Raine, J
837

IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM: Prentice, SPJ.
Tuesday,
29th April, 1975.

JOHNSON TAKOVONG v. TINO TARERA

Appeal 178 of 1974 (P)

1975
25, 29 Apr.
PORT MORESBY

Prentice, SPJ.

The appellant was convicted at the Local Court Boroko of driving a motor vehicle on a highway at a speed in excess of the limit. He was fined thirty dollars and disqualified from driving for five months.

In support of the appeal, which is brought on the ground of severity only, it is urged that the learned magistrate (a) failed to consider the relevant circumstances; (b) took into account matters unsubstantiated by the Record; (c) considered irrelevant matters.

This Court was asked to admit on the appeal affidavit evidence from the appellant's manager testifying as to his terms of employment, the extent to which it is essential for the appellant to be able to drive a motor vehicle at his work, and associated details. The evidence thus sought to be led must plainly have been available at the hearing before the Local Court. The policy of the magistracy as to its intention to use more fully the power to suspend licences, became notorious about September 1974 and must have been known to the appellant who is a graduate of the University of Papua New Guinea, employed by the Shell Company as a personnel manager.

No doubt there are cases where through bewilderment, lack of education, sickness, primitive background, and perhaps other factors, an accused might have been unable to put his case properly and adequately in a lower Court. In such cases an appellate Court will be willing, perhaps astute, to receive further evidence in the interests of justice.

But as I, and other Judges of this Court, have so frequently announced before; the tendency to seek a second trial of an issue (in effect) in a Senior Court by bringing evidence that was discoverable and available all along; after an initial representation (perhaps ill-advisedly sketchy) before a magistrate; must be sternly discouraged. Otherwise the Supreme Court would be overwhelmed with appeals from people who would be thereby testifying to the salutariness of punishment imposed.

I can discover no feature in this case that calls for the application of other than the usual rules, regarding reception of fresh evidence on appeal. I reject the tender.

As appears from his reasons for judgment; the magistrate dealt with the accused on the basis that he had been travelling at fifty-three miles an hour on Morea Tobo Road (a thirty miles per hour zone). When the matter was originally called on, on 6th November, 1974, the accused stated -

> "I was not doing more than thirty miles an hour. I was following the leading car. I was doing between thirty miles an hour and forty".

This plainly put in issue a material part of the facts alleged.

Now, when on a plea of guilty, an accused contraverts a vital assertion of the police case; if the prosecution seeks to maintain that vital assertion, the issue thereby raised should be decided by the hearing of evidence. The Queen v. Riley (1) Hawkins, J.; The Queen v. Gabai Vagi & Ors. (2) Raine, J.; Nash v. Haas (3) Burbury, C.J. Had the matter proceeded on 6th November, 1974, the Local Court should have followed this course. But the matter was in fact adjourned.

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(1) (1896) 1 Q.B. 309 at 318
(2) Unreported judgment 707
(3) (1972) A.M.L.D. 862

On 19th November, the matter came before another magistrate. Thereupon the appellant said he pleaded guilty. A short statement of facts appears to have been read in which it was asserted that the police registered his speed at fifty-three miles an hour. On his stopping and being so informed, the appellant is said to have replied "I thought I was going thirty miles an hour only".

The Record thus discloses to my mind, that though on the first occasion before the Court the accused was disposed to challenge the police version, on the second occasion (as so frequently happens) he decided to allow it to go unchallenged. I am unable to accept the submission of appellant's counsel, that in dealing with the matter as one involving a speed of fifty-three miles an hour; the magistrate was adopting an unsubstantiated allegation.

It was further asserted that in making reference to a "flagrant disregard of traffic laws" the magistrate was indicating his consideration of an irrelevant matter. I do not agree. A speed of fifty-three miles an hour in a thirty mile an hour zone may well be considered, I think, a "flagrant disregard of traffic laws".

Appellant's counsel again protests at the application of a "tariff" agreed upon at a magistrates' conference. I do not wish to repeat what I have said in the appeal of Guje Beng No. 167 of 1974 (P).(4). I think it perfectly proper that such a pattern of punishments be discussed and agreed to from time to time - provided the pattern be not adopted rigidly and without the exercise of discretion necessary to be brought to the consideration of each offender's circumstances, and to the facts of each particular offence.

The magistrate's reasons given, seem to indicate an intention to apply to this man's case, some agreed standard of punishment without consideration of his particular circumstances. The magistrate was aware that the accused was employed by Shell and had had no

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(4) (Unreported judgment 836

prior convictions. But I can only assume that in disqualifying the accused for five months for a first offence of such a kind, the learned magistrate must have overlooked the factors special to the accused - his good record, the effect of loss of licence on a man in his type of employment, in a city of such distances and such inadequate public transport as Port Moresby.

Finding a manifest excess of punishment, I am satisfied a substantial miscarriage of justice within the meaning of s.43 of the Local Courts Act has occurred. I allow the appeal. I confirm the conviction. I confirm the sentence of the thirty dollars' fine. I quash the order for suspension of licence for five months and substitute one of suspension for twenty-one days. Such a period has already been served - the appellant is therefore entitled to have his licence issued to him.

Solicitor for the Respondent: B.W. Kidu, Crown Solicitor.

Solicitor for the Appellant : N.H. Pratt, A/Public Solicitor.