A

JULIAN HENRY SIMPSON

v.

ATTORNEY GENERAL

B [SUPREME COURT, 1968 (Hammett C.J.), 19th April, 25th June]

Appellate Jurisdiction

Criminal law—traffic offences—disqualification—application for removal—no appeal lies from refusal of application—Traffic Ordinance 1965 (later Cap. 152—1967) ss.29 (1) (a), 29(2), 30(3), 39(1) (2)—Magistrates' Courts Ordinance (Cap. 10—1967) ss.36, 41—
C *Penal Code (Cap. 8—1955) s.38—Criminal Procedure Code (Cap. 14—1967) ss.43(2), 118, 157, 206, 289(1)—Criminal Procedure Code 1945 (Tanganyika) ss.52, 132, 210, 174, 312—Penal Code (Tanganyika) s.38.*

Criminal law—traffic offences—disqualification—application for removal—questions for consideration—whether "special reasons" existed at time of disqualification is one relevant circumstance—Traffic Ordinance 1965 (later Cap. 152—1967) ss.29(1) (a), 29(2), 30(3).

Appeal—criminal appeal—driving under influence of drink—disqualification—application
D *for removal—no appeal lies from refusal of application—Traffic Ordinance 1965 (later Cap. 152—1967 ss.29(1) (a), 29(2), 30(3), 39(1) (2)—Magistrates' Courts Ordinance (Cap. 10—1967) ss.36, 41—Penal Code (Cap. 8—1955) s.38—Criminal Procedure Code (Cap. 14—1967) ss.43(2), 118, 157, 206, 289(1)—Criminal Procedure Code 1945 (Tanganyika) ss.52, 132, 210, 174, 312—Penal Code (Tanganyika) s.38.*

No appeal lies from the refusal by a magistrate of an application under
E section 30(3) of the Traffic Ordinance, 1965, by a person who, by conviction or order under Part 3 of that Ordinance is disqualified from holding or obtaining a driving licence, for the removal of that disqualification.

Per curiam: In an application under section 33(3) of the Traffic Ordinance, 1965, for the removal of a driving disqualification, it is appro-
F priate for the court to take into account (*inter alia*) whether there were any "special reasons" within the meaning of section 39(2) relevant to the consideration of the question whether the disqualification should originally have been imposed.

Cases refered to: *Abdullah Nassor v. R.* 1 T.L.R. (R) 289: *Attorney-General v. Sillem* (1864) 10 H.L. Cas. 704; 11 E.R. 1200: 10 L.T. 434:
G *National Telephone Co. Ltd v. H. M. Postmaster General* [1913] 2 K.B. 614; 108 L.T. 539.

Appeal from a refusal by a magistrate to remove an order for disqualification from holding a driving licence.

Appellant unrepresented.

H

J. R. Reddy for the respondent.

HAMMETT C.J. [25th June, 1968]—

The Appellant was convicted on 20th June, 1967, by the Magistrate's Court of the First Class sitting at Suva of the offence of driving a motor vehicle whilst under the influence of drink contrary to Section 39(1) of the Traffic Ordinance, 1965 — now The Traffic Ordinance, Cap. 152 (1967 Revised Edition of the Laws of Fiji).

He was fined and disqualified from holding a driving licence for 12 months.

On 29th January, 1968, he applied, under Section 30(3) of the Ordinance, to the Court below for an order removing the disqualification. This application was heard on 6th February, 1968. In refusing the application the Court said :-

> "The facts show that the defendant was found incapable of having proper control of the vehicle at the material time. He was driving a motor cycle. It was a serious offence.
>
> Section 39(2) — Traffic Ordinance — reads as follows :-
>
> > "A person convicted of an offence under this section shall, unless the court for special reasons thinks fit to order otherwise, and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for a period of twelve months from the date of conviction from holding or obtaining a driving licence."
>
> "In this application no special reasons or any reasonable reasons shown for restoration of the licence and having regard to the seriousness of the offence the application is not granted."

The Appellant now appeals against the order refusing to remove the disqualication on the following grounds :-

(i) That the learned Magistrate erred in law in dealing with your Petitioner's application under Section 39(2) of the Traffic Ordinance, No. 11 of 1965;

(ii) That in dealing with the application as he did the learned Magistrate disabled himself from considering the matter under Section 30(3) of the Traffic Ordinance, No. 11 of 1965, under which provision your Petitioner was relying and under which the learned Magistrate should have considered the application; and

(iii) That in dealing with the application as he did the learned Magistrate disabled himself from considering your Petitioner's application on its merits.

Section 30(3) of the Traffic Ordinance (Cap. 152) reads as follows :-

> "Any person who by virtue of a conviction or order under the provisions of this Part of this Ordinance is disqualified from holding or obtaining a driving licence may, at any time after the expiration of six months from the date of the conviction or order, and from time to time apply to the court by which he was convicted or by which the order was made to remove the disqualification, and on any such application the court may, as it thinks proper, having regard to the character of the person disqualified and his conduct

subsequent to the conviction or order, the nature of the offence, and any other circumstances of the case, either by order remove the disqualification as from such date as may be specified in the order or refuse the application:

Provided that where an application under the provisions of this subsection is refused, a further application thereunder shall not be entertained if made within three months after the date of the refusal.

If the court orders a disqualification to be removed the court shall cause particulars of the order to be endorsed on the licence, if any, previously held by the applicant."

The Appellant's complaint is, in effect, that in considering his application for an order removing the disqualification the Court below only took into account whether there were "special reasons" in the case under Section 39(2) of the Traffic Ordinance, why he should not have been disqualified, instead of exercising the discretion given him under Section 30(3), whether to remove the order of disqualification, having regard to :-

1. The character of the person disqualified;
2. His conduct subsequent to the order for disqualification;
3. The nature of the offence; and
4. Any other circumstances of the case.

Upon an application for removal of an order for disqualification the question of whether there were or were not special reasons in the original case for not imposing an order for disqualification, is not of paramount importance. It may, of course, be taken into account when considering "the nature of the offence' which is one of the factors that has to be taken into account by virtue of Section 30(3), but it is by no means the only or the most important factor.

It must be remembered that the mere presence, in the original case, of "special reasons" does not preclude a court from ordering a disqualification in the case of a person convicted of drunken driving under Section 39 of the Ordinance. In the absence of "special reasons" the court must disqualify. Where there are "special reasons" the court is given a discretion whether to order a disqualification or not. This is clearly the effect of Section 39 when read in conjunction with Section 29(1) (a), which reads :-

"29. (1) Any court before which a person is convicted of any offence specified in sections 35, 36, 37, 38, 39 or 43 of this Ordinance—

(a) may in any case, and shall when so required by this Part of this Ordinance, order him to be disqualified from holding or obtaining a driving licence for such period as the court thinks fit; . . . . . "

It would, therefore, be appropriate for the court, on an application, by a person who has been disqualified, for the removal of the order of disqualification, to take into account whether or not there were any "special reasons" in the original case when considering the nature of the offence, which is merely one of the four considerations that must be taken into

account. In this appeal it appears that the Court below may only have taken this one consideration into account largely if not entirely to the exclusion of the other three matters for consideration. To this extent, therefore, there are some merits in this appeal.

For the Crown, which opposes the appeal, it is submitted, however, that there is no right of appeal from the refusal of the Court below to order the removal of the disqualification under the provisions of Section 30(3) of the Traffic Ordinance.

It is pointed out that nowhere in the Traffic Ordinance is there any express provision giving a right of appeal against the decision of a court, on the hearing of an application under Section 30(3) of the Traffic Ordinance for the removal of an order of disqualification, whether such application be granted or refused. Whereas, by way of contrast, an express right of appeal is granted by Section 29(2) of the same Ordinance against an original order of disqualification, in the following specific terms :-

> "29 (2). Any person who by virtue of an order of a court under the provisions of this section is disqualified from holding or obtaining a driving licence may appeal against the order in the same manner as against a conviction, and the court may if it thinks fit, pending the appeal, suspend the operation of the order."

It is contended that since no express right of appeal against the decision of a court on the hearing of an application to remove an order of disqualification is granted by the Traffic Ordinance, there is no right of appeal unless there is some other statutory provision therefor.

The provisions for appeals from the decisions of Magistrates' Courts are contained in the Magistrates' Courts Ordinance Sections 36 and 41, both of which appear under the main heading *"Part V — Appeals,"* of which the material parts read as follows :-

> Firstly: under the subheading *"Appeals in Civil Cases"*
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> "36 (1). Subject to the provisions of this Ordinance, an appeal shall lie to the Supreme Court from a magistrates' court of the first or second class in the following cases —
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> (a) from all final judgments and decisions; and
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> (b) from all interlocutory orders and decisions made in the course of any suit or matter before a magistrates' court."
>
> and Secondly : under the subheading *"Appeals in Criminal Cases"*
>
> "41. Appeals in criminal causes shall lie from magistrates' courts in accordance with the provisions of the Criminal Procedure Code."

An application to remove an order for disqualification imposed for an offence under the Traffic Ordinance clearly cannot fall within the general classification of "Civil cases." The right of appeal must, therefore, be found, if it is to be found at all, in the Criminal Procedure Code.

The material part of Section 289(1) of the Criminal Procedure Code reads as follows :-

"289 (1). Save as hereinafter provided, any person who is dissatisfied with any judgment, sentence or order of a magistrates' court in
A any criminal cause or matter to which he is a party may appeal to the Supreme Court against such judgment, sentence or order: . . . . "

It is the contention of the Crown that whilst an application to a Magistrate's Court under Section 30(3) of the Traffic Ordinance is an application "in a criminal cause or matter," the decision of the court in granting or refusing the removal of the order of disqualification is neither a
B "judgment" nor a "sentence" nor an "order," within the meaning of those terms in Section 289(1) of the Criminal Procedure Code.

I concede that the decision of the Court below on the hearing of the application cannot properly be called a "judgment" or a "sentence" but further consideration is necessary of the question of whether or not it was an "order."

C If the application had been granted, the Magistrate would in fact have made an "order" removing the disqualification. When he refused the application he did in fact make an "order" refusing to remove the disqualification.

It is submitted by the Crown, however, that such an "order" does not
D fall within the meaning of the word "order" as it is used in its context in Section 289(1). Reliance is placed on the decision of the High Court of Tanganyika in *Abdullah Nassor v. R.* 1 T.L.R. (R) 289. In that case an appeal was filed from a magistrate's refusal of bail. The material provisions of the Tanganyika Criminal Procedure Code under which the appeal was brought, Section 312, read as follows:-

" . . . . . any person aggrieved by any finding sentence or order made
E or passed by a subordinate court . . . may appeal to the High Court."

It will be seen that the words "finding sentence or order" in this section in the Tanganyika Criminal Procedure Code are comparable to the words "judgment sentence or order" that are used in the corresponding section (No. 289(1)) in the Criminal Procedure Code of Fiji which I have just read.

F In Abdullah Nassor's case Wilson J. applied the "ejusdem generis" rule in considering what meaning should be given to the word "order" in the expression "finding sentence or order" in Section 312 of the Criminal Procedure Code of Tanganyika.

In his judgment he relied on the following passage in Maxwell on Inter-
G pretation of Statutes, 8th Edition, at page 284, which is now reproduced in the 11th Edition at page 321:-

"When two or more words which are susceptible of analogous meaning are coupled together *noscuntur a sociis* they are understood to be used in their cognate sense. They take, as it were, their colour from each other: that is, the more general is restricted to a sense
H analogous to the less general."

The legal maxim "noscitur a sociis" has been authoritatively stated to mean that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. Wilson J. then said:-

"Following this principle of construction in the present case I am satisfied that the word 'order' in section 312 is limited by the words 'finding' and 'sentence' which precede it and means only an order analogous to or in the same category as a 'finding' or 'sentence': that is, an order passed or made at the conclusion of a trial in the nature of a determination of the case. Such an order is referred to in section 210 Criminal Procedure Code, 1945, which (with the marginal note "The decision") reads :-

> "210. The Court having heard both the complainant and the accused person and their witnesses and evidence shall convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him, or shall dismiss the charge under section 38 of the Penal Code."

It is clear that in the above section there is the same association of 'finding, sentence or order' such as section 312 contemplates the accused finding himself aggrieved by and against which it gives him a right of appeal.

I am fortified in taking this limited view of the nature of orders against which section 312 gives a right of appeal by the fact that there are other orders in the Code against which a specific right of appeal is given. Examples are orders in connection with forfeiture of recognizance (section 132), orders to give security for good behaviour (section 52) and orders for costs against an accused or a private prosecutor (section 174).

These specific provisions for a right of appeal would be wholly unnecessary and superfluous if the word 'order' in section 312 included every order made by a subordinate Court in the course of or in connection with criminal proceedings which is the argument put forward by counsel in this case.

No right of appeal against an order of a magistrate refusing bail is conferred by section 312 Criminal Procedure Code, 1945, and no other provision of the Code or other law giving such a right has been quoted to me. I hold therefore that there is no such right of appeal, for it is well settled that appeal is a creature of statute and does not lie unless the right is expressly conferred by law (*Attorney-General v. Sillem* (1864) 10 H.L. Cas. 704 and *National Telephone Co. Ltd. v. Postmaster-General* [1913] 2 K.B. 614)."

In the construction of the Fiji Criminal Procedure Code similar considerations apply. For example, Section 206 reads :-

> "206. The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or make an order under the provisions of section 38 of the Penal Code."

It will be seen that this is for all practical purposes, and certainly as far as this point is concerned, virtually the same as Section 210 of the Tanganyika Criminal Procedure Code to which Wilson J. referred in his judgment.

Again, in the Fiji Crimnal Procedure Code, Section 118 gives a specific right of appeal against an order for the forfeiture of a recognisance, which corresponds to Section 132 in the Tanganyika Criminal Procedure Code referred to in the judgment of Wilson J. Similarly, Section 43(2) of the Fiji Code gives a specific right of appeal against an order to give security for good behaviour as is given by Section 52 in the Tanganyika Code, and in the Fiji Code, Section 157 gives a specific right of appeal against an order for costs as is given by Section 174 in the Tanganyika Code.

In these circumstances the same considerations apply as applied in Abdullah Nassor's case. These are that those specific provisions in the Fiji Criminal Procedure Code would be quite redundant if the word "order" in Section 289(1) of the Code included every order made by a magistrate's court in the course of or in connection with a criminal cause or matter.

I do with respect adopt the same construction of the word "order" in Section 289(1) of the Fiji Criminal Procedure Code as Wilson J. did of the same word in Section 312 of the Tanganyika Criminal Procedure Code.

In my view the word "order" in Section 289(1) of the Fiji Code does not include the order or decision of a Magistrate's Court upon the hearing of an application to remove an order of disqualification under Section 30(3) of the Traffic Ordinance.

I am somewhat fortified in this view by the provisions of the proviso to Section 30(3) of the Traffic Ordinance which reads:-

> "Provided that where an application under the provisions of this subsection is refused, a further application thereunder shall not be entertained if made within three months after the date of the refusal."

If the legislature had intended that there should be a right of appeal against a decision of a magistrate's court on an application to remove an order of disqualification it could and, I feel, would have specifically said so. Instead, it has provided that when the court refuses to remove the disqualification a further application can be made therefor after three months have elapsed.

I am of the opinion that no right of appeal against an order of a magistrate's court ordering or refusing to order the removal of an order for disqualification from holding a driving licence is conferred by Section 289 of the Criminal Procedure Code.

The headnote to the case *The Attorney-General v. Sillem & Ors.* 10 H.L. Cas. 705 (see Vol. 11 E.R. at p.1200) summarises the effect of that decision in the folowing words:-

> "The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal nor both combined can create such a right . . . . . "

These words in this headnote which succinctly summarise the point decided in that case were expressly referred to with approval by Kennedy L.J. in the Court of Appeal in *The National Telephone Co. Ltd. v. Postmaster-General* [1913] 2 K.B. 614 at page 621, where this same principle was applied.

Since there is no statutory provision in Fiji giving a right of appeal against the decision of a magistrate on the hearing of an application to remove an order of disqualification under the Traffic Ordinance, I am of the opinion that the submission by the Crown that this Court should not entertain this appeal is sound. A

For these reasons I hold that the Appellant has no right of appeal in these circumstances and the appeal is therefore dismissed.

Appeal dismissed.