NALTAMBI

v.

REGINAM

[SUPREME COURT, 1963 (MacDuff C.J.), 29th March, 19th April]

Appellate Jurisdiction

Criminal law—sentence—first conviction—discretion—adoption of standard punishment inappropriate—Traffic Ordinance (Cap. 235) ss. 26, 32 (1).

It is important to equate the sentence to the circumstances of the particular case and wrong to adopt a standard punishment with little regard to those circumstances. In the case of an offence against s. 32 (1) of the Traffic Ordinance it is lawful to impose a penalty of two years' imprisonment and a fine or both, and to order disqualification from driving under s. 26. Disqualification on a first conviction is a matter for the Magistrate's discretion and only becomes mandatory in the case of a second conviction. Not to exercise the discretion but to impose disqualification in all cases is to arrogate to the court the functions of the legislature in making the law. Fine reduced and order for disqualification set aside, where the correct principle had not been followed.

Appeal against sentence.

Ramrakha for the appellant.

Palmer for the Crown.

MACDUFF C.J. [19th April, 1963]—

The appellant pleaded guilty to a charge of " Dangerous driving contrary to section 32 (1) of the Traffic Ordinance (Cap. 235, Laws of Fiji)". He was convicted and fined £30 together with 5s. costs and was prohibited from holding or obtaining a motor vehicle driving licence for a period of two years.

I have come to the conclusion, after considering a number of appeals from this particular Magistrate in respect of convictions for this offence, that he has, in effect, fixed what may be called a standard punishment with little, if any, regard to the circumstances of each particular case. If this is so he is not applying his mind to the quantum of penalty in accordance with recognised principles.

Section 32 (1) of the Traffic Ordinance provides for a penalty of two years' imprisonment or a fine or both such fine and imprisonment. There is accordingly a great extent through which the penalty can range and it becomes of added importance to equate such penalty to the circumstances of each case.

Section 26 empowers the court before which a person is convicted of any criminal offence in connection with the driving of a motor vehicle to order disqualification. But even in the case of " dangerous driving " such disqualification is mandatory only in the case of a second conviction for that offence. On a first conviction the legislature has recognised that disqualification is a matter for the Magistrate's discretion. It is trite to have to point out that such discretion must be exercised according to judicial principles. Not to exercise it and to impose disqualification in all cases without regard to circumstances is to arrogate to the Court the functions of the legislature in making the law.

In the present case the appellant pleaded guilty to the charge on advice and now appeals against sentence only. The facts outlined by the police prosecutor were as follows:—

> " On 14th January, 1963, at 6.20 p.m. P.C. Shiu Shankar was driving Police Land Rover from Ba to Lautoka. When he reached Karavi, he saw truck B605 ahead of him. It was then going at a normal speed. Constable sounded his horn and wanted to overtake. At same time the truck in front was accelerated to a fast speed and went to the wrong side of the road. He kept on driving at speed following the incorrect side of the road and generally going from side to side. After travelling for about 1 mile, constable caught up with this truck and stopped it. Constable saw accused was driving and when he pointed out the offence, the accused said sorry, I didn't see you behind. The accused was then charged with the offence. It was a heavy goods vehicle and this stretch was being driven at 40 m.p.h."

These were admitted in part only by the appellant who said:

> " It is true but I was not doing 40 m.p.h. only 30, and there were holes on the road. I had to drive over the road to miss holes."

It would appear then that the factors that tended to indicate that the driving of the appellant was dangerous were, firstly, " accelerating to a fast speed and going over to the wrong side of the road " when an overtaking driver indicated his desire to pass. Unless there is something more, for example, that the overtaking vehicle was forced to brake suddenly or that there was other traffic on the road, then this of itself is a classic example of " hogging the road " and comes more within the scope of " driving without reasonable consideration for other persons using the road contrary to section 31 of the Ordinance ".

The next factor was that the appellant continued to drive a heavy goods vehicle at a speed of 40 miles per hour. This the appellant denied. The next factor was he followed the incorrect side and generally drove from side to side of the road. The appellant, in effect, denied this allegation by saying that he only swerved to avoid pot holes in the road. The trial Magistrate was not entitled to rely on either of these allegations as a fact unless the appellant admitted them. If they were material to the assessment of penalty, and in my view they were, then the Magistrate should have required evidence on oath to support them.

It is for comment that there was nothing placed before the trial Magistrate as to the " nature, condition and use of the road and the amount of traffic which was actually at the time or which might reasonably have been expected to be on the road ". These facts I would think to have been necessary to give the trial Magistrate some indication as to the danger created by the appellant's driving.

Finally it does not appear that the trial Magistrate asked the appellant if he had anything to say in mitigation of penalty. In all those circumstances I am compelled to hold that the Magistrate's approach to the problem of assessment of penalty was unjudicial.

Neither counsel for the Crown nor counsel for the appellant has been able to assist the Court with any facts other than those on record. Accordingly I may err on the side of leniency.

The fine imposed is reduced to one of £15 in default one month's imprisonment. The appellant is also ordered to pay costs in the sum of 5s. in default one day's imprisonment. Order of disqualification is set aside.

Appeal allowed.

Solicitor for the appellant: *A. M. Raman.*

Solicitor-General for the Crown.