Lamie, J. 672

IN THE SUPREME COURT OF PAPUA NEW GUINEA

CORAM : FROST, SPJ.
Tuesday,
21st March, 1972

JOHN HANUNU
Appellant

- and -

COSMAS PULAI
Respondent

REASONS FOR JUDGMENT

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Mar. 13, 21
RABAUL
Frost, SPJ.

Pursuant to the notice of appeal this is an appeal against the appellant's conviction by the District Court at Rabaul on 14th December, 1971 of having been found drunk in a public place, to wit, the public section of Tomaringa Police Station contrary to the provisions of the Police Offences Ordinanance, and "the deeming of the appellant by the Court to be an idle and disorderly person" whereby the appellant was fined the sum of $60.00 payable forthwith in default three months' imprisonment with hard labour.

From the record of proceedings it appears that having been charged with the offence of having been found drunk in a public place, the appellant admitted the truth of the information. The brief statement of facts - "the defendant was seen at the mentioned place at 8.00 p.m. and was observed to be in a drunken condition" - was then read over, to which the appellant made no statement, and the appellant was accordingly convicted as charged. Counsel for the appellant conceded that that conviction was properly made, and the appeal is taken in respect of the proceedings which followed and which led to his conviction under Section 68(1)(b). From the record it appears that an application was made under that section that the appellant be declared an habitual drunkard. The

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Prosecution informed the Court of the previous convictions of the appellant, which included five convictions for drunkenness within the preceding twelve months period, a further four convictions going back to 12th May, 1970, all of which the appellant admitted. From his reasons for judgment, the Magistrate then explained the nature of the application to the appellant, who indicated that he understood. The appellant elected to say nothing to the court. The Magistrate then proceeded to consider the meaning of the section, the relevant portion of which is in the following terms:-

> "(1) Any person committing any of the following offences shall be deemed to be an idle and disorderly person:-
>
> (a) .....
>
> (b) any habitual drunkard having been thrice convicted of drunkenness within the preceding twelve months, or any common prostitute who, in or on any public place, behaves in a riotous or indecent manner;
>
> .....
>
> (2) Any person convicted of being an idle and disorderly person within the meaning of the last preceding sub-section shall be guilty of an offence".

The conclusion the Magistrate came to was that "either (a) the section was itself a definition of the term (of habitual drunkard), in that such was a person thrice convicted of drunkenness within the preceding twelve months, or (b) that the matter was a question for the court to decide". The Magistrate then considered it was open to infer that the appellant was an habitual drunkard from his convictions for drunkenness over the period I have referred to, and

further that convictions, which the appellant had also admitted from 15/10/68 involving vagrancy, drunk and disorderly offences, behaving in a riotous manner, gaming and violence, whilst not essential, reinforced his feeling that the appellant was such a person that the section was meant to cover. The Magistrate, to use his own words, "having deemed the appeallant an idle and disorderly person", for reasons which he then gave, proceeded to impose a penalty by way of fine.

It was significant that those words were used, without reference to a conviction, because it seems that the Magistrate did not appreciate that, from the introductory words of Section 68(1), and also from Section 68(2), the section provided for an offence of being an idle and disorderly person, otherwise he would have entered in the record of proceedings whether, in accordance with the procedure provided for the hearing of simple offences, he had ascertained from the appellant whether or not he had admitted the truth of the information, which, in this case, was obviously a verbal one, pursuant to Section 135 of the District Courts Ordinance. From the absence of any such note, it appears that this procedure was not carried out, although the appellant was given an opportunity of defending himself upon the alleged charge of being an habitual drunkard.

However, counsel for the appellant attacked the conviction on more fundamental grounds than the failure to observe the proper procedure.

The main ground of appeal was that there was no charge before the Court of an offence in respect of which the appellant could be deemed by the court to be an idle and disorderly person. Counsel for the appellant submitted that the Magistrate had mistaken the grammatical meaning of the sub-section, and the offence prescribed by Section 68(1)(b) was committed only if all the following elements were proved, viz - proof that a person was an "habitual drunkard having been thrice convicted of drunkenness within the preceding twelve months ..... who, in or on any public place, behaves in a riotous or indecentmanner". As there was no charge or any evidence before the court other than that relating to habitual drunkenness or alleging riotous or indecent behaviour

in a public place he submitted the appellant could not have been convicted under the section. As a matter of construction counsel for the appellant thus submitted that the final relative clause in sub- section 1(b) qualified both, "any habitual drunkard" etc. and also any common prostitute. In my opinion the sub-section should be so construed upon the plain meaning of the words of the section. This construction is supported by the history of the legislation which is derived from the Imperial Vagrancy Act, 5 Geo. IV C.83, and by reference to two Australian statutes also derived from that legislation. Thus, the Vagrancy Act 1902 of New South Wales specifically provides that -

> "Whosoever .....
>
> (d) being an habitual drunkard, thrice convicted of drunkenness within the preceding twelve months, behaves in a riotous or indecent manner in any street, public highway, or place of public resort"

shall be liable on conviction to the penalties provided (Section 4(1)(d)); and the Vagrants, Gaming and Other Offences Act 1931 to 1949, of Queensland provides that any person who "being an habitual drunkard, behaves in a riotous, disorderly or indecent manner in any public place" shall be deemed to be a vagrant (Section 4(1)(IV)). In my opinion, it is proper to have regard to these statutes which indicate that the vagrancy legislation was never intended to be applied to a person alleged to be an habitual drunkard without proof of riotous or indecent behaviour in a public place on the part of such person.

Accordingly this ground of appeal is made out. However, I should point out that the Magistrate erred in holding that proof of three convictions of drunkenness within the preceding twelve months was sufficient evidence of the appellant being an habitual drunkard. See O'Connor v. Dawson (1). Further the mere proof of the convictions was also not in itself sufficient evidence. See Tate v. Tate (2).

Accordingly, the appeal will be allowed, the conviction and sentence quashed.

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(1) (1909) 26 W.N. (N.S.W.) 74
(2) (1893) 14 N.S.W.L.R. 1 (cited Kennedy Allan p.126)