

DISTRICT COURT OF NAURU

CRIMINAL CASE NO: 98/82

THE REPUBLIC

v.

MORRIS DEMINGAUWE

J U D G M E N T

On 28th February 1982 sometime past midnight a police patrol car was parked in Denigomodu district in open space outside the barber shop. The policemen incharge of the patrol were Knox Tulenoa, Joseph Hubert, Bruce Diema, Deiden Kiki and Peter Dongobir. They were checking cars with no number plates or no headlights, etc. Const. Knox noticed a motorcycle coming from hospital side in the north. Its headlight was vibrating which made Const. Knox think that it was driven at a high speed. It came closer and Knox tried to stop it but it went past fast. The Constable could not recognise the driver. The police officers then pursued the motorcycle but could not catch up with it. When they reached Aiwo bridge, Knox saw the same motor cycle coming back fast. The police car also turned around and chased it. But again they failed to catch up on account of traffic. They continued following it and they could see tail light of the motorcycle then going in China Town while they were in front of the power station. The chase continued and when they reached N.P.C. hospital, they saw the motorcycle taking a U-turn in front of Chinese shop and then Const. Knox recognised the accused driving the motorcycle. The police car also made a U-turn and went after the accused at a fast speed. The police car vibrated a lot on account of speed. The police also put the sirens on and continued following the tail light and ultimately they reached Anibare where the rear light of the motorcycle went off. They approached the spot and found the motorcycle off the road but there was no trace of the accused. The police officers searched for him and found him under some bushes. Const. Knox informed him that he was being booked for speeding. He also smelt intoxicating liquor from the person of the accused who was then informed that he was also being booked for driving under influence of liquor. The accused asked for forgiveness and wanted to be taken home. The Constable refused to oblige.

The accused was handcuffed and taken to police station. He was produced before Const. Tyson Agir, Desk Sgt., who noticed that the accused was staggering all the way to the Desk and, when he reached the Desk, he fell on it. The Desk Sgt. also smelt strong odour of intoxicating liquor. The accused spat there thrice. He was then detained.

These events of that night involving the accused resulted in his prosecution for driving under influence of liquor, for dangerous driving and for speeding u/s 21(1), 19(1) and 28(a) of the Motor Traffic Act 1937-73 (hereinafter called 'the Act'). When the charges were read out and explained to him, he pleaded not guilty to the first and second count and guilty to the third count of speeding.

Evidence was led by the prosecution and P.W.1 Const. Knox, P.W.2 Const. Joseph Hubert and P.W.3 Const. Tyson Agir were examined in support of the prosecution case. P.W.1 made a statement which is almost the same as has been summed up hereinbefore while dealing with the story of the prosecution. P.W.2 Joseph Hubert was driving the police car engaged in giving the chase to the accused after Knox and Bruce unsuccessfully tried to stop him in China Town. According to him the police car sped to the extent of 120 km / hour but could not catch up with the accused. He also referred to accused turning around in Aiwo district near Patric Cook's house and then they also turned around and followed him and again he turned around and police followed suit and went after him driving all the way to Anibare. P.W.2 alleged that, besides travelling fast, the accused also zig-zagged while driving. When the police car was near Acua's place, they saw that the motorcycle ahead had switched off its lights. P.W.2 kept on going and dropped Knox and Kiki at the estimated distance of the place where the lights had gone off. He proceeded straight to the house of the accused and looked for his motorcycle there, could not find it and then came back to the place where he had dropped his colleagues and it was there that he found the accused with other Constables. He talked to him and could smell liquor from him. The accused was then brought to police station. P.W.3 Desk Sgt. Tyson Agir had noticed the accused staggering while approaching the Desk and falling on the Desk. He smelt strong odour of liquor. The accused spat thrice there. He was then detained.

Morris Demingauwe, accused himself gave evidence as D.W.1 and stated that on the night of 27th February 1982 he was at Ubinide Club playing billiards and left the Club at about 11 p.m. alongwith a friend. They reached the N.P.C. Staff Club where the accused met Andrian Notte and borrowed his motor cycle and left. Notte even asked him to return the motor cycle to him at about quarter to 2 p.m. at the Club. The accused then drove the motor cycle towards Anetan where he saw some people playing billiards at Ika's place and he too joined. At about half past midnight he went home where he ate something and left again taking a round of the island anti-clockwise which he did twice. On the second trip around the island he happened to see some policemen in China Town outside the barber shop. He noticed that one of them was sitting in the verandah and another policeman was standing close by. While passing that way he was behind another car ahead of him. He heard the policemen calling out but he could not make out whether they had called him and so he kept on going, reached Yaren and stopped at Debao's place and watched for a long time a party going on there. When people started leaving the place, he too drove back home and reached home at about 4 A.M. approximately and went inside where his mother asked him why the police had been looking for him. He went to his room and changed his trousers which were torn at seams and then again drove from Anetan anti-clockwise. He reached Yaren on the main island road and then took a left turn into airport road, crossed the airport and went back to the main island road, proceeded ahead towards Aiwo, reached the bridge and saw a police car coming from opposite direction. He kept going and then took a U-turn near the Chinese Tea Shop, drove ahead and saw at the power station a police car crossed him. He continued going via Yaren, Meneng and Anibare where at Acua's place he happened to look into his rear view mirror and noticed the blue revolving light of the police car behind. He stopped his motorbike at Peter Gadaraoa's place on beach side of the road. Having left the motorbike there he crossed to the other side of the road and hid himself there. In the meantime the police car went past that spot, stopped at Menke's place and made a U-turn and then he saw two police officers getting out of the car and the police car again making a U-turn and driving away. One of the two policemen happened to see him when he came out of hiding. This policeman called the other policeman and then

the accused was handcuffed. The police car came back and Const. Joseph Hubert told the other policeman to put him in the back of the car. On their way to police station he was informed by Joseph Hubert that he was speeding and nearly hit two persons on road in China Town. They reached police station where he was pushed towards the Desk and Const. Tyson Agir took his one handcuff off. The other handcuff was then removed with the help of a screwdriver. He was asked to take off his pants which he did. He was kicked and put in the cell.

D.W.2 Daniel Ouwak Dabwadauw claimed in his statement to have been with the accused at Larry's place and to have left for Ubinide Club between 9 and 10 P.M. where the accused played billiards and witness drank. Sometime after 11.00 P.M. they went to N. P.C. Staff Club. The witness then left. He certified sobriety of the accused.

D.W.3 Mrs. Demingauwe is the mother of the accused. She stated about the visits of the accused to the house at that night and the visit of police in his absence. When the accused came home for the second time at about 4.00 A.M. she told him about the police having visited the house and asked him the reason. According to her there was nothing wrong with the accused and he did not smell of alcohol.

This is the entire evidence on record. Id. Counsel for the accused, while commenting on the evidence on record, contended that there is no evidence with regard to the charge of dangerous driving, that the evidence on record with regard to the D.U.1 does not warrant conviction of the accused as P.W.1 & P.W.2 have only stated about smell of alcohol and nothing beyond that while P.W.3 has gone on record further to say about staggering, falling on the Desk and spitting, that the last act attributed to the accused is no indication of intoxication, that there is no evidence of slurred speech or bloodshot eyes, that the prosecution was a result of annoyance of P.W.1 and P.W.2 because the accused necessitated their chasing him and that the defence evidence is consistent on the point that the accused had not been drinking. Id. prosecutor pointed out the evidence on record with regard to zig-zagging and speeding. According to him, these two facts

taken together amount to dangerous driving. He further referred to the act of hiding himself resorted to by the accused after leaving the motorcycle on sea side of the road. According to the Ld prosecutor, the evidence with regard to smell, going left and right, speeding, taking U-turn unnecessarily and his effort to give a slip to police and evading being caught are attributable only to the fact that he had been drinking and driving under influence of liquor. He further contended that the evidence given by the D.W.2 and D.W.3 is interested because these two witnesses wanted to protect the accused.

I have carefully perused the evidence on record and have given utmost consideration to the respective contentions put forward by the Ld. defence counsel and the Ld. prosecutor during the course of their submissions. In absence of a scientific test to determine the factum or otherwise of intoxication (or the extent thereof), it is really a difficult task which the Court has to perform in coming to a conclusion. Be that as it may, a definite conclusion can be arrived at with regard to these aspects on the basis of the conduct, the appearance, the manner of driving and, last but not the least, preponderance of probabilities on the facts of a particular case on consideration of oral evidence led by parties. I would deal with the primary facts of the conduct and appearance first. This is a case where this Court has to arrive at the truth on the basis of prosecution statements made on oath and contested by defence on the basis of statements similarly made on oath. Thus it is a situation of oath against oath and definite assertion against emphatic denial. P.W.1 stated that initially when he first saw the erring motorcycle being driven he thought it to be at a high speed because it's headlight was vibrating which he could see from a distance and when it came closer, he tried to stop it. But it went very fast. He then refers to the chase which was not an ordinary type of chase where a person is stopped by police after some distance. The extraordinary nature of this chase was that there was chasing, the accused having gone completely out of sight, having made a u-turn and appearing near Aiwo bridge, again rushing past followed by police, another U-turn after crossing China Town, again chasing by the police and reaching their ultimate destination in Anibare where the accused hid himself and two policemen were dropped in search of him while one policeman drove to his house. The police had to put siren on.

When the accused was ultimately found, P.W.1 smelt intoxicating liquor. This is the first evidence regarding appearance of the accused. Then P.W.2 Joseph Hubert also talked to the accused after he was found on coming out of the bushes and he also smelt liquor from him. The third witness Const. Tyson Agir has given evidence about seeing the accused walking and staggering on his feet all the way to the Desk, falling on the Desk on approaching it and spitting thrice there. He has further stated that he smelt strong odour of intoxicating liquor from him. In cross-examination P.W.3 claimed to have dealt with many DUI cases in his capacity as Desk Sergeant which shows that he has had adequate experience of dealing with such cases of persons brought under influence of liquor before him. He further added that when a person is brought under this charge, he personally observes him whether he is under influence and, if he finds that he is not, he takes him home. Probably the Ld. defence counsel meant to say that if there is no evidence of slurred speech and bloodshot eyes, the person concerned should not be deemed to be under influence of liquor. It is true that neither of the police officers has stated about slurred speech and bloodshot eyes but whatever evidence is there in this case about appearance of the accused is quite sufficient to put him in the category of a person who had been drinking. It should be borne in mind that the chase continued for quite long. The accused had been successfully eluding the police in order to evade arrest which took good deal of time. His condition may have improved during that time. The three Police Constables are consistent in their testimony with regard to smell and so this fact is amply corroborated. Then there is more evidence about appearance in the testimony of P.W.1 who stated in examination in chief that when the accused came closer in Anibare, he noticed him a little going left and right. This too indicates that he was not steady on his feet and this statement of P.W.1 finds sufficient corroboration in the testimony of P.W.3 who has stated it in different words by saying that he saw the accused staggering all the way to the Desk. He then added that the accused fell on the Desk. The Ld. counsel for the accused with regard to this part of evidence submitted that the Desk has a height on which one has to lean and so the accused must have leaned himself there on. There is no basis for this contention. It is not on record what is the height of the Desk and whether one has to lean on it. No such question was

put to the concerned Desk Sergeant. No foundation is laid on record for this kind of contention. P.W.3 has not stated that the accused leaned on the Desk. His statement is that he fell on the Desk, then there is his statement about the accused spitting thrice and that too is not a normal behaviour of a sober person. Now a question for consideration is whether this duly corroborated evidence with regard to appearance of the accused is worthy of credence. Defence case is of complete denial. The credibility of these 3 witnesses is assailed by defence for different reasons. Annoyance is attributed to P.W.1 and P.W.2. P.W.1, has of course, admitted that he was annoyed and, at the same time, he qualified this statement by saying in the same breath ^{that} he was also afraid of a possible accident. P.W.1 must have felt harassed on account of the accused giving him a slip again and again and then hiding himself. The defence contention is that it was in order to teach a lesson to the accused that the DUI charge was cooked up to enable these two police officers to put the accused behind the bars by locking him up which they could not have done only on a charge of speeding. P.W.2 was also questioned about annoyance and he denied having felt annoyed but he too stated about the fear that the police car may be involved in an accident which could bring a blame on him because he happened to drive it. However, annoyance in the circumstances would be natural. Even if, for arguments' sake, it is accepted that such natural annoyance would result from the action of the accused, it would not apply so far as P.W.3 is concerned. There is nothing on record to show that he was informed of the harassment caused to P.W.1 and P.W.2 by the accused. He has only stated that he asked Const. Hubert why the accused was handcuffed and he was only informed that it was so done because the accused was resisting. On the contrary, it is in evidence that P.W.3 was sympathetic about the accused having been handcuffed. It has been so stated by D.W.1 himself that Tyson asked him whether handcuffs had hurt him. Const. Knox, according to the accused, asked Tyson P.W.3 not to remove handcuffs. P.W.3 did not agree and had one handcuff removed and the other one was got removed by a prisoner with the help of a screwdriver. P.W.3 was not at all vindictive. He had no reason to be so. Neither he was annoyed nor he was angry. He was only doing his duty. What I mean to say that the argument pertaining to annoyance can in no case be applicable

to P.W.3. His statement about the condition and appearance of the accused, in these circumstances, cannot be suspicious by any standards. There is no allegation of any grudge on the part of P.W.3 and so there is no reason why he should not be believed when he says that the accused staggered, fell on the Desk and spat.

Now, the conduct which is another primary fact to be taken into consideration. The nocturnal activities of the accused that night certainly do not bespeak of a state of sobriety. He goes to Larry's place admittedly and remains there in the afternoon and in the evening he went to Ubinide Club and from there at about 11.00 P.M. he went to N.P.C. Staff Club to get a motorcycle from Notte and then he went home and had something to eat and changed his torn pants and then he was on a driving spree around the island, not once but twice. Admittedly he was going fast. He has pleaded guilty to the charge of speeding and there is evidence also about the speed. P.W.2 has stated that he had to go at a speed of 120 K.M./hour at one stage while giving a chase to the motorcycle driven by the accused. He also played hide and seek with the police and tried to put them on wrong track by repeatedly taking U-turns. Ultimately he put the motorcycle on one side of the road of Anibare and then crossed the road and went into hiding on the other side of the road in bushes and thereby put the police on a wrong trail as a result of which the police car had to be driven to his house in search of him. What does this conduct indicate? According to defence he was only evading the police to avoid being caught for speeding. The explanation given by the accused himself as D.W.1 with regard to his hiding himself is that he wanted to see whether the concerned policemen pursuing him were good policemen or bad policemen. The entire sequence of events, according to defence, does not in any way indicate drunken behaviour while, according to prosecution, the accused was scared of being caught of driving under influence and, hence, he was trying to elude the police lest he might be caught and locked up. I have hereinbefore held that the accused did smell of liquor, that he did stagger, that he did fall on the desk at the police station and that he did spit repeatedly there. In continuation of that finding with regard to the appearance of the accused and on consideration of his conduct during the entire series of driving around I feel satisfied that the

conduct of the accused displays nothing short of a state of drunken behaviour. It was in his subconscious mind that the police is after him and so he went on speeding and ultimately hid himself. This is the only irresistible inference that can be drawn from all the surrounding circumstances of his going around the island at a high speed and ultimately hiding himself. Even what happened previous to that is no indication of sobriety. He went home, changed pants and again started driving. He drove once; then reached Yaren and watched a party. Once he turned into airport road and again resumed his journey on the main island road and then again took an about-turn and sped away. It was contended by the Ld. counsel for the accused that going around the island is a device of relaxation amongst the islanders of Nauru. To that extent I am prepared to agree. But I am unable to appreciate the contention to the extent that driving around continuously or even intermittently, taking turn into airport road and again going back sometimes clockwise and sometimes anti-clockwise and continuously driving upto past 4.00 A.M. in the morning is also a Nauruan pastime and a relaxing device. Particularly when one, in the process, tries to elude the police in the manner the accused did and after being nabbed is found smelling of alcohol and on reaching the police station is found staggering, unable to stand erect at the desk and is spitting, he can hardly be considered to be in any state other than of intoxication. This conduct of the accused speaks for itself and leads to the only conclusion that it is probative of intoxication and nothing else.

The other factor that has to be taken into consideration is the manner of driving. In this context, even at the risk of repetition, I have to say the something as hereinbefore stated in the preceding paragraphs. The whole series of the acts of driving at various stages that night indulged in by the accused lead me to conclude that it was driving under the influence of liquor and also amounted to dangerous driving. P.W.2 with reference to the manner of driving deposed that the accused was driving fast and in zig-zagging manner too. Going at a fast speed in a state of sobriety may by itself not be construed as dangerous driving. On the contrary, where a person in a state of inebriation

drives on a public highway at a break-neck speed around the island repeatedly zig-zagging on the way and interrupting the journey by turning into airport road and again taking the island road and intermittently taking U-turns for no rhyme or reason or with intent to evade detection or arrest, it would constitute drunken and dangerous driving. There is evidence on record that there were other cars on the road. P.W.1 and P.W.2 have stated that their police car could be involved in an accident while giving a chase to the accused. It would mean that there was danger to the police car and to other road-users and that fulfills the essential ingredients of the offence of dangerous driving.

It was contended by the Ld. counsel during the course of his submissions that the accused has stated that he was pushed and that may be the reason that he staggered. The argument is devoid of merit. P.W.3 had seen him walking and noticed that he staggered all the way to the desk. The Ld. prosecutor contended in reply that the accused is a heavily built man while P.W.1 and P.W.2 do not at all compare well with the build of the accused and a push by one of them would in no case make the accused stagger on his feet. I accept this argument of prosecution. I have already referred to the statement of P.W.1 in this context that he had seen the accused ' a little going left and right' when they came closer in Anibare.

As regards the accused having been handcuffed, the Ld. prosecutor contended that it is a normal procedure on arrest. It is true, as stated by Ld. defence counsel, that this normal procedure is not normally resorted to. However, I am not prepared to find fault about it because of the peculiar circumstances of the necessity of chasing the accused for a considerable distance and because he had hidden himself in order to evade detection.

According to the case of the defence, the accused ~~did~~ not consume a drop of liquor. It is so stated by D.W.1, D.W.2 and D.W.3. D.W.1 is the accused himself who would naturally say so in his defence. The state of evidence on record and the abounding preponderant probabilities of the case give a definite lie to what the defence witnesses have stated. D.W.2 is a friend and whatever he has stated is of

no help to the defence case because of the time factor. He happened to be with the accused only upto N.P.C. Staff Club. The time of that visit was sometime after 10.00 P.M. It was a long way to go between 10.00 P.M. and 4.00 A.M. and so his evidence is to be ignored so far as the crucial time factor is concerned. D.W.3 is the mother of the accused. She had a glimpse of him from a distance only and that too at about 4.00 A.M. Her anxiety to save her son is natural and understandable. To conclude, the evidence given by D.W.1 is to be ignored because he has given it to save himself, the evidence given by D.W.2 and D.W.3 is interested evidence of a friend and mother respectively and evidence of D.W.2 is also to be discarded as not being relevant while evidence of D.W.3 is further to be ignored being indefinite and uncertain in addition to being interested. The defence evidence adduced in this case in no manner matches the specific and consistent evidence adduced by the prosecution. It is, therefore, liable to be rejected and is hereby rejected.

The result is that I find the prosecution case established beyond any doubt on all the counts. I, therefore, convict Morris Demingauwe accused u/s 21(1), 19(1) and 28(a) of the Motor Traffic Act 1937-73. *the last count on his own plea.*


(S.C. CHATURVEDI)
RESIDENT MAGISTRATE

1.7.82

July 1 1982