



IN THE SUPREME COURT OF NAURU
AT YAREN JURISDICTION
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. 4/2022
DISTRICT COURT CRIMINAL
CASE NO. 27/2021

BETWEEN

AMY SPANNER

Appellant/Cross-Respondent

AND

THE REPUBLIC

Respondent/Cross Appellant

Before: Khan, ACJ
Date of Hearing: 12 May 2023
Date of Judgement: 26 May 2023

Case to be known as: *Spanner v The Republic*

CATCHWORDS: Driving under the influence of liquor under Section 69 of the Motor Traffic Act 2014 – Where suspension of driver’s licence is mandatory for 6 months – Where in addition to the suspension of the driver’s licence a maximum fine of \$1,000.00 is to be imposed or a sentence of 6 months imprisonment – Whether the imposition of fine and imprisonment is conjunctive or disjunctive – Whether under Section 84 of the Motor Traffic Act the Court has powers to impose additional penalties for disqualification from obtaining driver’s licence for any period it seems fit.

APPEARANCES:

Counsel for the Appellant/Cross Respondent: V Soriano
Counsels for the Respondent/Cross Appellant: F Puleiwai

JUDGEMENT

INTRODUCTION

1. The appellant was charged with one count of driving under the influence of liquor under Section 69(1) of the Motor Traffic Act 2014. The charge stated as follows:

STATEMENT OF OFFENCE

Driving under the influence of liquor: Contrary to s.69(1) and (2)(a) and read with s.81(a) of the Motor Traffic Act 2014.

PARTICULARS OF OFFENCE

Amy Spanner on the 7th November, 2020 at Yaren District in Nauru drove a Yamaha Crypton Motorcycle while she was under the influence of intoxicating liquor, the proportion of alcohol in her breath was .0200 grams which exceeded the prescribed limit of 0.0525 grams of alcohol per 210 litres of breath.

2. The charge was filed in the District Court on 31 August 2021 almost a year after the incident. The appellant pleaded guilty to the charge on 26 May 2022 before magistrate Mr. Rupasinge and was sentenced on 29 September 2022 as follows:
 - 1) 5 months imprisonment, which is suspended for 12 months, and if the convict is found guilty of any offence connected to drinking and driving within the suspended imprisonment period, this imprisonment will be executed despite the sentencing date of the following case.
 - 2) \$600 fine. In default to be imprisoned for term not exceeding the lower of (a) one day for every \$0.80 of the fine remaining unpaid OR (b) 6 months. 40 days to pay the fine.
 - 3) Further, driving licence of the convict is suspended for 6 months from today.

LIMITATION ON APPEAL

3. S.39 of the Supreme Court Act 2018 (Supreme Court Act) imposes limitation when a person is sentenced after a guilty plea. S.39 states:
 - 1) An appeal may not be brought by a person who has pleaded guilty and has been convicted on that plea by the District Court:
 - a) without the prior leave of the Supreme Court; and
 - b) limited to the judgement, decision or order as the sentence passed by the District Court.

- 2) No appeal shall be brought against a judgement, decision or order on conviction from the District Court without prior leave of the Supreme Court, where no:
 - a) sentence of custodial imprisonment has been imposed, except default of payment of a fine;
 - b) fine or compensation exceeding \$100 has been imposed; and
 - c) order of disqualification from doing any act has been made.

4. The appellant made an application for leave to file an appeal on 15 October 2022 which was listed for hearing on 2 November 2022 and Miss Akubor appeared for the appellant and submitted that no leave was required in light of the provisions of s.39(2) of the Supreme Court Act. I agreed with her submissions and held that no leave is required because the appellant was:
 - a) ordered to serve a term of imprisonment in default of payment of fine;
 - b) was fined a sum of \$600.00; and
 - c) an order was made suspending her driver's licence.

5. The respondent filed a cross appeal against the sentence that it was filed out of time and leave was granted to the respondent to file the cross appeal out of time.

GROUNDS OF APPEAL

6. Both the appellant's and respondent's challenge the legitimacy of the sentencing, in that, they submit that the magistrate erred in imposing sentence on all 3 limbs of s.79 of the Motor Traffic Act 2014 (Motor Traffic Act).

7. The respondent's sole ground of cross-appeal is that the fine of \$600.00 is inadequate given that the amount of alcohol in the appellant's breath was 0.200 grams which was almost 3 times in excess of the prescribed limit of 0.05255 grams of alcohol per 210 litres of breath.

8. S.53(4) of the Supreme Court Act states:
 - 4) Whereon an appeal against sentence, the Supreme Court determines that a different sentence ought to have been passed, the Supreme Court shall:
 - a) quash the sentence passed at the trial; and
 - b) in substitution, pass such other sentence which the Supreme Court deems fit under the respective law.

9. An appellate court cannot just simply substitute a sentence despite the provisions of s.53(4), it can only do so, if it finds that the trial magistrate made an error of law. This

principle was expounded by the Nauru Court of Appeal in *Jeremiah v The Republic*¹ where it is stated at [18] as follows:

[18] The principle governing an appeal sentence is well established in law and expounded upon by case law. In an appeal against sentence, the unfettered jurisdiction of the appellate court to vary sentence **is enlivened only where an error of law** on the part of the sentencing judge or Magistrate is demonstrated...
[Emphasis added]

SECTION 79 OF THE MOTOR TRAFFIC ACT

10. S.79 states:

1) Any person who is convicted of an offence under s.69(2) is liable to:

a) for a first offence:

i) mandatory suspension of his or her driver's license for 6 months;
and

ii) a maximum fine of \$1000.00; or

iii) imprisonment for 6 months.

11. The correctness of the sentencing by the magistrate depends on the interpretation to be placed on the words "and" and "or". In s.79(1)(a) the word "and" appears at the end of subparagraph (i). It is common ground that for the offence of driving under the influence of liquor under s.69(2) the suspension of the driver's licence is mandatory for a period of 6 months for a first offender. The magistrate imposed a suspension of 6 months, but, in addition thereto he also imposed a sentence of 5 months imprisonment which was suspended for 12 months and a fine of \$600.00 in default imprisonment. [I shall discuss the exact default imprisonment term later].

12. After the suspension of the driver's licence the magistrate should have considered whether to impose a fine or a term of imprisonment as the word "or" appears at the end of s.79(a)(ii) which means that it is disjunctive, however, the magistrate interpreted the word "or" as being conjunctive, and therefore, resulting in the imposition of a sentence of both imprisonment and a fine.

13. In Statutory Interpretation in Australia² it is stated at page 21 as follows:

[2.12]Modification of conjunction 'and' 'or'.

A particular and common example of the approach referred to in the preceding paragraph arises in relation to the use of the words 'and' and 'or'. In ordinary parlance the word 'and' is used conjunctively and the word 'or' disjunctively.

¹ [2018] NRCA 1; Criminal Appeal No. 1 of 2018 (7 December 2018); Palmer, Muria and Scott JJ

² 3rd Edition DC Pearce and RS Geddes

14. It is also stated in Stroud's Judicial Dictionary of Words and Phrases³ at page 2019 as:

OR. "Or" is prima facie an alternative word (Litt. S.723; per Parke B., *Elliot v Turner*, 15 L.J. C.P.49).

15. It is further stated at page 2020 as:

The word "or" is, prima facie, in the absence of some restraining context, to be read as disjunctive and not as "id est" (*Re Diplock [1941] Ch.253 at 260-261*).

16. The magistrate imposed a fine of \$600.00 and also stated:

"In default to be imprisoned for a term not exceeding the lower of:

- a) one day for every 80 cents of the fine remaining unpaid; OR
- b) 6 months. 40 days to pay the fine.

17. S.275 of the Crimes Act has a two-stage process – the first stage is to impose a fine and if the fine is not paid, then the Court decides whether it is appropriate to re-sentence the person to a term of imprisonment and then the provisions of s.275(2) comes into play under which a term of imprisonment is to be imposed and the formula to be used is:

- (a) 1 day for each \$0.80 of the fine remaining unpaid; or
- (b) 6 months imprisonment, whichever is the lowest.

SUSPENSION OF EXECUTION OF IMPRISONMENT IN DEFAULT OF FINE

18. S.9B⁴ makes provision for suspension of execution of imprisonment in default of payment of fine. S.9B states:

- 1) Where a convicted person has been sentenced to a fine only and to imprisonment in default of payment of a fine and whether or not a warrant of distress has been issued under Section 9A, the Court may make an order directing the fine to be paid on or before a specified date, not more than 30 days from the date of the order, and in the event of this fine not being paid on or before that date may, subject to the other provisions of this Section, forthwith issue a warrant of committal. The Court may, before making such order, require the convicted person to execute a bond, with or without sureties, conditional for his or her appearance before the Court on the date specified if the fine be not in the meantime paid. Upon the making of an order under this subsection, the sentence of imprisonment shall be deemed to be suspended and the convicted person shall be released from custody.

³ 8th Edition Vol 2 Sweet and Maxwell

⁴ Criminal Procedure (Amendment) Act 2016 No. 2

- 2) In any case in which an order for payment of fine has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith, the Court may require a person ordered to make such payment to enter into a bond as prescribed in subsection 1 and, in default in doing so, may at once pass sentence of imprisonment as if the money had not been recovered.
 - 3) The Court may in its discretion direct that any money to which this Section applied may be paid by instalments at such times and in such amounts as it may deem fit but so nevertheless that, in default of payment of any such instalment as aforesaid, the whole of the amount outstanding shall become and be immediately due and payable and all the provisions of this Act and the Crimes Act 2016 applicable to a sentence or fine and to imprisonment in default of payment thereof shall apply to the same accordingly.
 - 4) A warrant of committal to prison in respect of non-payment of any sum of money by a person to whom time has been allowed for non-payment under the provisions of subsection (1) or has been allowed to pay by instalments under the provisions of subsection (3) shall not be issued unless the Court shall first make as to his or her means in his or her presence: Provided that the Court may issue such a warrant of committal without any further enquiry as to means if it shall have made such enquiry in the presence of the convicted person at the time when the fine was imposed or at any subsequent time and the convicted person shall not before the expiry of the time for payment have notified the Court of any change in his or her means or applied to the Court for an extension of time to pay the fine.
 - 5) After making enquiry in accordance with the provisions of subsection (4), the Court may, if it thinks fit, instead of issuing a warrant of committal to prison, make an order extending the time allowed for payment or varying the amount of the instalments or the time at which the instalments were, by previous order of the Court, directed to be paid, as the case may be.
 - 6) For the purpose of enabling inquiry to be made under the provisions of subsection (4), the Court may issue a summons to the person ordered to pay the money to appear before it and, if he or she does not appear in obedience to the summons, may issue a warrant for his or her arrest or, without issuing a summons, issue in the first instance a warrant for his or her arrest.
19. There are various options available for orders to be made for non-payment of fines and in this matter an order could have been made for payment of fine and time could have been allowed under s.9B(2), where the maximum period is 30 days and not 40 days as per the order of the magistrate in this matter; and in the event of failure to pay the fine an order for a warrant to be issued could have been made and the default period as per s.9B(3) could have been made for a period of 6 months in accordance with the provisions of s.275 of the Crimes Act 2016.

COMMITTAL IN LIEU OF DISTRESS – DRAFTING ERROR

20. A totally unrelated matter which is of concern to me is the committal in lieu of distress. S.9C(1) and (2) speaks of execution of warrant of distress and s.9C(3) provides for the period of committal and it is stated:
- a) If the person has been sentenced to a term of imprisonment in default of payment of fine, the period to which he or she was so sentenced; or
 - b) In other cases such period as the Court considers reasonable subject to the maximum laid down in Section 9A(2) relating to fines.
21. Section 9A(2) does not make any provision for imprisonment and it seems that it was a drafting error and I would request the legal draftsman to correct that error.
22. The magistrate erred in imposing both a fine and a term of imprisonment. The magistrate could only impose a fine or alternatively a term of imprisonment not exceeding 6 months and not both. Further under s.87 of the Motor Traffic Act the magistrate had powers to impose additional penalties. S.87 provides:
- 1) Where a person is convicted under this Act or any other Act of an offence involving the driving of a motor vehicle, the Court may **in addition to any penalty imposed:**
[Emphasis added]
 - a) if the person holds any licence, suspend or cancel that licence;
 - b) declare the person to be disqualified from obtaining any licence for such time as the Court thinks fit; and
 - c) order that particulars of the conviction to be endorsed upon any licence or renewal of licence held by the person during such period as the Court thinks fit.
 - 2) A licence suspended in accordance with this Section shall, during the term of the suspension, be of no effect, and the person whose licence is suspended or be declared by the Court to be disqualified from obtaining a licence, shall during the period of suspension or disqualification, be disqualified from obtaining a licence.
23. I note that the imposition of additional penalty as prescribed under s.87 is a discretionary matter, however, notwithstanding that the magistrate should have at least addressed that in the sentencing as to whether he was going to exercise those discretions, and if he was not going to do so, then he should have given his reasons for not doing so.
24. In the circumstances the sentence imposed by the magistrate is quashed. Mr Soriono concedes that the fine imposed by the magistrate was inadequate given that the

appellant's alcohol reading was almost 3 times above the prescribed legal limit of 0.0525, and he also conceded that the appellant should be fined the maximum amount of \$1,000.00.

25. In sentencing an offender, a court should only impose a fine after ascertaining the person's means and ability to pay the fine – see s.281 of the Crimes Act 2016. I have not had any evidence as to the appellant's ability to pay the fine, however, in light of Mr Soriono's concession and under the provisions of s.281(2) of the Crimes Act, I impose a fine of \$900.00 on the appellant.
26. The sentence on the appellant is as follows:
 - 1) Suspension of driver's licence for a period of 6 months with effect from 29 September 2022;
 - 2) A fine of \$900.00.
 - 3) I allow the appellant 30 days to pay the fine and in default 6 months imprisonment.
27. In addition to the above sentence, I order that under s.87(1)(b) of the Motor Traffic Act the appellant is disqualified from obtaining a driver's licence for a period 18 months with effect from 28 September 2022.
28. One matter that I would like to highlight is the error that appears in s.79(b) where the word "and" appears at the end of subparagraph (b)(iii). This appears to be a drafting error and should be corrected.

DATED this 26 day of May 2023


Mohammed Shafiullah Khan
Acting Chief Justice

