1967 *Present :* **Siva Supramaniam, J.**

J. E. M. SENEVIRATNE, Appellant, *and* A. H. M. JAHAN (S. I. Police), Respondent

S. C. 203/67—M. C. Narahenpita, 31302

Motor Traffic Act (Cap. 203)—Section 151 (1)—Charge of driving when under the influence of alcohol—Quantity of evidence.

A person cannot be convicted of having driven a motor car on a highway while he was under the influence of alcohol, in breach of section 151(1) of the Motor Traffic Act, if the evidence does not indicate that, as a result of the alcohol he had consumed, his powers of co-ordination and orientation had been impaired or that his capacity to drive a car had been prejudicially affected.

APPEAL from a judgment of the Magistrate's Court, Narahenpita.

E. R. S. R. Coomaraswamy, with *S. Sahabandu*, for the accused-appellant.

Sunil de Silva, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 3, 1967. SIVA SUPRAMANIAM, J.—

The appellant was convicted in this case on a charge of having driven a motor car on a highway while he was under the influence of alcohol in breach of S. 151(1) of the Motor Traffic Act and sentenced to pay a fine of Rs. 250, in default to undergo six weeks simple imprisonment. He has appealed from the conviction and sentence. There was a second count

that he had failed to take such action as was necessary to avoid an accident in breach of S. 149 (1) of the Motor Traffic Act but he was acquitted of that charge.

The facts of the case may be briefly stated as follows :—

On 23rd October 1964 at about 2 p.m. the appellant who was driving his car No. 3 Sri 4141 along Skinner's Road South in Colombo, while overtaking taxicab No. 3 Sri 2728, collided with it on the right side causing a scrape mark on the right rear mudguard and a dent on the hub cap of the right rear wheel of the said taxicab. It was conceded that the damage was very slight. The taxi driver made a complaint at the Kotahena Police Station. The appellant too drove in his car to the same Police Station and arrived there before the taxi driver's statement was recorded. P. C. Dhanapala to whom the complaint was made formed the impression that the appellant was after liquor and took him to the Assistant Judicial Medical Officer, who, after examination, reported that the appellant was under the influence of alcohol. The charge contained in count (1) was based on the Medical Officer's report.

The taxi driver in his evidence stated that the appellant was "after drinks" and P. C. Dhanapala stated that the appellant "was unsteady". The learned Magistrate relied principally on the evidence of the Medical Officer in convicting the appellant on count (1).

The Medical Officer stated in the course of his evidence-in-chief that he examined the appellant at 3.45 p.m. and found him to be under the influence of alcohol and, in that condition, he was not in a fit condition to drive a motor vehicle. Under cross-examination he stated that he noted on the Police ticket the results of his examination on which he based his opinion. He did not produce the document in evidence although, he admitted, he had it with him in Court. But he read out what he had entered on that ticket. According to that entry, the results of his examination were as follows :—

"(1) Strongly smelling of alcohol.

(2) Tends to be talkative.

(3) Pupils semi dilated and sluggish.

(4) Performed tests but resents examination.

(5) Does not comprehend the place ; and

(6) Tends to march."

He stated that his opinion was "based on the sum total of all tests". In the course of his further evidence under cross-examination, the witness stated that he also tested the appellant for "rhombagism" and the result was positive. No explanation however was given by him for his failure to include the result of this test in the contemporaneous note made by him on the Police ticket. He also stated that the appellant's

" clothes were in disarray " and " his face was flushed " but these too were not noted by him on the ticket. He admitted, however, that the appellant's memory for recent events was good, that he was coherent and had no difficulty in recalling what had happened. When asked for the time, the appellant looked at his watch and gave him the time. But he made no record whether the time given was correct or not.

The witness examined the appellant on 22.10.64 but gave his evidence in Court on 15.1.67. It would therefore be safer to rely on the results of the tests as recorded by him in his contemporaneous note than on his recollection of the details more than two years later.

In regard to the six items mentioned in the note, he explained that item (5)—" does not comprehend the place "—meant that the appellant " was not at first aware for what purpose he was brought there ". If the Police had not told the appellant where and for what purpose he was being taken, he would not have been aware why he had been taken to that place. That can hardly be regarded as a point against the appellant. In regard to items (4) and (6)—" Resents examination " and " Tends to march ",—the witness admitted that when he asked the appellant to walk, he marched " because he resented my attitude ". He did not say that he found the appellant's gait unsteady. The appellant may well have marched in order to impress on the doctor that not only could he walk steadily but could even do something more difficult, namely, march steadily, showing proper co-ordination of his limbs. The note under item (4) shows that the appellant performed all the tests, that is, carried out all the tests successfully.

The only circumstances against the appellant were that he was strongly smelling of alcohol and that his pupils were semi-dilated and sluggish. These would undoubtedly indicate that the appellant had consumed alcohol. The question however is whether a person who drives a car on the highway after having consumed alcohol commits a breach of S. 151(1) of the Motor Traffic Act.

In the case of *Don Carthelis v. Ibrahim* [1] Gratien J. after examining this section of the Act, as well as the corresponding legislation in England, reached the conclusion that a person cannot be convicted under this section unless the evidence justifies the inference that the accused person was under the influence of drink to such an extent as to be incapable of having proper control of the vehicle. With respect, I am in agreement with that view. The evidence in this case does not indicate that as a result of the alcohol he had consumed, the appellant's powers of co-ordination and orientation had been impaired or that his capacity to drive a car had been prejudicially affected. The fact that the appellant's car had grazed the taxicab while overtaking it cannot lead to a necessary inference that the appellant was incapable of having proper control of

[1] *(1955) 56 N. L. R. 561.*

his vehicle. There is no evidence that either immediately before or after the accident the appellant drove his car in such a manner as to show want of control over it. On the other hand according to the evidence the appellant drove the car quite competently from the scene of the accident to the Police Station.

The learned Magistrate misdirected himself by relying on the Medical Officer's opinion without closely examining the effect of the evidence given by him under cross-examination.

On the evidence led, the prosecution failed to establish beyond reasonable doubt the charge under count (1).

I set aside the conviction of the appellant on count (1) and acquit him.

Appeal allowed.