## RAJENDRA CHAUDHARY v STATE

COURT OF APPEAL — CRIMINAL JURISDICTION

SHEPPARD, TOMPKINS and SMELLIE JJA

21, 31 May 2002

[2002] FJCA 59

**Practice and procedure — appeal — sentence of imprisonment — whether there was special circumstances — Court of Appeal Act (Cap 12) ss 6(1), 6(2), 22 — Traffic Act (Cap 176) s 30(4) — Criminal Procedure Code s 320 .**

Rajendra Chaudhary (Appellant) was charged with Driving while Disqualified. After hearing submissions, the Chief Magistrate imposed a fine of $100 with 1 week to pay, in default 3 months' imprisonment. The State appealed against the sentence on the ground that the court erred in not imposing a term of imprisonment in the absence of special circumstances. The High Court allowed the appeal, quashed the fine, imposed a sentence of 2 months' imprisonment and disqualified the Appellant from driving any motor vehicle for 12 months from the date of the judgment.

**Held** —

(1) Where a person is convicted of driving while disqualified, the court is bound to impose a sentence of imprisonment unless it finds special circumstances sufficient to render a fine and adequate punishment. If a person seeks to avoid a sentence of imprisonment by relying on special circumstances, the onus is on that person to satisfy the court that such special circumstances exist.

(2) On the appeal from the Magistrates' Court to the High Court, the initial task of the judge was to determine whether the Chief Magistrate's decision has special circumstances which were open for him to make on the information. The judge did not approach his task in this way. Rather, he decided virtually to rehear the case himself on the erroneous understanding that there was a requirement for special circumstances to be established by evidence on oath.

(3) There is no requirement that the Chief Magistrate should hear evidence before accepting that there were special circumstances. It was within his discretion to decide whether that he would accept the information placed before him in counsel's submissions. In those circumstances, it was appropriate for the Chief Magistrate to accept the special circumstance information being provided in the course of submissions.

Appeal allowed.

**Cases referred to:**

*Director of Public Prosecutions v Osali* Criminal Appeal No 39/1978, considered.

*Maraia Maivusaroko v State* Criminal Appeal No HAA0020/1995, considered.

*R v Lundt-Smith* (1964) 2 WLR 1063, cited.

*R v Indar Naicker* Review No 4/1978, followed.

*V. M. Mishra* for the Appellant

*J. Naigulevu* for the Respondent

**Sheppard, Tompkins, and Smellie JJA.**

### Background

The Appellant was charged with Driving while Disqualified on 7 May 1998. When the charge came before the Chief Magistrate on 5 November 1998 the Appellant initially pleaded not guilty, then changed his plea to guilty. After

hearing submissions from counsel, the Chief Magistrate imposed a fine of $100 with 1 week to pay, in default 3 months' imprisonment.

The State appealed to the High Court against the sentence, substantially on the ground that the Chief Magistrate erred in not imposing a term of imprisonment in the absence of special circumstances.

That appeal came before Surman J in the High Court. By a judgment delivered on 5 February 1999 the judge allowed the appeal, quashed the fine, imposed a sentence of 2 months' imprisonment and disqualified the appellant from driving any motor vehicle for 12 months from the date of the judgment. From that decision the appellant has appealed to this court.

This appeal came before this court on 27 February 2002. Two judges of appeal sat as it was impracticable to summon a court of three judges (see s 6(1) and (2) of the Court of Appeal Act (Cap 12) (the Act)). At that hearing an issue arose concerning the right of appeal to this court. The court gave the Appellant the option of proceeding with the appeal or adjourning it until a court of three judges could be assembled. The Appellant opted for the second course.

**The right of appeal**

Appeals to this court from a decision of the High Court on appeal from the Magistrates' Court are governed by s 22 of the Act. Of direct relevance in this case is subs (1A):

No appeal under subs (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground:

(a) that the sentence was an unlawful one or was passed in consequence of an error of law; or

(b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence.

The circumstances in the present case are clearly within para (b) of subs (1A). Unlike an appeal under subs (1), the right of appeal under para (b) is not limited to an appeal which involves a question of law only. It is a general right of appeal against the sentence imposed, to be determined on the normal principles that this court will only interfere if the sentence is shown to be inappropriate, inadequate or excessive or if the Court of Appeal thinks that a different sentence should have been passed: s 23(3) of the Act.

**Driving while disqualified**

Those parts of s 30(4) of the Traffic Act (Cap 176) relevant to the present case provide:

*If any person who, under the provisions of this Part, is disqualified from holding … a driving licence … drives a motor vehicle … on a road that person shall be liable on conviction to imprisonment for a term not exceeding six months or, if the court thinks that, having regard to the special circumstances of the case, a fine would be an adequate punishment for the offence, to a fine not exceeding $100, or to both such imprisonment and such fine.*

It is apparent from this provision that where a person is convicted of driving while disqualified, the court is bound to impose a sentence of imprisonment unless it finds special circumstances sufficient to render a fine an adequate punishment. If a person seeks to avoid a sentence of imprisonment by relying on special circumstances, the onus is on that person to satisfy the court that such special circumstances exist.

An issue has arisen concerning the proper course to follow in establishing special circumstances. In the *Director of Public Prosecutions v Osali* Criminal Appeal No 39 of 1978 Grant CJ was concerned with a person convicted of driving a motor vehicle under the influence of drink contrary to s 39(1) of the Traffic Ordinance. On whether special reasons had been established to justify the person not being disqualified he said:

> *Further, if special reasons are being raised by the defence it is not sufficient for the accused or his counsel simply to submit them in an address in mitigation. The proper procedure was laid down in R v Lundt-Smith* [1964] 2 WLR 1063 *namely that evidence on oath should be given by the accused of the circumstances put forward as special reasons for not ordering a disqualification.*

The same approach was followed by that Chief Justice in *R v Indar Naicker* Review No 4 of 1978. He said:

> *By virtue of Section 4 (2) of the Motor Vehicles (Third Party Insurance) Ordinance, the minimum mandatory period of disqualification for this offence, in the absence of special reasons, is twelve months; and it is well established that it is for the accused to raise special reasons and to give evidence on oath of the circumstances which it is submitted amount to same, which circumstances must be special to the case and not to the offender.*

More recently, this approach was followed by Pain J in *Maraia Maivusaroko v State* Criminal Appeal No HAA20 of 1995.

The authority upon which Grant CJ relied in adopting the approach set out in the two cases cited is not authority for the proposition he adopted. It seems likely that he was misled by an erroneous headnote. *Lundt-Smith* concerned an ambulance driver charged with causing death by dangerous driving. The report is of his sentencing. In the headnote there is the following:

> *Held* (1) that evidence on oath should be given by the defendant of the circumstances put forward as special reasons for not ordering disqualification.

But that is not what the judge said when sentencing the defendant. Counsel for the defendant submitted that there were special circumstances for not ordering disqualification. Counsel for the Crown conceded that it was a case where there were special reasons, if the court should think fit, for not imposing disqualification. Counsel for the defendant observed "... that it may be thought desirable that the special reasons advanced should be supported by evidence on oath; if that is so the defendant is prepared to give such evidence". The judge commented that "I should like to hear the defendant". He then gave evidence. Nowhere in the decision of the judge is there a passage that would support the headnote.

We do not consider that the somewhat rigid approach adopted by Grant CJ is appropriate. Whether an accused seeking to establish special circumstances for the purpose of this or similar provisions should be required to give evidence on oath is a matter for the discretion of the judge or magistrate, depending upon the circumstances of the particular case. No inflexible rule should be laid down. The section certainly does not require that approach.

We do not propose to suggest guidelines on how that discretion should be exercised because of the varying circumstances that would be relevant. However, by way of example, if in the course of submissions, counsel for the accused advanced reasons in support of a special circumstance in submissions, and counsel for the prosecution raised no objection nor sought to challenge those reasons, it may well be appropriate for the judge or magistrate to accept that the

special reasons were established by the facts submitted by counsel. If, however, the prosecution challenged, or sought to examine the accused concerning, them, it would be appropriate for the judge or magistrate to require the accused to give evidence on oath. Even if the prosecution did not challenge the reasons advanced, it would still be open to the judge or magistrate, in the exercise of his or her discretion, to require the accused to give evidence on oath.

**The hearing in the Magistrates' Court**

When the charge came before the Chief Magistrate on 5 November 1998 the Appellant initially pleaded not guilty. At some stage in the proceedings, the court record does not indicate when, the Appellant's counsel applied for the hearing to be in camera. It appears that this application was on the ground that the main complainant and witness for the prosecution was a magistrate. The Chief Magistrate granted that application. In the course of the closed hearing there were apparently some discussions between counsel and the Chief Magistrate as a result of which the appellant changed his plea to guilty.

Counsel for the appellant then made submissions on penalty. In the course of them he said, as recorded by the Chief Magistrate, that the appellant was suffering from asthma and a bowel problem. He was driving to a pharmacy to get medicine which normally he carries with him. Counsel submitted that this was a special circumstance, apparently in support of a submission that a custodial sentence should not be imposed.

The Chief Magistrate, in imposing sentence, noted the plea of guilty and the appellant's plea in mitigation. He recorded counsel's submission concerning the appellant driving to the pharmacy to get some medication, a submission which he specifically recorded he accepted. Although his record does not expressly say so, it is clear that the Chief Magistrate found that there were special circumstances which justified the imposition of a fine without a custodial sentence.

**The hearing in the High Court**

The appeal by the State was on the grounds that the Chief Magistrate erred in hearing the case in camera, that he erred in not imposing a term of imprisonment in the absence of special circumstances, and that the sentence was manifestly lenient having regard to the nature and circumstances of the offence.

In his judgment the judge, when referring to the mitigation submissions made to the Chief Magistrate, said:

> *Unfortunately the Magistrate did not hear directly from the respondent on these matters but apparently relied exclusively on counsel's submission. It would have been better and more appropriate if he had heard from the respondent direct.*

Later in his judgment he said:

> *I decided that the fairest way of dealing with this appeal was to hear evidence from the respondent himself, which the Magistrate unfortunately had failed to do.*

Having heard the evidence, the judge was not convinced that there was an emergency situation at all. He concluded that there were no special circumstances or real emergency situation present which forced the respondent to drive his own personal vehicle.

As a result of this conclusion the appeal was allowed, the fine imposed by the Chief Magistrate was quashed, a sentence of 2 months' imprisonment was substituted, and the appellant was disqualified from driving for 12 months from the date of his judgment. The judge also criticised the Chief Magistrate's decision

to hear the case in closed session. He observed that as a general rule the system of administering justice requires that it be done in public. All witnesses, no matter how important or what embarrassment it may cause, should be heard in public.

**Conclusion**

On the appeal from the Magistrates' Court to the High Court, the initial task of the judge was to determine whether the Chief Magistrate's decision that there were special circumstances was one that it was open for him to make on the information before him. The judge did not approach his task in this way. Rather, apparently on the erroneous understanding that there was a requirement for special circumstances to be established by evidence on oath, he decided virtually to rehear the case himself.

The High Court acting in its appellate capacity is entitled to hear evidence in the course of an appeal if it thinks evidence is necessary: Criminal Procedure Code, s 320. So that if in this case the Chief Magistrate had made a finding unsupported by the material placed before him, or if for some other reason evidence was necessary to enable the appeal to be determined, the judge could have required it to be given. But that is not the case here.

As we have already determined, there is no requirement that the Chief Magistrate should hear evidence before accepting that there were special circumstances. Rather it was within his discretion to decide that he would accept the information placed before him in counsel's submissions. There's no basis for holding that he erred in doing so. On the contrary, as the record indicates and counsel before us have confirmed, there was no objection on behalf of the prosecution to the information being placed before the court in this way, nor was there any application to the court for the appellant to give evidence in person. In those circumstances it was appropriate for the Chief Magistrate to accept the special circumstance information being provided in the course of submissions.

We are in full agreement with the judge's observations concerning the Chief Magistrate's decision to hear the case in camera. There can, of course, be circumstances that justify a hearing in private, but they need to be of sufficient importance to override the public interest in justice being administered in public. That a witness is a person holding public office such as a magistrate can rarely if ever be a ground for holding a hearing in camera. However, the Chief Magistrate's decision to do so does not invalidate his decision, if it is otherwise appropriate.

**The result**

The decision in the High Court is quashed. We find no grounds for interfering with the conclusion by the Chief Magistrate that there were special circumstances, a finding of fact that he was entitled to make on the information before him. It follows that he was correct in not imposing a sentence of imprisonment. As he imposed the maximum fine, the penalty he imposed was not inadequate. The sentence in the Magistrates' Court is confirmed.

The disqualification from driving imposed in the High Court remains with effect from the date of the judgment in that court.

There will no order for costs.

*Appeal allowed.*