A

GOKUL SINGH

v.

REGINAM

B

[SUPREME COURT, 1975 (Grant C.J.), 25th April]

Appellate Jurisdiction

Criminal law—traffic offences—driving whilst disqualified—imprisonment obligatory unless special circumstances of the case warrant fine—special circumstances special to case and not offender—Traffic Ordinance (Cap. 152) s.30(4).

Practice and procedure—law practitioners—counsel should not act as counsel and witness in same case. C

Law practitioners—counsel should not act as both counsel and witness in same case.

The appellant pleaded guilty to driving whilst disqualified and was sentenced to 4 months imprisonment. He contended at the trial that he had been misled by his own legal adviser with regard to the length of his disqualification, but his counsel did not give evidence in the Magistrate's Court as he was also appearing on behalf of the appellant. D

On appeal the legal adviser was called to give evidence and confirm the appellant's account.

Held : The circumstances were special to the case and therefore a sentence of imprisonment was not necessary.

Cases referred to : E

R. v. Secretary of State for India [1941] 2 All E.R. 546 ; [1941] 2 K.B. 169.
R. v. Kells (1955) 19 Jo. Crim. L. 100.
R. v. Sugden (1959) 23 Jo. Crim. L. 100.
R. v. Lynn [1971] Crim. L.R. 429 ; 55 Cr. App. R. 423.
Taylor v. Kenyon [1952] 2 All E.R. 726 ; 116 J.P. 599.
Rennison v. Knowler [1947] 1 All E.R. 302 ; [1947] K.B. 488.
R. v. Jackson [1969] 2 All E.R. 453 ; [1969] 2 W.L.R. 1339. F
Whittall v. Kirby [1946] 2 All E.R. 552 ; [1947] K.B. 194.
Lines v. Hersom [1951] 2 All E.R. 650 ; [1951] K.B. 682.
R. v. Wickins (1958) 42 Cr. App. R. 236 ; [1958] Crim. L.R. 619.

Appeal against a sentence of imprisonment imposed in the Magistrate's Court for driving whilst disqualified.

GRANT C.J. : [25th April 1975]— G

On the 21st August 1973 the appellant was convicted at Labasa Magistrate's Court of driving a motor vehicle under the influence of alcohol and was, inter alia, disqualified from holding a driving licence for a period of two years. The appellant appealed against sentence to the Supreme Court at Suva which on the 7th December 1973 reduced the period of disqualification to twelve months.

H

On the 30th July 1974 being three weeks prior to termination of disqualification the appellant drove a tractor on a public road in Labasa, resulting in his being charged at Labasa Magistrates Court on the 4th March 1975 with driving a motor vehicle whilst disqualified from holding a driving licence contrary

to section 30 (4) of the Traffic Ordinance. The appellant pleaded guilty to the offence which carries a term of imprisonment not exceeding six months unless the court thinks that, having regard to the special circumstances of the case, a fine would be an adequate punishment. The appellant gave evidence before the trial Magistrate for the purpose of establishing special circumstances, namely that some time after his appeal above referred to he had telephoned counsel who had represented him in his absence at the hearing of the appeal, who informed him that he had won his case, whereupon the appellant put down the telephone and subsequently purchased a tractor believing, as a result of what his counsel had said, that he was no longer disqualified from holding a driving licence. The trial Magistrate, in a considered judgment delivered on the 18th March 1975 did not accept the appellant's evidence stating, inter alia : " It is also hard to believe that his counsel did not tell him to the effect that his disqualification has been reduced to twelve months for I cannot imagine any counsel merely stating that he ' won the case ' without telling his client exactly what happened either by telephone or in writing particularly in a case of this nature. The accused's counsel has not given any evidence to say exactly what he said to show whether the accused was misled or not. "

The trial Magistrate went on to state that : " I do not find that the accused's belief was founded on reasonable grounds to constitute a special reason or circumstance " and proceeded to impose a sentence of four months' imprisonment.

The appellant, represented by a different counsel, has now appealed against this sentence of imprisonment. With regard to the trial Magistrate's reference to counsel not having given evidence as to the telephone conversation in question, that counsel may well have found himself in a quandary, as he was the same counsel who had appeared for the appellant on the prior appeal and could hardly have been a witness before the trial Magistrate as to what took place between himself and his client. " A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as both counsel and witness in the same case. " (Per Humphries J. in *R. v. Secretary of State for India* [1941] 2 All E.R. 546 at 556 para. A ; and see *Boulton's Conduct and Etiquette at the Bar*, Second Edition at pages 29-30). In the event, counsel appearing for the appellant on this appeal applied for leave to call additional evidence in the person of the counsel in question (the appellant having waived privilege) which application was, in the circumstances, granted. The evidence of counsel corroborated in all material particulars the evidence which the appellant had given before the trial Magistrate ; counsel going on to explain that it had been his intention to elaborate on his statement to the appellant that he had " won the case ", but that the appellant had put down the telephone.

It is perfectly clear that the appellant, however inadvertently, was misled by his own legal adviser and that the appellant's belief that he was no longer disqualified was therefore founded on reasonable grounds. There is no doubt that had the trial Magistrate been aware of this his whole approach to the question of the appropriate sentence would have been different. The position is comparable with that in *R. v. Kells* (1955) 19 Jo. Crim. L 100 where it was held that having regard to the defendant's education and standing in life the defendant did have a reasonable belief, based on reasonable grounds, that he was not disqualified, and that there were special circumstances for not sentencing the defendant to imprisonment (see also *R. v. Sugden* (1959) 23 Jo. Crim. L. 100 ; c.f. *R. v. Lynn* [1971] Crim. L.R. 429).

This was not a case of a defendant deliberately refraining from making enquiries as to whether or not he was disqualified (vide *Taylor v. Kenyon* [1952] 2 All E.R. 726) ; nor was his mistaken belief based on unreasonable grounds (vide *Rennison v. Knowler* [1947] 1 All E.R. 302).

For the purpose of considering special circumstances, the circumstances which the court may take into account may well be different according to the offence committed (per Sachs L.J. in *R. v. Jackson* [1966] 2 All E.R. 453 at 459 para. G) ; and the Court must, therefore, be on its guard not to be misled by cases on the subject which relate to different types of offences. However I am satisfied that the basic principles laid down in *Whittall v. Kirby* [1946] 2 All E.R. are of general application, namely that the circumstances must be special to the case and not to the offender, although as was pointed out in *Lines v. Hersom* [1951] 2 All E.R. 650 at 653 para. A : " It is often difficult to maintain a sharp distinction betwen the case and the offender ".

After a consideration of the authorities (including *R. v. Wickins* (1958) 42 Cr. App. R. 236) I consider that the circumstances raised by the appellant are circumstances special to the case ; and that had the trial Magistrate had the benefit of counsel's testimony he could not have failed to have treated the matter as one in which a sentence of imprisonment was not required.

As the appellant has been imprisoned for over five weeks the sentence is varied so as to allow of his immediate release.

Appeal allowed—fine imposed in lieu of sentence of imprisonment.