SC 601

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

CORAM: RAINE, J.

Monday,
9th November, 1970.

BETWEEN GOMARA GAHUSI
Appellant

AND MALCOLM STANLEY BAKER
Respondent

1970

November
2nd and 9th.

PT. MORESBY

Raine, J.

This is an appeal from a conviction under Section 328(A)(1) of the Code, namely for dangerous driving along Brown River Road. The appellant pleaded guilty to this charge in the District Court. The learned Magistrate imposed a sentence of three (3) months imprisonment with hard labour. Since his conviction the appellant has been released on recognizance pending hearing of the Appeal, and has only been in custody for a day. The accused has no convictions, is married and is in employment.

There are two grounds of appeal, firstly that the plea of guilty was a mistaken plea, and secondly that the sentence was excessive. The first ground has been abandoned.

In support of his client's appeal Mr. Francis made three submissions. They were :-

1. That when one looked at the Police statement of facts, and then looked at what the appellant said to the Magistrate, it is clear that not all of the facts put before the District Court were admitted by the appellant, and again, when one looks at the report of the Magistrate it is clear that not all the latter relied on was admitted.
2. That the Magistrate's reasons, as set out in his report, contain matter not adverted to, but in particular, sub-para. (v) therein stated "the Defendant negotiated the twisting nature of the Brown River Road" and sub-para. (vi) stated "that the nature of the curves and corners is such that in the majority of them it is impossible to see oncoming traffic until the curve or corner is actually being negotiated." Mr. Francis says that this was not mentioned in open Court, does not appear in the Police statement of facts, which took up a foolscap page, nor was it admitted by

1970

Gomara Gahusi

and

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Raine, J.

the appellant. Mr. Francis therefore complains that the Magistrate took into account his own privately held views on the nature of the road. In addition, to some extent because of my intervention in the argument, he submitted that in doing this His Worship was doing the same sort of thing that has been the subject of criticism where a Judge or jury has had a view.

3. That the sentence was manifestly unjust.

Mr. Francis relies on all or one or some of these submissions in order to bring himself within Section 236(2) of the District Courts Ordinance which provides that "An appeal shall be allowed only if it appears to the Supreme Court that there has been a substantial miscarriage of justice."

Counsel agree that I cannot avail myself of the alternatives set out in Section 261(1)(b), (c) and (e) until satisfied under Section 236(2) that there was a substantial miscarriage of justice. Mr. Francis submits that a bond is appropriate, failing this a fine in lieu of imprisonment, and failing this a reduction in the term of imprisonment.

First Submission

Notwithstanding the submissions made, (supra) I do not think that anything approaching "a substantial miscarriage of justice" occurred on this account. What takes place in a Court subsequent to a plea of guilty should not be regarded as an exercise in the art of pleading. In other words, it is inevitable that issue will not be precisely joined on everything that is said for and against an accused. This is not to say that the proceedings should not be conducted with care. However, on a plea, many matters are not tested. This does not relieve the Court of its responsibility to ensure that the circumstances of the offence are explained clearly and that the accused person has every chance to explain, to confess and avoid or to deny some of the matters raised. But in this case, notwithstanding the force of what Mr. Francis has said, and leaving aside sub paragraphs (v) and (vi) in the Magistrate's reasons, I do not think that there has been "a substantial miscarriage of justice."

Second Submission

A careful examination of the record makes it clear that the Police did not say nor did the defendant admit that Brown River Road

could be described as having a "twisting nature". The most that the record shows is "cutting corners", and "Every corner (the appellant's) truck negotiated, it went on to the incorrect side."

Most roads have a corner or more in a stretch of three miles, the distance the respondent says he chased the appellant, but this does not necessarily cause the road to deserve to be described as in (v) as possessing a "twisting nature." On the other hand if somebody says "Every corner", as did the respondent, I would understand this to mean more than two, and probably a few. But this does not mean "twisting" in every case.

Thus, it does appear that the learned Magistrate who has served here for many years, drew upon his own knowledge when he said that the road was twisting in its nature.

So far as sub-para. (vi) is concerned there is no statement or admission to support the proposition "that the nature of the curves and corners is such that in the majority of them it is impossible to see oncoming traffic until the curve or corner is actually being negotiated."

In Black v. Goldman (1), Hood, J. considered the effect of a court placing reliance on its local knowledge. At page 692 His Honour said "I am prepared to go the length of holding that the Magistrates were not entitled to say - 'We know the spot, and therefore we conclude that a large amount of traffic might reasonably be expected there at the time the offence was committed.' This would make the case depend upon the local knowledge of the particular Magistrates, on which there would be no check." Cf. Hughes v. Bradfield (2), which Messrs. Leslie and Britts suggest is wrongly decided in their Motor Vehicle Law (N.S.W.), 2nd Edition at page 187.

If the use by the Magistrate of his knowledge of the area can be equated to a view then what he says in his reasons in sub-para (v) is of like nature to the taking of a simple view. In this type of view what the eye sees answers all arguments. Sometimes witnesses get the points of the compass wrong. A simple view will soon solve any problem as to whether an intersecting road comes onto another road from a

(1) (1919) V.L.R. 689.
(2) (1949) Q.W.N. 46.

northerly or southerly direction. Sometimes a photograph does not make it clear whether an important object alongside the road is opposite a straight portion of the road or further on and opposite the road as it curves. A simple view will solve this problem.

But His Worship's remarks in sub-para. (vi) in the reasons is of like nature to the conclusions and inferences made and drawn from a demonstrative view.

All the cases I can find on the proper use of a view are cases dealing with disputed questions of fact. I can find no reference to a case or cases dealing with the proper or improper use of a view on sentence or on a plea of guilty. It is not surprising there has been no such discussion arising out of a sentence after a contested trial, because there the Court would, in most cases, be more fully seized of the facts than on a mere plea of guilty. Possibly another reason the matter has never been brought up, at least sufficiently to warrant a report, is that an accused, when he pleads guilty, confesses the offence charged, and, further to this, in the case of an indictable offence the Judge has the depositions. But in Police Courts pleas are dealt with, almost invariably, by a Police Officer or critical witness giving fairly abbreviated evidence or by the prosecutor giving a summary of the facts to the Magistrate.

I appreciate that opinions differ as to whether a view is part of the evidence or merely an aid to the Judge or Jury charged with the duty of deciding the factual issues raised. This is discussed and examined, and the authorities collected in an article appearing in 34 A.L.J. 46 and 66. See also Bellia v. Colonial Sugar Refining Co. Ltd. (3) and Kristeff v. The Queen (4). It does not seem necessary for me to concern myself in this debate, because in a demonstrative view at any rate it seems clear that a Judge must not do what Bonney, J. did in Unsted v. Unsted (5), namely draw very significant inferences from what was a simple view in the first instance, yet not inform the parties of the inferences drawn. From the vice of this see the judgment of Street, J. (as he then was) in

(3) (1961) S.R. (N.S.W.) 401.
(4) (1967-68) P. & N.G.L.R. 415.
(5) (1947) S.R. (N.S.W.) 495.

Unsted v. Unsted (6) (supra) at p. 499. The original simple view held by Bonney, J. was used as a demonstrative view by him when His Honour came to write the judgment.

In regard to the general principles applicable on sentence, and leaving the question of views aside, Dixon and Evatt, J.J. (as they then were) and McTiernan, J. in House v. The King (7) said "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him ..... then his determination should be reviewed ....." What the learned Magistrate said in sub-para. (vi) of his reasons would not have been "extraneous or irrelevant matters" had they been either established by evidence or put forward in a reasonably clear way in the statement of facts. However in the case of dangerous driving the question of degree always arises, both on the question of liability and on sentence, which makes it all the more important, on a plea of guilty, for an accused person to know pretty clearly what he is up against. In passing, I would observe that The King v. Bright (8), points up the care that must be taken by a court on a plea of guilty, although I do not suggest that the facts of that case are helpful in an examination of this appeal.

I am of opinion that what the Magistrate said in sub-para. (vi), when read with (v), must have had a very considerable effect on the penalty he awarded. As the accused was never made aware what the Magistrate had in mind, and as it aggravated the offence, I am of opinion that there was "a substantial miscarriage of justice." The learned Magistrate will understand that there is no sting in this so far as he is concerned. If I might say so, one only has to read the record and the report to see how carefully His Worship conducted the hearing.

What I have said above is not to be understood as prohibiting a court from using its general knowledge and applying commonsense. I think the Magistrate here did apply his general knowledge of the area but drew conclusions which were of such significance that he should have given the appellant the chance to correct him, if what is said

(6) (1947) S.R. (N.S.W.) 495.
(7) 55 C.L.R. 499 at p. 505.
(8) (1916) 2 K.B. 441.

in sub-para. (vi) was capable of being corrected. It occurs to me that in the average motor car one might not have nearly as good a view as the appellant would have, presumably sitting up higher in the truck he was driving. It could be that he was able "to see oncoming traffic (before) the curve or corner (was) actually being negotiated."

For these reasons I think Mr. Francis succeeds in bringing himself within Section 236(2).

Third Submission.

In my opinion the sentence is not manifestly unjust, but I would not have awarded a sentence quite as severe myself.

I do not agree with the submission that this is a case for a bond. Even leaving aside sub-para. (vi) of the Magistrate's reasons, this is a bad case, there was potential danger to road users, and it was serious danger. Mr. Francis suggested that the Police Officer's estimate of speed, namely 60 - 70 miles per hour, was extravagent. He says that such a speed is unlikely bearing in mind the nature of the road and the nature of the vehicle driven by the appellant. The Police Officer might be in error to some extent, he certainly had a bad fright when the appellant nearly hit him, then came the excitement of the chase, and as Inspector Baker said, the truck threw up dust and gravel. I am far from saying he was mistaken about the speed, but what if he was? One thing is certain, the appellant was travelling fast and much too fast in all the circumstances.

Conclusion.

Although I am not of opinion that the penalty awarded by His Worship was manifestly wrong as a matter of law I am of opinion that having found that there was a miscarriage of justice (see second submission) that I nevertheless have power under Section 236(1)(c) to substitute the penalty that I think ought to have been awarded by the District Court. See my own judgment in Bapo Gotnogosa & Ors. v. Jarratt (9), in which I applied obiter dicta of Ollerenshaw J. in Mames-Weviong v. Zania (10) at p. 82. It is true these two judgments dealt with Section 43(5)(d) of the Local Courts Ordinance, but the reasoning is valid for Section 236(1)(c) of the District Courts Ordinance

(9) (Unreported) Judgment No. 600 of 26th October, 1970.
(10) (1967-68) P. & N.G.L.R. 79.

in my opinion.

The learned Magistrate awarded three months or thirteen weeks imprisonment with hard labour. I vary that by reducing it by four weeks and substitute for the Magistrate's sentence a sentence of imprisonment with hard labour for a period of nine weeks. The appeal is allowed to this extent.

Solicitor for the Appellant : Messrs. Francis & Francis.

Solicitor for the Respondent: P.J. Clay, A/Crown Solicitor.