IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC 15928

IN THE MATTER of an Appeal to the Supreme Court pursuant to Section 138 of the Criminal Procedure Act 1972:

BETWEEN: ONOSA'I FILIPO of Leauvaa, General Hand:

Appellant

A N D: THE COMMISSIONER OF POLICE of Apia, Western Samoa:

Respondent

Counsels: Mr T. Malifa for Appellant
Ms H. Aikman for Respondent

Date of Hearing: 8 December 1993

Date of Decision: 13 December 1993

DECISION OF SAPOLU, CJ

The Appellant was charged in the Magistrates Court for dangerous driving under section 39 of the Road Traffic Ordinance 1960. He was tried and convicted of the charge and ordered to pay a fine of $210 to be payable forthwith and in default two(2) months imprisonment. He has now appealled against both his conviction and sentence.

It would be helpful in dealing with this appeal against conviction and sentence to set out briefly the evidence put before the Magistrates Court as far as it can be gathered from the notes of evidence. The Police, now the respondent in these appeal proceedings, called three(3) witnesses. The defen-

dant now the appellant in these proceedings gave evidence himself and called no other evidence.

The first witness called by the Police was Simon Potoi. He said that on 17th October 1992 he was working with his wife at their shop at Pesega. They closed the shop at about 1.00am in the morning and got into his vehicle which he had only bought for three(3) months and drove home to Fagalii-uta. When they approached the bridge at Lelata, he saw a big truck with high beam lights approaching the Lelata bridge from the opposite direction. In his estimate the truck was about 50 metres from the bridge travelling probably in excess of 80m.p.h in a zig-zag fashion weaning to the left and the right of the road. So he swerved his vehicle about 20 feet from the western end of the bridge to ditch on the right side of the road. The truck kept on coming and hit Potoi's vehicle and then swerved to the left side of the road and went off the road. Potoi's vehicle was extensively damaged and he said it was written off. Potoi was also hurt on his left side.

The second witness called by the Police was Potoi's wife. She testified that she was on her way home at Fagalii-uta with Potoi after their shop at Pesega was closed about 1.00am on 17 October 1992. When they came to the bridge at Lelata, she saw an on-coming truck approaching the bridge from the opposite direction at a very fast speed and in a zig-zag fashion. Their vehicle was then swerved inland on the right side of the road until it could not go right any further. She also screamed and called out "watch the truck". But the truck kept coming without slowing down and Potoi's vehicle was a write off. The truck eventually ditched on the opposite side of the road from Potoi's vehicle.

The third witness called by the Police was Sergeant Sapatu Pulepule who was the Police investigating officer for this case. He testified that the Police went to the scene of the incident after 1.00am on 17 October 1992. He found the truck way off the road behind a ditch on the seaward side and

at the western end of the bridge. The truck was identified as belonging to the Cardinal of the Catholic Church but the driver could not be found as he had disappeared. Then after 7.00am in the same morning, the driver of the truck (the present appellant) and his family came to the Apia Police Station. Subsequently, the appellant was interviewed and he made a cautioned statement to Sergeant Sapatu which was produced as evidence at the trial. According to Sergeant Sapatu, after he cautioned the appellant he advised him of his right to counsel and that he could get a lawyer. He also gave the appellant a list of lawyers.

The appellant was then called by the defence to give evidence. He testified that at the material time he was driving the Cardinal's truck at 20m.p.h. He denied that he was driving at 80m.p.h in a zig-zag or swerving fashion. He also said that when he drove onto the bridge it was clear and then he was surprised to see an on-coming vehicle on the opposite end of the bridge and that vehicle continued to come towards his vehicle with its headlights on. The headlights of the on-coming vehicle blinded him and as he tried to save his truck and the other vehicle, he swerved seaward and the tray of his truck struck the rest of the on-coming vehicle. The truck ended up in a hedge and he hid there for 20 minutes as there were a lot of people on the other vehicle.

The appellant also denied he was advised by the Police as to his right to counsel or given a list of lawyers when he was interviewed by Sergeant Sapatu. He also denied that he was arrested or agreed to waive his right to counsel. He admitted, however, that he drank four(4) bottles of beer on the night in question.

Coming now to the grounds of appeal that the Magistrates Court erred in law and in fact in convicting the appellant when that Court held it was doubtful whether the appellant was driving at 80m.p.h but rather that the appellant was driving at 20m.p.h., this Court is of the view that there is

still sufficient evidence from the testimonies of Potoi and his wife to convict the appellant of the charge of dangerous driving even if the accepted speed was 20m.p.h. It is to be remembered that the charge in this case is not speeding. The charge is one of dangerous driving and for a driving to be dangerous does not depend on the speed of the vehicle alone. Section 39 of the Road Traffic Ordinance 1960 is quite clear that the question whether a vehicle is driven in a manner dangerous to the public is to be decided by having regard to all the circumstances of the case including the nature, condition, and use of the road and the amount of traffic actually on the road at that time or which might reasonably be expected to be on the road. Essentially therefore the question is to be decided having regard to all the circumstances of each case, and the generality of those words are not to be limited to the specific matters referred to in section 39.

I therefore do not accept the first ground of appeal.

The second ground of appeal has three(3) limbs but taken together I think they amount to this. The learned Magistrate who tried this case spend almost an hour in cross-examining the appellant. So he must have had a reasonable doubt as to the guilt of the appellant and therefore should have dismissed the charge. Further, the lengthy cross-examination of the appellant by His Worship amounts to active involvement in the arena of conflict and a usurpation of the respective roles of the prosecutor and defence counsel and is therefore a violation of the appellant's right to a fair trial under Article 9 of the Constitution. Perhaps it should be pointed out that counsel for the appellant in his written grounds of appeal does point out that His Worship at the commencement of his cross-examination of the appellant made the comment that his cross-examination was not affecting his decision.

In considering the second ground of appeal, I begin by referring first to the cross-examination under challenge. Counsel for the appellant says

that the cross-examination by His Worship was more extensive than the 20 or so lines of answers from the appellant shown in the notes of evidence. It endured for almost an hour. If that is so, and there is nothing before this Court to suggest otherwise, then this Court does not have a complete record of the answers given by the appellant to cross-examination by His Worship. Be that as it may, it appears to me that this cross-examination was not conducted whilst the appellant was examined in chief and was directed principally at what happened after the incident at the Lelata bridge. It appears from the appellant's answers in the notes of evidence that he was cross-examined as to what he did after the incident at Lelata and subsequently what happened at the Apia Police Station and the two(2) statements that he made to the Police.

Now in R v Cain (1936) 26 Cr. App. R.204, the English Court of Appeal dealt with an appeal against conviction on ground that whilst the defendant was giving evidence-in-chief he was subjected to cross-examination by the trial Judge. The nature of the questioning by the trial Judge was that he put to the defendant whilst giving evidence-in-chief the allegations that had been made by the prosecution witnesses. The Court there said :

> "There is no reason why the Judge should not from time to time
> "interpose such questions as seem to him fair and proper. It
> "was, however, undesirable in this case that....the Judge should
> "proceed, without giving such opportunity to counsel for the
> "defence to interpose, and long before the time had arrived
> "for cross-examination to cross-examine [the defendant] with
> "some severity. The Court agrees with the contention that that
> "was an unfortunate method of conducting the case. It is
> "undesirable that during an examination-in-chief the Judge
> "should appear to be not so much assisting the defence as
> "throwing his weight on the side of the prosecution by cross-
> "examining a prisoner".

In that case the Court nevertheless found that the result of the case would still have been the same even if there was no judicial cross-examination of the defendant. So the appeal against conviction was dismissed.

In the case of R v Gilson and Cohen (1944) 29 Cr. App. R.174, a differently constituted English Court of Criminal Appeal adopted what was said in R v Cain about intervention by a trial Judge when cross-examining a defendant whilst giving evidence in chief. The appeal in R v Gilson and Cohen was however allowed and the conviction quashed but not because of judicial intervention but because the trial Judge did not refer to an essential element of the charge in his summing up to the jury. In R v Bateman [1946] 31 Cr. App. R.106, the English Court of Criminal Appeal again adopted the observations quoted from R v Cain and added :

> "We would adopt those observations and apply them to any witness,
> "whether called by the prosecution or the defence".

In that case, the appeal was dismissed and the conviction sustained because there was still other conclusive evidence on which the jury could have based their verdict. So there was no miscarriage of justice in the opinion of the Court.

Then we come to the case of R v Clewer (1953) 37 Cr. App. R.37. In that case what was involved was a lot more serious. The trial Judge clearly intervened too much and too far. The trial Judge not only too often imputed defences to the defence counsel which defence counsel was not setting up, but he also unduly interrupted defence counsel whilst addressing the jury with comments to the effect that defence counsel was raising false issues, that there was nothing in the defences being put forward, and that he, the Judge, intended to tell the jury so. The Court of Appeal there said :

> "At the same time, the first and most important thing for the
> "administration of the criminal law is that it should appear
> "that the prisoner is having a fair trial, and that he should
> "not be left with any sense on the ground that his case has

"not been fairly put before the jury. If counsel is constantly
"interrupted both in cross-examination and examination-in-chief,
"and, more especially, as in this case, during his speech to the
"jury, his task becomes almost impossible. The more improbable
"the defence, the more difficult it is for counsel to discharge
"his duty to his client adequately, and, provided that he keeps
"within the bounds of fair advacacy....it is highly desirable
"that he should be allowed to do his best in presenting his case,
"leaving it to the judge to deal with, and maybe to demolish, it
"in his summing-up".

In this case, even though there was certainly evidence on which the conviction could be based, the Court nevertheless allowed the appeal and quashed the conviction because it appeared that the manner in which the trial was conducted denied the defendant a fair trial.

The next case is R v Dowell [1960] Crim. L.R. 436. It appears from that case the appellate Court was of the view that the interruptions from the Bench did not prevent the appellant at the trial from putting forward his defence. Further the appellate Court seemed satisfied that the jury had preferred the evidence of the prosecution witnesses. The appeal was therefore dismissed.

In the next case of R v Ptohoplous (1968) 52 Cr. App. R.47, the English Court of Criminal Appeal said that discourtesy, even gross discourtesy towards counsel cannot by itself be any ground for quashing a conviction. Likewise it appears from R v Liggett (1968) 53 Cr. App. R.51, that judicial criticism of counsel in his handling of a case, as opposed to criticism of the case itself or disparagement of the defendant, is not sufficient to quash a conviction.

In the next case of R v Hamilton [1969] Crim. L.R.486, the English Court of Appeal referred to interventions which are perfectly justified and

those interventions which may lead to a conviction being quashed. The Court said :

> The second and the real ground for the appeal in the present "case concerns these interruptions. Of course it has been "recognised always that it is wrong for a judge to descend "and give the impression of acting as advocate. Not only "is it wrong but very often a judge can do more harm than "leaving it to experienced counsel. Whether interventions "can give ground for quashing a conviction is not only a "matter of degree but also depends on what the interventions "are directed to and what their effect may be. Interventions "to clear up ambiguities and to enable the judge to make an "accurate note are perfectly justified. Interventions which "may lead to the quashing of a conviction are (1) those "which invite the jury to disbelieve the defence evidence in "such terms that they cannot be cured by telling the jury "that the facts are for them; (2) those which make it "impossible for counsel to present the defence properly; "(3) those which have the effect of preventing the defendant "from doing himself justice and telling his story in his own "way".

In the case of R v Perks [1973] Crim. L.R.388, of the 700 questions asked the defendant during his examination in chief 147 were asked by the trial judge. Then the trial judge closely cross-examined the defendant. During counsel's final address he made more interruptions. The English Court of Criminal Appeal held that the conviction should be quashed. See also R v Matthews and Matthews (1948) 78 Cr. App. R.23 C.A.

In <u>Cross on Evidence</u>, 3rd New Zealand edition at p.204, it is there stated :

> "The judge may, of course question the witnesses and he
> "frequently does so for the sake of elucidating the evidence
> "or to assist a witness to whom a badly worded question has
> "been put. But he must not in effect descend into the arena.
> "He may be discourteous to, but he must not obstruct, counsel.
> "In <u>R v Hulusi and Purvis (1974) 58 Cr. App. R.378</u>, for
> "example, the judge frequently interrupted the witnesses,
> "he often intervened when they were answering questions from
> "counsel and cross-examined them on their answers, and unfairly
> "implied that the defendant's counsel was misleading the jury.
> "In quashing the conviction the Court of Appeal referred to an
> "earlier case which had analysed three types of intervention
> "as warranting the quashing of a conviction - interventions
> "which invite the jury to disbelieve the evidence for the
> "defence in such strong terms that it cannot be cured by the
> "common formula that the facts are for the jury, which is
> "entitled to disagree with any comments passed by the judge
> "about them; interventions which have made it really impossible
> "for the defence counsel to do his duty and properly present
> "the defence; and interventions which have had the effect of
> "preventing the prisoner from doing himself justice and telling
> "the story in his own ways. In the end the line between 'holding
> "'the ring' and descending into 'the arena' is a question of
> "degree".

It would appear from the above passage in <u>Cross on Evidence</u>, 3rd New Zealand edition that the position in New Zealand is, if not likely to be, the same as that set out in the English case already referred to of <u>R v Hamilton</u>.

We are here dealing with a criminal appeal from the Magistrates Court but the position regarding judicial interruptions seems to be very much the same in civil cases : see for instance Yuill v Yuill [1945] 1 All E.R.183 and especially Jones v National Coal Board [1957] 2 All E.R.155 per Denning L.J.

Applying the authorities on criminal cases to this appeal, it is clear to this Court that the cross-examination of the present appellant by the trial Magistrate did not prevent counsel for the appellant from presenting the case for the appellant properly and adequately during the trial, or prevent the appellant from doing justice to himself or telling his own story at the trial. It is also clear from the authorities that not every intervention by the judicial officer who is trying a case will lead to a conviction being quashed on appeal.

In this case, it apears as far as one can gather from the notes of evidence that the trial Magistrate when he questioned the appellant was doing so in relation to events that occurred after the incident at Lelata bridge. So it is most unlikely that any views he had formed on the evidence relating to the incident at Lelata bridge would have been affected by the questions he asked the appellant or the answers to those questions. Perhaps out of extra caution, the trial Magistrate stated at the commencement of his questions that his cross-examination was not to affect his decision on the evidence. Having regard also to R v Cain and R v Bateman already referred to, it is clear to this Court that there is still sufficient in the evidence of Potoi and his wife to convict the appellant of dangerous driving even if the answers by the appellant to the Magistrate's questions were to be put aside.

As to any possible breach of the appellant's right to a fair trial under Article 9 of the Constitution, this Court is of the view that whilst it might have been best for the trial Magistrate not to question the accused for almost an hour, I am not satisfied on the evidence and the authorities

that what happened at the trial of this case infringed the appellant's right to a fair trial or led to an unfair trial in terms of Article 9 of the Constitution.

Accordingly the second ground of appeal is also set aside.

This brings me to the third and final ground of appeal. I should mention in considering this ground of appeal that counsel for the respondent made the concession during the hearing of the appeal that the appellant was only advised by the Police of his right to counsel after he had made his statement to Sergeant Sapatu. Counsel for the appellant says the manner in which the cautioned statement was obtained from the appellant was in violation of his right to counsel under Article 6(3) of the Constitution. Likewise the manner in which the appellant was kept in police custody without arrest was also in violation of the appellant's right to personal liberty under Article 6(1) of the Constitution. There was however no submission addressed to the Court as to what constitutes an arrest for the purpose of Article 6. But on the evidence before this Court, I am inclined to the view that the actions of the Police in this case amount to an arrest of the appellant. In any event, the application for compensation for infringement of the right to personal liberty should be dealt with in other proceedings and not in these appeal proceedings.

Coming back to the appellant's right to counsel, I am satisfied that in the circumstances of this case that right was infringed and the cautioned statement must therefore be excluded. It is accordingly excluded. But even if the cautioned statement is excluded, there is still sufficient evidence on which to base the conviction for dangerous driving.

In view of what has been said about the right to personal liberty and the cautioned statement which has been excluded, it is not necessary to deal with that part of the third ground of appeal which relates to new evidence that the appellant seeks to adduce in relation to the appellant being held in Police custody in the early morning of 17 October 1992.

The appeal against conviction is therefore dismissed.

As to the appeal against sentence, I am of the view that the fine of $210 imposed by the Magistrates Court in this case is not excessive having regard to all the circumstances of the case. This is a serious case of dangerous driving and the fine imposed is quite within the range of penalties that the trial Court was entitled to impose.

Accordingly the appeal against sentence is also dismissed.

TFM Sapolu
....
CHIEF JUSTICE