POLICE v PULA (TAVITA)

Supreme Court Apia
7, 18 April 1978
Nicholson CJ

STATUTORY OFFENCES - Defendant charged with three driving offences contrary to the Road Traffic Ordinance 1960, viz., negligent driving causing bodily harm (s 39A), failing to stop after an accident (s 44(1)), and driving while under the influence of drink (s 40) - Magistrate dismissing all three charges having found that no prima facie case had been made out in respect to any of the charges for the reason that it was doubtful whether the accident occurred on a road and the identity of the driver of the motor vehicle in question had not been established to his satisfaction:

Held, on appeal by way of case stated, that for the offence of negligent driving causing bodily harm it is unnecessary to prove driving "on a road" and such words in the charge were mere surplusage, the mention of a specific road in the information being for the purpose of designating the area where the accident occurred;

that for the offence of failing to stop after an accident it is unnecessary to prove the accident occurred on a road as use of a motor vehicle cannot be held to imply use on a road: Police v Moore [1977] NZLR 567 referred to; also, there was conflicting evidence as to whether or not defendant did stop, and even a brief stop would satisfy the requirements of the section: Laughton v Christchurch City [1970] NZLR 1114, Police v Houten [1971] NZLR 903 referred to; (However, the information charging this offence failed to allege the defendant was the driver of the vehicle in question and was therefore a nullity.)

that with respect to the offence of driving while under the influence of drink there was ample evidence that the vehicle was driven on a road immediately before and after the accident, and the Magistrate's finding being inconsistent with the facts and the evidence was reversed: Transport Department v Giles [1965] NZLR 726 applied.

(Evidence) - Statement to Police (Admissibility) - Statement of defendant ruled inadmissible because of failure to comply with Judges' Rules - No evidence that caution given by Police, nor was there any evidence that it was necessary in the circumstances - Record not disclosing whether or not Magistrate had exercised his discretion as to admissibility - Held, the Magistrate had erred in excluding defendant's statement.

- Eye witness accounts of accident and subsequent driving of vehicle leading to only one reasonable conclusion, viz., that prima facie defendant was the driver at the time of the accident and at the time of the relevant driving.

CASE STATED pursuant to s 131 of the Criminal Procedure Act 1972 to determine whether Magistrate erred in dismissing three driving charges against defendant.

Question answered in the affirmative and charges of negligent driving causing bodily injury and driving while under the influence of drink

remitted for continuation of hearing.

Charge of failing to stop after an accident dismissed.

Sapolu for prosecution.
Epati for defendant.

Cur adv vult

NICHOLSON CJ. This is an appeal by way of case stated pursuant to section 131 of the Criminal Procedure Act 1972, against the decision of Mr F.J. Thomsen, Magistrate, sitting in Apia on the 14th December, 1977 when he dismissed three charges relating to driving offences against the defendant, finding that no prima facie case had been made out in respect of all three charges.

The learned Magistrate recorded his reasons in the following terms. "Don't need to hear counsel. Spot where the accident occurred doubtful whether road or not. In any case, identity of driver has not been established to my satisfaction, so information dismissed as no case to answer." The appellant challenges that determination as being erroneous in law.

The brief statement of evidence adduced by the prosecution before the learned Magistrate is that a blue taxi with at least two persons in it attempted a U-turn on Main Beach Road, Apia on 13th November, 1977 and in the process left the normal carriageway and crossed the line of the footpath and collided with a pedestrian, Mr Belzer, causing him injury. The car then drove down between two buildings where it was seen to stop and possibly the doors were opened. Within one to two minutes the same vehicle drove on around a building and back on to the road at which time the driver was recognised by an eye witness to the accident, Havila Lo Tam, as the respondent. The same witness said in her evidence, "Know driver Tavita - knew him well as my aiga . . . . He drove car at time of accident." Later, she said, "Car had come around between buildings when I recognised driver." Later again, she said, "Only know Tavita driver for certain when it came past again."

I propose first to deal with the first ground upon which the learned Magistrate based his findings, that there is no case to answer, namely, that it was not proved that the offences were committed on a road. It will be observed that the learned Magistrate did not assign particular reasons to the three informations separately. In his case as stated to this Court, he stated that the question relating to whether the alleged offences occurred on a road was a reason for dismissing only the charge of negligent driving causing injury.

For the avoidance of doubt, however, I will deal with this reason in relation to all three charges. The first charge is an allegation that the defendant failed to stop after an accident contrary to the terms of section 44.(1) of the Road Traffic Ordinance 1960. That section reads:-

> Where an accident arising directly or indirectly from the use of a motor vehicle occurs to any person or to any horse or vehicle in charge of any person, the driver of the motor vehicle shall stop, and shall also ascertain whether he has injured any person, in which event it shall be his duty to render all practicable assistance to the injured person including transportation of that person to the hospital.

It will readily be seen that the section does not require as an ingredient of the offence that the offence or the accident occurred "on a road." The expression "use of a motor vehicle" is not the subject of interpretation in the Ordinance, so that I think it impossible to argue that that expression implies use on a road. In this respect, I refer to the New Zealand case of the Police v. Moore [1977] 1 NZLR 567,

where Casey J. held that the provisions of the Transport Act 1962 of New Zealand show an intention on the part of the Legislature in some instances to restrict some offences to actions or behaviour on any road, but in other cases to place no restriction on the locus criminis. The expression "use of a motor vehicle" was also considered in that decision and was held not to include use on a road. There is a parallel position in the Road Traffic Ordinance 1960 of Western Samoa and the Transport Act 1962 of New Zealand in that some driving offences are specified as requiring to be committed on a road; others are not.

I conclude from the words of section 44.(1) that to establish a prima facie case of failing to stop after an accident, it is not necessary to prove that the offence or the accident occurred on a road.

Before I leave the question of the information charging failing to stop, I feel I must point out that the information has a fatal defect in that it contains no allegation that the defendant was the driver of the vehicle in question so as to establish his obligation to stop. The charge simply reads that, "at Apia on 13th November, 1977, Tavita Pula of Lepea where an accident arising directly from the use of the motor vehicle, namely, a taxi registered plate number T.1126 occurred to Frederick Belzer, male of Vaiala, did fail to stop." The information discloses no offence and is therefore a nullity. I further draw to the attention of counsel for the appellant two New Zealand decisions based upon the New Zealand equivalent of section 44, Laughton v. Christchurch City [1970] NZLR 1114 and Police v. Houten [1971] NZLR 903 on the question of what amounts to a failure to stop. I do so because the evidence adduced by the prosecution is conflicting as to whether there was a stopping or not. If there were a brief stop, on the authority of those two cases, that brief stop may well have been sufficient to satisfy the requirements of section 44.(1). The more appropriate charge would have been the alternative one provided for in section 44.(1), viz., failing to ascertain whether anyone had been injured.

As to the second information of driving under the influence of drink, there was ample evidence that the vehicle in question was driven on Main Beach Road immediately before and shortly after the accident involving Mr Belzer. On the authority of Transport Department v. Giles [1965] NZLR 726, I conclude I have the power to intervene to disturb the Magistrate's finding in this respect, which I conclude was inconsistent with the facts and contradictory to them.

As to the third information, the same reasoning as to the charge of failing to stop applies. In this case the information alleges that, "on 13th day of November, 1977, Tavita Pula of Lepea being the driver of a motor vehicle, namely, a taxi registered plate number T.1126, negligently drove such motor vehicle on a road, namely, Main Beach Road, and did thereby cause bodily injury to Frederick Belzer, male of Vaiala."

Section 39A of the Road Traffic Ordinance 1960 reads as follows:-

> Every person commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding five hundred pounds who recklessly or negligently drives or rides any vehicle and thereby causes bodily injury to or the death of any person.

Again the words, "on a road", do not appear in the section and, applying Police v. Moore, supra, I conclude that there was no burden on the prosecution to prove that the accident occurred on a road. I accept the appellant's argument that the words, "on a road", appearing in the charge are mere surplusage and of no consequence. The mention of Main Beach Road was necessary to the charge merely to establish the approximate area of the accident as the appellant suggests.

I conclude that the learned Magistrate erred in law in assigning the first ground for the finding of no prima facie case, in respect of all three informations.

I turn to the second ground for the finding, viz., that the learned Magistrate was not satisfied on the question of the driver's identity at the times of the alleged offences.

Upon consideration of the evidence before the Court, I accept the submission of the appellant that the learned Magistrate could have reasonably arrived at only one conclusion, viz., that the appellant had established prima facie that the respondent was the driver when the accident occurred and when the relevant driving occurred.

There is no evidence of any change of drivers or even that any of the car's occupants alighted from the car during the one or two minutes between the accident and Havila seeing the car return towards the road, a period during a proportion of which it was apparently within the view of the eye witness, Captain Evans. It is not for the Court to speculate on possible lines of defence in considering whether there is a case to answer.

I conclude the learned Magistrate erred in assigning the second ground for finding there was no prima facie case made out.

Finally, I turn to the question of the admissibility of the statement made by the respondent to the Police. The notes of evidence are brief in this respect but they do reveal that the learned Magistrate ruled the statement inadmissible as against the Judges' Rules. There is evidence that the statement was made without a caution, but there is no evidence that the conditions under which the respondent was being interrogated were such as to make a caution necessary. There was no evidence that he was under arrest, nor that the Police officer concerned had made up his mind to charge the respondent before he began questioning him. In any event, even if the situation were one which required a caution, the absence of the caution alone does not automatically exclude evidence of the statement. The learned Magistrate would still have to exercise a discretion as to whether or not he should admit the statement. The record does not show whether he exercised that discretion or not.

On the evidence recorded, I find the learned Magistrate erred in law in excluding the evidence of respondent's statement.

The question posed upon the case is answered in the affirmative and the charges of driving under the influence and negligent driving causing injury are remitted to the learned Magistrate to continue the hearing of them. The remaining information for failing to stop was correctly dismissed for the reason I have given.

I make no order as to costs.