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IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction

CRIMINAL APPEAL NO. 33 OF 1978

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

v.

MOHAMMED SHAMEEM Respondent
s/o Mohammed Munif

A. Gates for the Appellant
S.R. Shankar for the Respondent

Date of Hearing : 14th July, 1978
Delivery of Judgment: 3rd August, 1978

JUDGMENT OF THE COURT

This is an appeal against the judgment of the Supreme Court given at Lautoka on 16th June 1978 allowing an appeal from the Magistrates Court at Tavua in which the respondent was convicted of careless driving contrary to section 37 of the Traffic Ordinance Cap. 152 and fined \$40; an order also being made that his driving licence be endorsed. He was summoned to appear in the Court by a notice issued by a police officer under the provisions of section 81 of the Criminal Procedure Code. Under section 81(4) this process is available to all offences punishable by fine or by imprisonment, with or without a fine, for a term not exceeding three months. The appellant appealed to the Supreme Court on the ground that his trial in the Magistrates Court was a nullity because the punishment for that offence included possible disqualification, and thus exceeded that laid down in section 81(4).

The learned Judge on the appeal held that the offence of which the appellant was convicted was punishable by more than the fine and imprisonment laid down in section 81(4), and that therefore the proceedings in the Magistrates Court were a nullity.

(2)

The learned Judge quashed the conviction, set aside the sentence, and ordered that the fine, if paid, should be refunded.

This present appeal is brought by the Director of Public Prosecutions on the ground that the learned appellate Judge erred in law in holding that the procedure provided by section 81 of the Criminal Procedure Code cannot be used for offences which, although punishable only by a fine or imprisonment for a term not exceeding three months, also carry the possible penalty of disqualification from driving.

In 1969 both the Traffic Ordinance (Cap.152) and the Criminal Procedure Code (Cap.14) were amended. Section 29 of the Traffic Ordinance, which provides for disqualification and endorsement of driving licences for certain offences, was extended in its operation by section 9 of the amendment. Section 31, which provided for endorsement of licences was also amended : vide section 10. This section required the production of a driving licence at the hearing of any charge. It is clear from these amendments that the law in relation to disqualification from driving and the endorsement of driving licences for offences under the Ordinance were extended by being made more effective.

By the Criminal Procedure Code (Amendment) 1969, section 89 of the principal Ordinance (Cap.14) was amended by adding the words "or by disqualification from holding or obtaining a driving licence". The effect of this amendment is that on the hearing of a summons a Magistrate may dispense with the personal attendance of an accused when the offence is :

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"Punishable only by fine or only by fine and/or imprisonment not exceeding 3 months or by disqualification from holding or obtaining a driving licence."

If the provisions were so left it might result in disqualification being imposed in absentia but the right of the subject was protected by adding subsection 2A which dealt with proof of a previous conviction when that was relevant and by substituting a new section 4 which reads :

"(4) Where the magistrate is of the opinion that it would be just to order disqualification under the provisions of section 29 of the Traffic Ordinance against an accused person whose personal appearance has been dispensed with under the provisions of this section, he shall order a summons to be served upon the accused calling upon him to show cause why such disqualification should not be imposed and, if the accused person does not attend upon the return of such summons or fails to show good cause why the disqualification should not be imposed, the magistrate may order disqualification."

Thus under the amendment a person who was proceeded against by summons, and whose personal attendance was dispensed with was not liable to have his licence cancelled without being served with a summons and given an opportunity to be heard.

The code of Criminal Procedure, by section 81, provided for a procedure alternative to the issue of a summons. In 1969 this procedure was also amended. Subsection (1) made it lawful for

(4)

any police officer to serve a notice in a form prescribed in the rules requiring a person, reasonably expected to have committed an offence (defined in subsection 4), to attend Court in answer to the charge. A new subsection (2) was enacted in the following form :

"(2) A notice served in accordance with the provisions of the last preceding subsection shall for all purposes be regarded as a summons issued under the provisions of this Code and, in the event of a person upon whom such a notice has been served failing to comply with the requirements of the notice, a warrant for the arrest of such person may be issued notwithstanding that no complaint has been made on oath."

Subsection (4) defined the class of offences to which section 81 applies. It reads :

"(4) This section shall apply to all offences punishable by fine or by imprisonment with or without a fine, for a term not exceeding three months."

The form of notice (form 9) prescribed for use under section 81 contained the following provision after giving due notice of the charge and the date and place of attendance at Court:

"Provided that your personal attendance will be excused and the case then be disposed of in your absence if -

- (a) you admit the offence and plead guilty in writing ; or
- (b) you appear by barrister and solicitor."

Thus both under section 81 and section 89 personal appearance may be dispensed with.

(5)

It will be noticed that the operation of section 89(4), which requires a further summons to be issued before disqualification is ordered, is confined to "an accused person whose personal appearance has been dispensed with under the provisions of this section." It therefore does not apply to a notice issued under section 81. The crucial question in the present appeal is whether the words "offence punishable by fine or by imprisonment with or without fine for a term not exceeding three months" in section 81(4) include an offence which is punishable also by the imposition of disqualification. If it does include such an offence then an anomalous position arises in that an accused may, in his absence, have a disqualification imposed on him but no such punishment may be imposed under section 89. This because subsection (4) requires the issue of a further summons. We do not consider that the legislation intended to create such an anomaly and if there is a reasonable construction which will avoid it, that construction should be given to the legislation.

In our opinion, in view of the scheme of amendment we have set out both in respect of the Traffic Ordinance and in respect of the Criminal Procedure Code, a disqualification is a punishment within the meaning of the word "punishable" in both section 89(1) and section 81(4). If the legislature intended to include a disqualification in section 81(4) it would have so defined the offences to which section 81 applies. When a punishment, to which a disqualification was intended to apply, the legislation said so as is the case in section 89(1).

On this construction the anomaly of imposing a disqualification without notice of a hearing is avoided. The respective offences in section 81 and section 89 are defined, by the use of the word "punishable", to punishments and it is clear from section 89(1) that the legislature considered a disqualification was a punishment. Three types of punishment are recognised by the legislation, namely fine, imprisonment for three months (with or without a fine) and disqualification. "Punishable" is to be construed in that sense. Accordingly in section 89 it includes disqualification but in section 81 the omission to include it means that those offences punishable by disqualification are not included.

We agree with the learned Judge that the proceedings were a nullity.

This appeal has been decided solely on a question of jurisdiction. No injustice resulted to respondent because the Magistrate did not intend to add a disqualification to the punishment meted out. The procedure selected by the prosecution was not available for this particular offence so the Court was without jurisdiction and respondent was entitled to have the proceedings dismissed.

The appeal is dismissed and the judgment in the Supreme Court is affirmed.

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

(Sgd.) T. Henry
JUDGE OF APPEAL

(Sgd.) B.C. Spring
JUDGE OF APPEAL