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BASDEO SHARMA

v.

REGINAM

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[SUPREME COURT, 1968 (Moti Tikaram Ag. P.J.), 27th, 28th February]

Appellate Jurisdiction

Criminal law—sentence—fine—first offender—means of accused to be considered—maximum penalty reserved for worst offenders—plea to lesser offence accepted—no opportunity to address in mitigation—Traffic Ordinance 1965, ss.37, 85.

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In imposing a fine upon a first offender the capacity of the accused to pay should be considered and the maximum penalty provided for the offence should be reserved for the worst cases. Before sentence is passed the accused should be given an opportunity to address in mitigation and, if a plea of guilty to a lesser offence than that charged has been accepted, care must be taken to sentence only for the lesser offence.

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Cases referred to: *Suva City Council v. Ram Lal* (1958) 6 F.L.R. 13: *R. v. Mureto Munyoki* 20 K.L.R. 64: *Taman v. Regina* (1958) 6 F.L.R. 9: *R. v. Raper* (1922) 16 Cr. App. R. 195: *R. v. Harrison* (1909) 2 Cr. App. R. 94.

Appeal against a sentence imposed by the Magistrate's Court.

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M. V. Pillai for the appellant.

J. R. Reddy for the respondent.

The facts sufficiently appear from the judgment.

MOTI TIKARAM J.: [28th February, 1968]—

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The Appellant in this case was originally charged with the offence of Dangerous Driving before the Magistrate's Court of the First Class, Nadi. He pleaded 'Not Guilty' to this charge but stated that he was guilty of driving carelessly. This plea was accepted by the Prosecution and the charge of Careless Driving, Contrary to Sections 37 and 85 of the Traffic Ordinance, No. 11 of 1965, was substituted.

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The Particulars of Offence were as follows:

'BASDEO SHARMA s/o Daya Ram Sharma, on the 29th day of September, 1967 at Nadi Township, Nadi in the Western Division, drove a motor vehicle on Queen's Road without due care and attention.'

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The Appellant had collided with a dust bin on his incorrect side and then he reversed across the road and backed into a stationary vehicle on his correct side, damaging the right rear door of the parked vehicle. No one was injured. He drove off and when interviewed by the Police at Lautoka, denied any knowledge of the accident.

The Appellant was convicted of careless driving on a plea of 'Guilty' and he was fined £25, in default two months' imprisonment. He was also disqualified from holding or obtaining a driving licence for a period of two years.

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The Appellant was convicted on the 1st November, 1967 and on the 15th November, 1967 the learned Trial Magistrate refused an application to suspend the order of disqualification pending Appeal.

This Appeal is against sentence and disqualification upon the grounds that they are harsh, manifestly excessive, and wrong in principle.

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The Appellant was a first offender and the maximum penalty provided by Section 85 of the Traffic Ordinance, No. 11 of 1965, in the case of a first offence, is a fine not exceeding £25. Maximum penalty was, therefore, imposed in this case on the Appellant. Disqualification for any period was not mandatory.

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In this case the Appellant was fined and the order of disqualification made immediately after conviction without the Appellant being called upon to address the Court in mitigation before sentence. Nor was there any information before the Court as to the Appellant's means. I therefore allowed learned Counsel for the Appellant to address this Court in mitigation and also to state to this Court the Appellant's means. The Appellant is a driver by occupation, earning as wages between £25 and £30 per month. He is a married man under 30 years of age.

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In *Suva City Council v. Ram Lal*, (see Fiji Supreme Court Revisional Jurisdiction No. 14 of 1958 in 6 F.L.R. 13) Lowe C.J. enunciated the principles to be applied in assessing fine. He cited with approval the following dicta in *R. v. Mureto Munyoki* 20 K.L.R. 64 "It is the first principle in inflicting fines that the capacity of the Accused to pay should be considered." He added, however, that this principle should be abandoned where the offender has a long list of convictions or there are other aggravating circumstances.

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In *Taman v. Regina*, Criminal Appeal No. 24 of 1958, 6 F.L.R. 9, Hammett J. (now Chief Justice) observed that after an accused is convicted and before sentence is passed, he should be allowed a final opportunity of addressing the Court on the subject of sentence, or mitigation thereof. I respectfully concur with the observations of their Lordships in both the cases cited and consider that those observations are of relevance to the Appeal before this Court. Furthermore I cite with approval the headnotes in *Charles Raper*, Criminal Appeal Reports (Vol. XVI), 195, which read as follows :

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"When on a charge of graver offence a plea of guilty to a lesser is accepted, care must be taken only to sentence for the latter."

In *Samuel Harrison*, Criminal Appeal Reports, (Vol. II) 94, it was stated by Channell J. that 'maximum sentence must, as presumably the law intended, be reserved for the worst cases.' I respectfully concur with this dictum. Whilst the learned Magistrate was entitled to consider this to be a bad case of careless driving (although he has not stated any

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reasons for the extreme measure he took) I cannot with respect agree that it comes under the category of "worst cases" warranting maximum fine and in addition two years' disqualification.

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For the reasons given above and bearing in mind that the Appellant is a first offender with very ordinary means, I must allow this Appeal. The sentence of £25 fine, in default two months' imprisonment and the order of two years' disqualification are set aside. In lieu thereof the Appellant is fined £10. His licence is to be endorsed. As the fine of £25 has already been paid, I make a further order that the sum of £15 be refunded in due course.

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Appeal allowed.