A

DIRECTOR OF PUBLIC PROSECUTIONS

v.

BISSUN PRASAD

B

[SUPREME COURT, 1974 (Grant Ag. C.J.), 22nd February]

Appellate Jurisdiction

Criminal law—practice and procedure—notice to attend court—Criminal Procedure Code (Cap. 14) s. 81—when such notice valid.

C *Criminal law—sentence—driving whilst disqualified—Traffic Ordinance (Cap. 152) s. 30(4)—imprisonment proper sentence unless special circumstances warrant lesser punishment.*

The respondent, charged with driving whilst disqualified, was served with a written notice to attend court under Criminal Procedure Code s. 81. At the hearing he was convicted and fined $50.

D On appeal against leniency of sentence it was held that the proceedings before the Magistrate's Court we e null and void as the notice to attend court only related to offences where a minimum sentence of three months imprisonment could be imposed, and driving whilst disqualified was punishable by imprisonment for a term of upto six months. It was a fundamental error in the institution of proceedings which could not be remedied by entry of appearance or waiver.

E *Per curiam:* In any event, as no finding of special circumstances had been made by the trial magistrate, a term of imprisonment was obligatory and the imposition of a fine was wrong in principle.

Cases referred to:

Thorne v. Priestnall [1897] 1 Q.B. 159.

Beardsley v. Giddings [1904] 1 K.B. 847. 68 J.P. 222.

F *R. v. Wakeley* [1920] 1 K.B. 688; 14 Cr. App. R. 121.

Hargreaves v. Alderson [1963] Crim. L.R. 46; [1962] 3 All E.R. 1019.

Appeal by the Director of Public Prosecution against the sentence imposed on the respondent in the Magistrate's Court for driving whilst disqualified, and a cross appeal by the respondent against his conviction.

GRANT Ag. C.J.: [22nd February 1974]—

G On the 18th of June, 1973 at Suva Magistrate's Court the respondent was convicted of driving a motor vehicle whilst under the influence of drink contrary to section 39(1) of the Traffic Ordinance for which offence he was fined $50 and disqualified from holding or obtaining a driving licence for two years.

On the 1st November 1973 the respondent was discovered by the police to be driving a taxi on a road and was served with a notice to attend Court to answer
H to the charge stated thereon of driving a motor vehicle while disqualified from holding or obtaining a driving licence contrary to section 30(4) of the Traffic Ordinance, and on the 12th December 1973 at Suva Magistrate's Court he was convicted of that offence and sentenced to a fine of $50.

The Director of Public Prosecutions on behalf of the Crown has appealed against the sentence imposed for the latter offence on the grounds that the learned Magistrate erred in law in not imposing a term of imprisonment in the absence of special circumstances making a fine an adequate punishment for the offence, and that the sentence is wrong in principle and/or manifestly lenient having regard to the nature and circumstances of the offence.

By driving while disqualified a perpetrator not only commits that offence but is also driving without a driving licence, without effective third party insurance, and in contempt of a court order.

In normal circumstances, in view of its serious features, the only appropriate sentence for the offence is one of imprisonment and this is given statutory force by section 30(4) of the Traffic Ordinance which provides that if a person drives a motor vehicle on a road while disqualified from holding or obtaining a driving licence he shall be liable on conviction to imprisonment for a term not exceeding six months unless the court thinks that, having regard to the special circumstances of the case, a fine would be an adequate punishment for the offence.

The trial Magistrate made no finding of special circumstances, and indeed none was disclosed. Consequently the imposition of a fine was wrong in principle.

However on the hearing of this appeal counsel for the respondent submitted that the proceedings before the Magistrate's Court were a nullity; and as the respondent had not been represented by counsel in the lower court the objection was heard (section 323 of the Criminal Procedure Code).

Section 81 of the Criminal Procedure Code provides as follows—

> " (1) Notwithstanding the other requirements of this Code, it shall be lawful for any police officer to institute proceedings by and to serve personally upon any person who is reasonably suspected of having committed any offence to which this section applies a notice in the prescribed form requiring such person to attend court in answer to the charge stated thereon at such place and on such date and time (not being less than ten days from the date of such service) as shown on such notice or to appear by barrister and solicitor or to enter a written plea of guilty:
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> Provided that such notice shall be served not later than fourteen days from the date upon which the offence is alleged to have been committed.
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> (2) A notice served in accordance with the provisions of last preceding subsection shall for all purposes he 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.
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> (3) A copy of such notice shall be signed by the police officer preferring the charge and shall be placed before the court by which the charge is to be heard before the time fixed for such hearing.
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> (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.
>
> (5) Nothing in this section shall be deemed to prevent the institution of proceedings under the other provisions of this Code."

A In the case the subject matter of this appeal no complaint or formal charge was laid under the provisions of section 79 of the Criminal Procedure Code, the prosecution choosing to institute proceedings under the provisions of section 81(1) of the Criminal Procedure Code by way of a notice to attend court; but the offence to which the notice to attend court related is not an offence to which section 81(1) applies, as by virtue of section 81(4) the section is limited to offences punishable by fine and/or by imprisonment for a term not exceeding three months whereas the offence in question is punishable by imprisonment for a term not exceeding six
B months.

This is not a matter of defective service which may be remedied by the appearance of an accused but is a matter of a prosecution having been instituted by a procedure which was wholly inapplicable. Nor is it a matter of a defect or irregularity in a complaint, charge or notice to attend court which may be waived. It is a fundamental error in the institution of proceedings which goes to jurisdiction. By analogy with an information, the prosecution of the respondent in this instance
C was instituted by and commenced with the notice to attend court *Thorne v. Priestnall* [1897] 1 Q.B. 159; *Beardsley v. Giddings* [1904] 1 K.B. 847 and *R. Wakeley* [1920] 1 K.B. 6[illegible]8), and just as a court cannot proceed upon a bad information (*Hargreaves v. Alderson* [1963] Crim. L.R. 46) the Magistrate's Court in the circumstances could not proceed upon the charge preferred by way of a notice to attend court which was *ultra vires* the enabling section.

D The purported proceedings in the Magistrate's Court were a nullity, and the conviction is accordingly quashed and the sentence set aside.

Conviction quashed; sentence set aside.