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IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA.

CORAM: MANN C.J.

Appeal No.37 of 1964(P).

MICHAEL EXTON

(Appellant)

v.

ROY BERTIL NORDFELT

(Respondent).

REASONS FOR JUDGMENT.

Port Moresby. 17th March and 1965.

This was an appeal from a decision of the Court of Petty Sessions at Port Moresby under which the appellant was convicted of a traffic offence. The substance of the charge was that he failed to reduce the speed of his vehicle so as to pass behind another vehicle which had the right of way on approaching an intersection. It is necessary for it to be established as one ingredient of the offence that the cars were on such courses that they would collide if the prescribed action were not taken by the car which did not have right of way.

The learned Magistrate found that there was a substantial conflict of evidence as to whether in approaching the intersection the vehicle which would otherwise have had right of way, was proposing to turn to the left and was signalling his intention to do so with the car's turning indicator lights. The learned Magistrate evidently found some difficulty in determining the issue on this evidence, but if he had done so the case would have been very much clearer, because if the car were proposing to turn to the left no question of right of way as between the two vehicles would arise and at no stage would there have been any question of collision.

On the other hand, if the car were not turning to the left the section would be directly applicable and the appellant's offence would be clearly established.

The learned Magistrate dealt with the case upon the footing of the defence relied on by the appellant under Section 24 of the Criminal Code. In substance this is the defence of mistake of fact, and requires a reasonable and honest belief as to questions of fact. If such a belief is established the accused person is tried upon the basis that thefacts believed are the true facts. I think that the applicability of Section 24 as a defence to a traffic charge is clear, and I adopt with respect the views expressed by my learned Brother Mr. Justice Minogue in the case of Thick v. Hoeter, reported in 1963 1 P. and N.G.L.R. at p.87.

In dealing with this defence the learned Magistrate concluded that an honest and reasonable belief could not have been held by the appellant because he failed to continue to keep the approaching car under observation over the last thirty yards of its travel before the collision which occurred. The Magistrate thought that if the appellant had continued to observe the other car he would have observed that its failure to slacken speed was a positive indication that he was not proposing to turn to the left because he was travelling too fast to take the turn.

With respect to the learned Magistrate, whose criticism of the appellant's driving in this aspect appears to me to be perfectly sound, it seems to me that this is not an argument against the proposition that the appellant had the relevant belief. It tends, if anything, to support the existence of such belief and it does not, in my opinion, tend to negative it at all. Such a belief once arrived at and firmly held would be the best justification for not looking at the approaching car any longer, because on the basis of that belief it was clearly not going to be a relevant consideration. Therefore on entering the intersection the appellant, if he held such a belief, might with every justification concentrate his attention on cars coming from other directions or pedestrians and other hazards which he might expect to encounter. Therefore I find that the reason for rejecting the existence of a reasonable and honest belief

was erroneous.

I think the true criticism of the appellant on the view which the learned Magistrate appears to have taken would be that notwithstanding the existence of the belief in question, the appellant in the circumstances had a further duty, which again, in those circumstances, would include a duty to continue to observe the other car. His breach of that duty would not, whilst his belief remained, constitute a breach of the particular charge with which we are now concerned, but would amount on the face of it to an act of negligence and possibly traffic offences of a different character. I am not for one moment saying that the appellant did commit any offences. I am only saying that assuming, as a starting point, that the relevant belief was held by the appellant and that he proceeded to act upon it, his failure to continue to observe the other car might amount to negligence, but does not constitute a reason for saying that the appellant could not have had an honest and reasonable belief.

I do not see how this case can be resolved without determining the issue of fact which arises on the evidence and I think that the Court should determine whether or not the traffic indicator lights were in operation so as to indicate a left hand turn and whether,under the circumstances existing at the time when the appellant asserted that he formed the relevant belief, such a belief was in fact held and was in fact reasonable and honest.

I have been invited to arrive at my own conclusion on this question upon the footing that the learned Magistrate's conclusion is a matter of inference from facts, of which the evidence is uncontradicted. (Benmax v. Austin Motor Company Ltd. (1955) A.C.370). Although I think that this argument was substantially right, and I would be prepared to arrive at my own conclusion as to inferences to be drawn if the evidence were clearly uncontradicted, it does seem to me that any conclusion I draw would have to be based upon a finding that the turning indicator lights were or were not in operation so as to convey, or not to convey, as the case might be,

the information that the car was proposing to turn to the left. This is certainly a question upon which there seems to be a conflict of evidence and it seems to me to involve a finding which would depend directly on the credibility of witnesses.

There was an alternative argument put on behalf of the appellant to the effect that the Magistrate could not be satisfied that a collision would occur, as at the time the section, if applicable, would have imposed upon the appellant the obligation to give right of way. It was emphasised that the onus of proof on this issue is upon the prosecution and I was invited to say that the facts and circumstances did not point with certainty to a collision. Again, I think that this question should be the subject of a direct finding of fact based on the evidence of the witnesses and the weight to be given to that evidence, I do not think that this argument would lead to a satisfactory conclusion of the case without hearing the case again. I think, therefore, that the correct course is for me to set aside the conviction and sentence and to send the case back to the Court of Petty Sessions, Port Moresby, to be heard and determined according to law. I do not want anything that I have said to indicate any view of what the facts might be, or how they might appear upon a re-hearing of the case.

For the benefit of Magistrates who may not have convenient access to Law Reports, I should perhaps refer briefly to two recent Queensland cases where the practice of the Queensland Courts has been specified.

In Heffernan v. Ward, (1959) Qd.R.12, on a charge for dangerous driving, the defendant pleaded guilty influenced by advice given to him by a Police Officer, who was the driver of the other vehicle directly involved in the accident which took place. The defendant thought that if he pleaded guilty he would be dealt with more leniently but was surprised to find that the Police Officer, who had given him this advice, gave evidence against him placing great stress on the speed of the defendant's car and other matters which the defendant was prepared to contest

strongly. On appeal Stanley J. expressed the following view that as a matter of prudence "before accepting a plea of guilty in any case in which a Policeman is the complainant and the accused is not represented by counsel or solicitor, the Stipendiary Magistrate would be well advised to point out to any such accused that the severity of penalties does not depend on whether he pleads guilty or not guilty, and to enquire whether anyone connected with the Police Force has suggested that he should plead guilty; and if the Magistrate does not receive from the accused a prompt and convincing disclaimer of any such suggestion, he should suggest to the accused to plead not guilty and emphasise the impropriety of any such advice."

In Hallahan v. Kryloff, (1960) Q.W.N. p.22, Note No.18, the defendant pleaded guilty before a Stipendiary Magistrate to a charge of vagrancy. The Full Court expressed agreement with the views of Stanley J, expressed in Heffernan v. Ward (supra) and repeated by him in Hallahan's Case. The Full Court added one further point "that in a case at which my learned brother's remarks were directed it would also be prudent on the part of the Magistrate to intimate positively to the person who is before him his right of putting everything he wishes before the Magistrate, provided it is relevant to the charge and then getting down on the record the agreement of the accused person that he has said all that he wishes to say" - see Wanstall and Stanley JJ.

Without imputing any suggesting of malpractice on the part of the Police, I think that this rule of prudence, so firmly recognised in Queensland, should be closely observed in the Territory where, as is well known, we commonly encounter the likelihood of misunderstanding and misapprehension on the part of unrepresented defendants. In many circumstances, quite apart from those which arise from some officer failing to realise that he is in a partisan position and that he should strictly avoid giving advice which may influence the course of action taken by an unrepresented defendant, one of the oldest, but still the best, methods of overcoming difficulties of this kind is to bring everything out into the open before the Court which has the responsibility of determining the case in the first instance.