that,

> *"The tube is then removed from the bag. The tube is then examined. If the yellow crystals have changed to green and the green stain extends to the red line at the centre of the tube the alcohol level in the blood corresponds to the prescribed limit."*

According to the proceedings of the Magistrate's Court (Pg. 143) the findings of the test was recorded as follows:

> "මුද්‍රා තබන ලද කවරයක බහාලූ ප්‍රස්වාස නලය ඉ/කරයි. එය වීක්ෂිකරු සහ නී/මහතුන් ඉදිරිපිට දී විවෘත කරන ලදී. එහි අඩංගු ද්‍රව්‍යය කොළ පැහැ ගැන්වී ඇති බව නී/මහතුන් සහ වීක්ෂිකරු පිලිගනී. වීක්ෂිකරු නඩු වාර්තාව අත්සන් තබයි."

It is therefore quite evident that the said description is not in terms with clauses 3:8 and 3:9(c) iii of the I.G. Circular No. 697/87, which clearly that, for a positive reading, it is necessary to read that,

> *"The yellow crystals have changed to green and the green stain has extended to the red line at the centre of the tube."*

Admittedly, there was no mention whatsoever, in the observations of the police officer regarding the green stain extending to the red line at the centre of the tube.

On a consideration of the aforesaid, it is apparent that the procedure adopted by the police to ascertain the level of alcohol in the appellant's blood had created a serious doubt as to whether the said concentration of alcohol in the appellant's blood was above the quantum contemplated by regulations framed under the Motor Traffic Act.

In the circumstances, question No. 1 is answered in the negative.

(2) Does the evidence led in the trial establish that the appellant caused death or injury by driving the motor vehicle after the consumption of alcohol as contemplated by section 151(1)B of the Motor Traffic Act?

Section 151(1) B of the Motor Traffic Act was introduced by the Motor Traffic (Amendment) Act, No. 31 of 1979, with the amendment to section 151. The said section 151(1)B reads as follows:

> *"Any person who drives a motor vehicle on a highway after he has consumed alcohol or any drug and thereby causes death or injury to any person, shall be guilty of an offence under this Act."*

Prior to the amendment, which came into effect in 1979, the known concept was on the basis of 'under the influence of liquor' and the original section 151(1) therefore read as follows:

> *"No person shall drive a motor vehicle on a highway when he is under the influence of alcohol or any drug".*

The concept of driving after a person has 'consumed alcohol' therefore had been introduced by the amendment to the Motor Traffic Act in 1979.

Referring to section 151(1)B of the Motor Traffic (Amendment) Act of 1979, learned State Counsel for the respondent submitted that the ingredients to be proved under the said section 151(1)B would consist of driving a motor vehicle, on a highway, after consumption of alcohol and causing death or injury to any person and that there is no added requirement to prove that the appellant had acted negligently. The contention of the learned State Counsel for the respondent was that negligence was inherent on the fact that the appellant had consumed alcohol and driven a motor vehicle on the highway thereby causing the death of the deceased.

Considering the contention of the learned State Counsel for the respondent, the question that arises would be whether the ingredients that has to be proved under section 151(1)B would be limited to the appellant having 'consumed alcohol, driving on the highway and causing the death of the deceased'.

As stated earlier, section 151(1)B introduced in terms of the amendment to the Motor Traffic Act in 1979, brought in the new concept of driving a motor vehicle after a person had consumed alcohol.

Accordingly, when a person is charged under section 151(1)B, it would be necessary to establish that the said person had been driving the vehicle in question after he had consumed alcohol.

Would a mere statement to indicate that a person had 'consumed alcohol' be sufficient for this purpose? My answer to this question is clearly in the negative for the reasons which could be derived from the rest of the provisions contained in section 151 of the Motor Traffic (Amendment) Act.

Section 151(1)C and its sub-sections clearly deal with the situation dealt with in section 151(1)B regarding consumption of alcohol by a person, who had been driving a motor vehicle. Section 1C(a) states that,

> "Where a police officer suspects that the driver of a motor vehicle on a highway has consumed alcohol he may require such person to submit himself immediately to a breath test for alcohol and that person shall comply with such requirement."

Further section 1C(c) provides for the officer to produce a driver, whom he suspects had consumed alcohol or any drug before a Government Medical Officer for examination.

Thus sections 1C(a) and 1C(c) clearly have made provisions for the police officers either obtain a breath test or a medical report to ascertain and establish that the driver, whom the police officer suspects, had consumed alcohol or any drug.

In order to facilitate the process of the aforementioned tests, the amendment had made provision to make Regulations and Section 1D thus reads as follows:

> "Regulations may be made prescribing –
>
> i. the mode and manner in which the breath test for alcohol shall be conducted;

ii. the concentration of alcohol in a person's blood at or above which a person shall be deemed to have consumed alcohol;
iii. the mode and manner in which any examination may be conducted to ascertain whether a driver of a motor vehicle had consumed any drug; and
iv. the concentration of any drug in a person's blood at or above which a person shall be deemed to have consumed any drug."

Such Regulations in terms of the Motor Traffic (Amendment) Act, were introduced under I.G.'s Circular No. 679/87 dated 01.09.1987. The said Circular has clearly stipulated the need for a breath test and the concentration of alcohol in a person's blood that is necessary to establish that the person in question has 'consumed alcohol'. The relevant Regulations are as follows:

*"1.3 In terms of the amendment it is **now** an offence for any person to drive a motor vehicle on a highway "AFTER HE HAS CONSUMED ALCOHOL' or any drug.*

*1.4 In terms of the **regulations** made by the Minister of Transport under sections 151 and 237 of the Motor Traffic Act as amended by Act No. 31 of 1979 and Act No. 40 of 1984, a person is deemed **'TO HAVE CONSUMED ALCOHOL'** if the concentration of alcohol of that person's blood is at or above 0.08 grams of alcohol per 100 millilitres of blood (0.08 grams = 80 milligrams).*

1.5 The concentration of alcohol in a person's blood is determined by a breath test for alcohol carried out by a Police Officer by means of a device approved for that purpose by the Inspector-General of Police.

1.6 The device approved by the Inspector-General of Police for the purpose is the 'ALCOLYSER (Breath-alyzer) manufactured by Liens Laboratories of U.K."

Thus it is evident that when a person is charged in terms of section 151 of the Motor Traffic (Amendment) Act for having committed an offence under the said section having consumed alcohol, the prosecution has to prove that the said person had a minimum concentration of 0.08 grams of alcohol per 100 millilitres in his blood. If this cannot be proved it is evident that the prosecution had failed to establish an important ingredient of the offence.

In this appeal the prosecution had failed to prove that the appellant had a minimum concentration of 0.08 grams of alcohol per 100 millilitres in his blood and therefore the appellant should be acquitted on count 2. Accordingly, I answer this question as well in the negative.

As stated earlier the appellant was convicted on all seven (7) counts by the learned Magistrate and learned Judge of the High Court has set aside the conviction and sentence on counts 1 and 5. Out of the remaining counts 2, 3, 4, 6 and 7, for the reasons aforementioned, I set aside the conviction and sentence on count 2 and acquit the appellant on that count.

Since the appellant is acquitted on count 2, the order made by the learned Judge of the High Court to cancel the driving licence of the appellant is set aside.

The appellant has not appealed against the judgment regarding counts 3, 4, 6, and 7. Accordingly this appeal, which is only confined to count 2, is allowed and to that extent the judgment of the High Court of the Central Province holden in Kandy dated 09.12.2005 and the judgment of the Magistrate's Court, Kandy dated 20.09.2004 are varied.

I make no order as to costs.

MARSOOF, J. – I agree.
SOMAWANSA, J. – I agree.

Appeal allowed-partly.