SC 823

IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM : FROST, C.J.
Monday,
3rd March 1975.

APPEAL NO.174/74(P)

BETWEEN : KAPENA BOE ARUA
Appellant

AND : ANTHONY BULANASOI
Respondent

1975
Feb 27,28.
Mar 3.
PORT MORESBY.

Frost, C.J.

This is an appeal under s.43 of the Local Courts Act 1963 against the severity of a penalty prescribed under s.21 of the Motor Traffic Act 1950-1970 * upon the conviction of the appellant under Regulation 56(1)(a) of the Motor Traffic Regulations for driving a motor vehicle upon a public street in a town at a greater speed than 30 miles per hour. The penalty prescribed is $100.00.

In this case the appellant was fined $13.00 and in addition under s.21 of the Act the Court ordered that his licence to drive should be cancelled, and that he should be disqualified from obtaining a licence during a period of suspension of nine months.

The only facts before the Court were that the appellant on 1st November 1974 at 5-Mile within the city of Port Moresby and within a 30mile an hour zone drove his Holden Station Sedan upon the Hubert Murray Highway at a speed of 70 miles per hour. The appellant's counsel stated that the offence had been detected by an amphometer.

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* 21.-(1.) The Court before whom a person is convicted of an offence against or contravention of any provision of this Ordinance or the Regulations may, in addition to any other punishment to which he may be liable under this Ordinance or the Regulations in respect of the offence or contravention -

(a) if the person convicted holds a licence under the Regulations -
(i) suspend that licence for such time as the Court thinks fit, and if the Court thinks fit, also direct that no licence shall be issued to that person during such further time after the expiration of the licence as the Court thinks fit; or
(ii) cancel the licence and, if the Court thinks fit, declare the person convicted to be disqualified from obtaining a licence for such time as the Court thinks fit;

(b) if the person convicted does not hold a licence under the Regulations, direct that no licence shall be issued to that person during such time as the Court thinks fit.

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It was the appellant's first traffic offence over a period of 13 years during which he had been licensed to drive. He is employed as a senior journalist by the National Broadcasting Commission; his work requires him to drive a motor vehicle when called on at any time during the day or night, and he has the further need of a car to attend lectures and tutorials at the University where he is taking a course part-time. During the period of five weeks of disqualification before the order was stayed pending this appeal he tried to make use of taxis in the course of his work but this did not prove an effective substitute for the use of his own vehicle.

The first ground of appeal was that the order for disqualification was invalid and should be quashed because the appellant was not asked before the learned Stipendiary Magistrate exercised his power to disqualify if the appellant had anything to say specifically on that subject.

His Counsel relied upon certain South Australian cases which establish that before an order is made under the provisions of the Road Traffic Act 1961-72 of that State disqualifying a defendant from holding or obtaining a driver's licence the defendant should as a matter of practice and procedure be informed that the Court has the power to make such an order and should be asked if he has anything to say upon that subject: Cooling v. Steel (1), Wyngaarden v. Samuels (2), Hanley v. Steel (3).

However, under s.168 of that Act the Court's power to disqualify is much wider than in the Papua New Guinea provision, for it extends to offences in the commission of which a motor vehicle was used or the commission of which was facilitated by the use of a motor vehicle, so that a defendant might be taken by surprise unless a warning were given if his offence had no relation to the driving of a vehicle. Further, if the House of Assembly had intended such a rule in Papua New Guinea it could be said that it would have so prescribed.

On the whole I can see no warrant for this Court to go so far as to import into the Act any such ground of invalidity of the Local Court's order. I thus agree with the conclusion of Prentice J. in John Kamir v. Peneia Woi Woi (4) in which the same argument as was put before me was rejected.

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(1) (1971-72) 2 S.A.S.R.249.
(2) (1973) 4 S.A.S.R.420.
(3) (1973) 5 S.A.S.R.242.
(4) (Unreported) Judgment No.817 - 13 Dec 74.

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But I also agree with Prentice J. that the magistrate should be careful in a driving case to get from the offender full particulars as to the appellant's circumstances, and that it is desirable to seek his comments upon the subject of disqualification. Otherwise this Court is likely to have a spate of appeals which would also impose burdens upon the magistrates in submitting reasons for decision.

The second ground of appeal was that the penalty of disqualification was manifestly excessive. Having regard to the high speed admitted to by the appellant in my opinion it would be wrong for this Court to hold that an order for cancellation for some period should not have been made, and it is only the period of nine months' suspension which is open to challenge.

Upon this matter I have had the assistance of the magistrates' sentencing policy which the learned Stipendiary Magistrate very usefully set out in his reasons for conviction and sentence. It appears that at a conference of all the magistrates of the Boroko District and Local Courts it was decided that "in the light of the evident deteriorating standard of driving in the city of Port Moresby, and the consequent high incidence of serious road accidents.....much greater use should be made of the power to cancel and suspend driving licences for speeding offences and other cases where there was a flagrant disregard of traffic laws."

It was only after wide publicity that the Courts began to impose disqualification for speeding offences. Apparently a general scale was agreed on -- for charges of exceeding the speed limit periods of cancellation or suspension were ordered varying from three days to three months for speeds up to 45 miles per hour and six months for admitted speeds of up to 55-60 miles per hour. It was upon this scale that the penalty of nine months' disqualification was fixed in the present case, the fine being kept low having regard to the appellant's income of $130.00 per fortnight.

Now the magistrates are in as good a position as the judges to know the incidence of speeding offences, and I accept their views that the time has come in Port Moresby for licences to be suspended in an effort to reduce these offences. (<u>Burke v. Muir</u> (5) per Fox J. at p.302). But as the House of Assembly has not enacted in this type of case a mandatory penalty of disqualification, the power should only be exercised in proper cases. Further, "any flexible general standard (of penalty) must be adjusted in accordance with the particular circumstances of each case" - <u>Flanagan v. Knowles</u> (6) per Burbury C.J. at p.307.

(5) (1967) 15 F.L.R.300. (6) (1957) Tas S.R.301.

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A Judge or a Magistrate cannot put aside his duty to exercise his discretion in each particular case simply by relying on a general scale drawn up by himself or the magistrates generally. Quite apart from the rate of speed the circumstances of each case of course vary. In this case there was no evidence of the existence of any other traffic or pedestrians in the vicinity, nor was it alleged that any condition of danger or obstruction was caused to anyone. There was no suggestion that the weather was other than fine. These are matters properly to be considered. (Wilkeson v. Grant (7) per Minogue J. (as he then was) at p.117). Matters also for the magistrate's consideration were the appellant's previous good record over a period of 13 years, and the stigma which disqualification involves. Although, as the learned magistrate pointed out, this was not a case in which the appellant's living was dependent upon being able to drive, that can be an extenuating consideration. Flanagan v. Knowles (8)(supra) at p.308.

There was one other matter which in my opinion the magistrate failed to take into account. Port Moresby is not at this stage of its development a city with an adequately developed public transport system. People living in Port Moresby drive cars for the main reason that they cannot without great inconvenience otherwise get to and from work or, in many cases, perform the daily duties of their employment. I exclude the inconvenience and expense incurred, as in this case, by the employer. For a driver to be deprived of his right to drive in Port Moresby for periods of even two or three months is a real hardship such as to constitute a sufficient deterrent to the ordinary road user. (The case of the lunatic driver who "knows no law" can be put to one side).

If such periods of disqualification do not deter in cases when all that is alleged against the defendant is exceeding the speed limit without aggravating factors other than speed, it will be time enough then for the magistrates to increase the period of suspension.

In my opinion periods of disqualification of the order imposed in this case should be reserved for cases of driving under the influence of liquor or driving at a speed or manner which is dangerous to the public.

I would therefore upon the second ground allow the appeal. However, in view of the appellant's high speed this case is an exceptional one and I would substitute a period of suspension of five months during which he is to be disqualified from obtaining a licence.

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(7) (1967-68) P.N.G.L.R.112.
(8) (1957) Tas.S.R. 301.

Conviction affirmed, appeal allowed as to penalty, and in lieu of the period of nine months' suspension declare the appellant to be disqualified from obtaining a licence for five months, of which five weeks has already been undergone.

Solicitor for the Appellant : Mr. N.H. Pratt, A/Public Solicitor.

Counsel for the Appellant : Mr. C.F. Wall.

Solicitor for the Respondent: Mr. P.J. Clay, Crown Solicitor.

Counsel for the Respondent : Mr. B.J. Cassells.