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

CORAM : MANN C.J.

Monday,
20th May, 1968.

IN THE MATTER of the District Courts Ordinance 1963-1965.

AND

RANDOLPH ROBINSON

Respondent.

AND

DONALD GORDON TURNER

Appellant.

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APPEAL :

This was an appeal on the grounds of severity of sentence against a decision of the District Court at Goroka made on the 24th January, 1968, whereby the appellant was convicted on a charge of driving under the influence of intoxicating liquor and fined $60.00.

The part of the Order of the District Court appealed against is that part which imposes upon the appellant a disqualification from holding a licence to drive motor vehicles for a period of two years.

The appellant was, at the same time, convicted of other concurrent offences and fined.

As an officer carrying substantial responsibilities in relation to the transport services of the Administration, the appellant must be taken as a person well aware of the dangers and risks not only to other users of the public road, but also to his own career should he commit traffic offences of the kinds in question. He must also be taken to be well aware of the increased burden placed on possible claimants by reason of his driving an unregistered and uninsured vehicle. I in no way minimise the seriousness of the offences involved and approach the review of the penalties imposed by the learned Magistrate with considerable reluctance. On the face of it the penalties imposed appear by no means to be unreasonable, and the learned Magistrate is usually in the best

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position to assess the seriousness of the dangers arising from incidents of the kind in question. In the local context, the sentences were well within the jurisdiction and discretion imposed on the learned Magistrate.

In spite of all that I have just said, there are circumstances in the present appeal which now call for special consideration. In the first place, the appellant was not represented by Counsel upon the hearing before the District Court, but he was so represented and his case was ably argued on his behalf upon the hearing of the appeal.

Authorities were quoted and I was left with the strong impression that if the same arguments had been addressed to the learned Magistrate he would not have imposed quite the same penalties as in fact he did. I had the same impression in relation to the peculiar situation of the appellant in so far as he was a first offender, and is in a position where he needs a motor driving licence to fulfil the duties of his normal employment. I reached the conclusion that the appellant is in a position where there is an excellent chance that the very force of these circumstances will enable and compell him to take the most scrupulous care not to commit such serious and dangerous errors in the future.

If, therefore, a less onerous punishment is imposed on this occasion, the remedial objectives of the enforcement of the law are likely to be fully vindicated and a serious risk might be satisfactorily resolved for the future. If, on the other hand, these offences were due to established drinking habits on the part of the appellant, so that he could not discipline himself to change, it is likely that some further offences of the kind will be committed, in which event the Court would have every justification for putting it beyond the power of the appellant to drive again for a long period of time.

There were two main points put to me in argument. The first was that it is quite clear from the learned Magistrate's reasons that he was influenced in his final decision by the demeanour of the appellant in the Court. On this occasion the appellant must have

been quite unimpressive in his general appearance, he having barely recovered from his insobriety. I think that the learned Magistrate was not consciously punishing the appellant for this aspect of the case, but concluded that he could not place any real reliance on the apparent character of the appellant as he appeared in Court, and that for these reasons it would be unsafe in the interests of the public to extend to the appellant substantial concessions as a first offender in order to encourage him to mend his ways. In this I think that the learned Magistrate's approach to a very difficult problem was most fair and impartial.

However, I was referred to the case of Minagall v. Ayres (1), where upon a charge of having driven a motor vehicle whilst so much under the influence of either liquor or a drug as to be incapable of exercising effective control of the vehicle, the defendant was acquitted on the ground that the Special Magistrate, having observed the defendant's behaviour in Court for several days during the hearing of the charge was satisfied that the witnesses for the prosecution could have been honestly mistaken as to the conduct of the defendant to which they had testified. The case went to the Full Court on appeal where it was held, (upholding the judgment of Hogarth J.), that although "It is, of course, proper and usual for the Court to take note of the demeanour of a witness ..... It is entirely different, however, for a court to take into account the 'action, mannerisms and idiosyncrasies' of a party while he is sitting in the body of the court, that is to say, while he is out of range of vision of both his own and opposing counsel, when the conduct in question may be calculated to lead the court to a decision in his favour. Such conduct is analogous to a statement made by a party in his own favour out of court, evidence of which, in general, would not be admissible. No reference was made during the hearing of the conduct observed by the Special Magistrate, and of course counsel for the prosecution had no opportunity to investigate its genuineness."

Although on the facts this decision is the reciprocal of the case at present under appeal before

(1) (1966) S.A.S.R. p. 151.

me, it gains all the more strength from this circumstance, because a favourable impression created by the defendant in Court is one that might merely induce the Court to take a view more favourable to the defendant either in assessing the weight of evidence, or in imposing a punishment, but an unfavourable impression of subsequent behaviour might seriously prejudice the defence.

The appellant's argument derived further support from the case of Wise v. The Queen (2). In this case the Court of Criminal Appeal reviewed the provisions of the Tasmanian Criminal Code imposing imprisonment and suspension of driving licences in cases involving dangerous driving. In that case the Court was dealing with a whole series of most serious offences which led to the imposition of substantial terms of imprisonment and to the suspension of the driving licence for a period of fifteen years. It is not possible to make any direct comparison of the circumstances existing in that case with those affecting the appeal at present before me, but some guidance may be derived from the views expressed by the Full Court as to the nature and effect of the order for suspension. At pages 204, 208-9 and 210, the learned Judges constituting the Court of Criminal Appeal express the view that the suspension savoured of retribution, and was likely to be unduly restrictive to the offender's future rehabilitation and possible reception into society, (p. 204). Crisp J. at page 204 goes on to say, "While it is right that licences should be taken away, it can in working men be a severe penalty, particularly in those cases where a man's livelihood may depend on it. This should not deter the court from imposing an adequate penalty, and I have no doubt that the learned Chief Justice was impressed, as I have been by the evidence of the obvious immaturity of outlook by the appellant in relation to his social responsibilities as a driver of motor vehicles, but five years added to his present age should be sufficient to induce a different outlook. If it doesn't he will only have himself to blame the next time he comes before a court. The deterrent aspect being taken care of by the sentence of imprisonment, I think the element of possible rehabilitation should be considered and in the circumstances I would

(2) (1965) Tas. S. R. p. 196.

reduce the period of deprivation of a licence from fifteen years to five."

The learned Judge goes on to point out that the duty of the Court to impose deterrent punishments is one which does not arise only in cases where serious accidents are caused by the offences committed and that such punishment may be imposed not merely to deter the defendant but to deter others in appropriate cases and in cases where accidents have not occurred. In the case now before me, the learned Magistrate was, therefore, clearly right in dealing with the case in the circumstance as a case involving serious danger, even though no accident had in fact occurred. Nevertheless, the Court of Criminal Appeal drew attention to the heavy burden which may remain upon the offender after the requirements of a deterrent punishment had been fully satisfied, and that during a long period the suspension of a licence might operate as a bar to the rehabilitation of the offender. It was on this principle that the Court of Criminal Appeal reduced the suspension from the long term of fifteen years to the still very substantial period of five.

I have also considered the Territory case of Wilkeson and Ors. v. Grant (3). I do not accept the argument that in the present case the learned Magistrate has sub-consciously allowed himself to impose additional punishment for elements of the case which were not before him in the form of charges which they, if taken separately, might have supported. I think that on a true analysis of the case, the learned Magistrate has imposed a very substantial punishment upon a first offender for the reasons which he clearly stated and which, prima facie, do justify his action.

Nevertheless, I remain with the impression that if the learned Magistrate had had the advantage of the argument which was addressed to me, he would have imposed a sentence which would not have involved a suspension of licence which would carry on for such a long period after the deterrent element of the punishment imposed had been satisfied. I do feel quite strongly that the element of rehabilitation is at about its maximum in the present case and that a

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(3) Unreported. No. 442

stern warning against repetition of this type of offence by the appellant would have helped to meet the situation. I think that in the absence of arguments the learned Magistrate did not give sufficient consideration to the principles above cited.

I therefore reduce the suspension from two years to one year, and expressly add a caution for the benefit of the appellant that he would be most unwise to jeopardise his career again.

Solicitor for the Appellant : Richard Major and Co.
Solicitor for the Respondent : S. H. Johnson, Crown Solicitor.