TANOA NAICERU

v.

REGINAM

[SUPREME COURT, 1963 (MacDuff C.J.), 15th, 28th February]

Appellate Jurisdiction

Criminal law—practice—charge—essential particulars—nullity—Traffic Ordinance (Cap. 235) ss. 31, 37 (1), 37 (2), 65—Criminal Procedure Code (Cap. 9) s. 325 (1).

Criminal law—charge—disqualification—necessity to specify the count in respect of which imposed—Criminal Procedure Code s. 155 (2).

Criminal law—sentence—need to give accused opportunity to plead in mitigation.

The appellant pleaded guilty to a charge of careless driving and a second charge of failing to stop after an accident. He was fined £10 on each charge and it was ordered that he be disqualified from holding or obtaining a driving licence for six months. On appeal against sentence it was submitted that the particulars of the second charge were defective and disclosed no offence in that there was no allegation of damage or injury being caused to any person, vehicle, property or animal.

Held.—(1) That such damage was a necessary ingredient of a charge under s. 37 (1) and (2) of the Traffic Ordinance and, it being conceded by the Crown that the defect was not curable under s. 325 (1) of the Criminal Procedure Code, the trial on the charge was a nullity.

(2) As the Magistrate had not specified in respect of which conviction he had imposed disqualification the order for disqualification must be set aside.

(3) To fail to give an accused person an opportunity of putting forward any facts he may desire to urge in mitigation of sentence is a denial of justice.

Case referred to:

Taman v. Reg. [1958–59] F.L.R. 9.

Appeal against sentence and disqualification.

Parshotam for the appellant.

Palmer for the Crown.

MACDUFF C.J. [28th February, 1963]—

The appellant was charged on the following two counts:—

" *First Count*—

Statement of Offence

Careless Driving: Contrary to sections 31 and 65 of the Traffic Ordinance, Cap. 235.

Particulars of Offence

Tanoa Naiceru, on the 19th day of December, 1962 at Vaileka, Ra in the Western Division, drove motor vehicle registered No. E540 without due care and attention.

Second Count—

Statement of Offence

Fail to stop after accident: Contrary to sections 37 (1), (2) and 65 of the Traffic Ordinance, Cap. 235.

Particulars of Offence

Tanoa Naiceru, on the 19th day of December, 1962, at Vaileka, Ra, in the Western Division, being the driver of light public service vehicle registered No. E540 on C.S.R. Road, when owing to the presence of the said vehicle on the said road an accident occurred, failed to stop."

He pleaded guilty and was convicted, the sentence of the learned Magistrate being as follows:—

" Sentence: On 1st count accused is fined £10 with 2s. 6d. costs in default 14 days' imprisonment. On 2nd count accused is fined £10 with 2s. 6d. costs in default 14 days' imprisonment.

It is further ordered that Tanoa Naiceru be disqualified from holding or obtaining a motor vehicle driving licence for a period of 6 months."

The appellant has appealed against the sentences imposed on both counts on the grounds that they are unreasonable having regard to all the circumstances of the case. He has also appealed against the order disqualifying him from holding or obtaining a motor vehicle driving licence for a period of six months on the grounds that the learned Magistrate had no power to make such order.

At the hearing of this appeal counsel for the appellant raised the further ground that the particulars of the second count are defective and do not disclose any offence. The section under which this count is laid reads—

" 37—(1). If in any case owing to the presence of a motor vehicle on a road an accident occurs whereby damage or injury is caused to any person, vehicle, property or animal, the driver of the vehicle shall stop and if required so to do by any person having reasonable grounds for so requiring shall give his name and address and also the name and address of the owner."

It will be obvious that the liability of an offender to stop after an accident is not dependent on the accident alone but also on damage or injury being caused to any person, vehicle, property or animal. This second and necessary ingredient of the offence was not charged and the trial, therefore, must be held to be a nullity. Even in outlining the facts the police prosecutor made no reference to any damage or injury having been caused. Counsel for the Crown concedes that this defect in the charge cannot be cured by the provisions of the proviso to section 325 (1) of the Criminal Procedure Code. Accordingly the appeal is allowed in respect of the second count, conviction and sentence are quashed and the fine, if paid, is to be refunded.

In view of the fact that conviction on the second count has been quashed the form of the learned Magistrate's order of disqualification must be considered.

Section 155 (2) of the Criminal Procedure Code provides—

> " In the case of a conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."

In like manner it is necessary that a Magistrate should specify in respect of which conviction he orders disqualification. If he does not this Court is unable to say whether he has thought fit to order such disqualification in respect of the first count, or the second count the conviction on which has now been quashed, or on both counts.

Again counsel for the Crown concedes that he cannot support the learned Magistrate's order. Accordingly the order disqualifying the appellant is set aside.

In view of the above finding it now becomes unnecessary to consider, in respect of this appeal, the ground put forward by the appellant that the Magistrate had no power to order disqualification.

This leaves for consideration the appeal against sentence on the first count. Again the learned Magistrate has erred, according to his record, in failing to give the appellant an opportunity of placing before him any facts he desired to urge in mitigation of sentence. This Court said in *Taman v. Reginam*, 1958–59 F.L.R. 9 that—

> " There is nothing on the record to show that the accused was given any opportunity before sentence and after conviction of speaking in mitigation. This is a practice which although not laid down by any Ordinance should be followed, especially where the Court is of the mind to take into account when passing sentence, considerations which have not, up to then been mentioned at the trial."

I would go further and say that to deny an accused an opportunity to place before the Court any facts he may wish to urge in mitigation of sentence is to deny him justice.

Before this Court it was said in favour of the appellant that he had been driving for 16 years during which period he had a clean driving record. This is a factor that should be taken into account in assessing penalty. While this Court is loath to interfere with a Magistrate's assessment of penalty the result of the learned Magistrate's failure is that he has failed to assess penalty on proper principles. The fine on the first count is reduced to £5. Any amount paid in excess of that figure is to be refunded to the appellant.

Conviction on second charge quashed.

Order for disqualification set aside.

Sentence on first charge reduced.

Solicitor for the appellant: *A. M. Raman.*

Solicitor-General for the Crown.