IN THE SUPREME COURT OF NAURU

Criminal Jurisdiction

Criminal Appeal No.10/1974

JEAN MACDONALD APPELLANT

vs

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

The appellant was tried by the District Court on 28th March this year on a charge of speeding contrary to section 28(a) of the Motor Traffic Act 1937-1972. Evidence was adduced by the Prosecutor; the appellant then stated she was not giving evidence or calling any witnesses but instead wished to make a submission that there was no such statute as the Motor Traffic Act 1937-1972. The learned Resident Magistrate upheld that submission; he found that there was a statute entitled the Motor Traffic Ordinance 1937-1972, but no statute entitled the Motor Traffic Act 1937-1972. He made no findings of fact but found the appellant not guilty and acquitted her on the ground that the charge disclosed no offence.

The Director of Public Prosecutions appealed and the appeal was upheld by this Court, which ordered that the trial be resumed. It ordered also that the particulars of the charge, which were incorrectly set out and ungrammatical, should be amended into correct grammatical form when the trial was resumed. The statement of the offence charged was to remain the same, subject to a correction made to the title of the Act by the Minister in the intervening period.

On 1st July, 1974, the trial in the District Court was resumed. The appellant was unrepresented. The learned Resident Magistrate accepted an amended charge and placed it on the file of the case record. He then informed the appellant of the directions given by the Supreme Court and read out the amended charge. Immediately thereafter he delivered his judgment, in which he accepted the evidence of the Prosecution witness and found that it established the offence charged. The appellant neither said anything nor was invited to do so between the time when the amended charge was read out and the judgment was delivered.

Section 191(2) of the Criminal Procedure Act 1972, as read with Section 158 of that Act, makes provision for

the amendment of a charge. It can be amended at any stage of the proceedings in the District Court before judgment; but the proviso to section 191(2) regulates the procedure to be adopted and contains provisions to prevent an accused person suffering an injustice by reason of an amendment of the charge. Paragraph (a) of the proviso requires the Court to inform the accused person of the substance of the amendment made and to call upon him to plead to the charge as amended. Paragraph (b) entitles the accused person to demand that the witnesses who have given evidence be recalled to give further evidence.

The provisions of paragraph (a) are mandatory; they were not followed in this case. However, Mrs. Billeam has submitted that no substantial miscarriage of justice resulted from the error. The appellant had pleaded not guilty and the Court continued to treat her as having pleaded so. I accept the submission, therefore, that that error did not result in a substantial miscarriage of justice.

However, Mr. Clark has pointed out that the appellant was unrepresented and that the learned trial Magistrate did not inform her of her right to have the Prosecution witness recalled. He has submitted that this failure was unfair to the appellant. Mrs. Billeam has drawn attention to the fact that the Act lays no duty on the Court to inform an accused person of his rights under paragraph (b) and that, in any case, the appellant could only have recalled the police officer who gave evidence of her speeding and he was unlikely to have changed his evidence; so that she would have gained nothing by exercising her right.

The second limb of that argument cannot be accepted as valid. This Court cannot surmise what effect cross-examination by the appellant might have had on the witness. But the matter goes a lot further than the question of whether or not the Court should have informed the appellant of her rights under paragraph (b). When an accused person is unrepresented, the Court must take particular care to ensure that his trial is absolutely fair. In this case the appellant on 28th March had expressed herself in such a manner, before objecting to the charge, that technically she had closed her defence. That being so, she had no statutory right after the charge was amended, to re-open her defence and give evidence herself. But the Courts have a duty to ensure that all accused persons appearing before them are given a full

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opportunity to present their cases, that is to say to adduce evidence and to present arguments of fact and law. In the present case, in view of the manner in which the trial had proceeded on 28th March, the learned Resident Magistrate might reasonably have given the appellant a further opportunity to adduce evidence if she wished. But, in any event, he should have given her an opportunity to argue the merits of her case on the basis of the amended charge. In the absence of evidence rebutting the police officer's evidence, the chances of her making out a convincing argument would no doubt have been small. But she should have been given the opportunity.

In the circumstances, there has been a miscarriage of justice and it would be unsafe to allow the conviction to stand. The conviction is quashed and the sentence set aside.

2nd October, 1974

I.R. Thompson
CHIEF JUSTICE