

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO: AAU 0011/2009
(HIGH COURT CRIMINAL ACTION NO: HAC 004/09L)

BETWEEN:

SEMISI WAQA

Appellant

AND:

THE STATE

Respondent

Coram: Hon. Mr Justice Devendra Pathik,
Judge of Appeal

Counsel: Appellant in Person
Ms Seini K Puamau for the Respondent

Hearing: 23 September 2009

Date of Ruling: 23 October 2009

Ruling

Leave to appeal against sentence
Activation of suspended sentence

- [1] This is an application made within time for leave to **appeal against sentence** of 19 [nineteen] months imposed on the appellant by the High Court at Lautoka on 11 March 2009.
- [2] The appellant was convicted by the learned Magistrate on his own plea of guilty on 1 July 2008 to possession of 1.3 grams of cannabis and committed to the High Court under the provisions of Illicit Drugs Control Act No. 35 of 2004.
- [3] Previously on 18 May 2007 he was convicted for possession of drugs for which he was sentenced to 2 years imprisonment suspended for three years.

- [4] Then on 14 August 2007 he was convicted for the offence of indecent exposure and sentenced to 2 years imprisonment suspended for 3 years. The Magistrates Court file was not made available to the High Court.
- [5] Then again on 21 December 2007 he was convicted for possession of illicit drugs and sentenced to 6 months imprisonment suspended for 12 months.
- [6] Only 2 out of 3 files were made available to the Judge because an incorrect file number was given by the prosecution in the list of previous convictions.
- [7] The files given were No. 431/06 [Possession of illicit drugs] and 480/06 [indecent exposure]. The learned Judge said in item 9 of his sentencing remarks.

"In the normal course, the learned Magistrate who dealt with the accused on 21st December 2007 would have activated two years suspended sentence imposed on 14th August 2007. However, the list of previous convictions given to the Magistrate did not disclose the previous suspended sentence. So it was not activated."

- [8] For the present offence the High Court [Jiten Singh J] imposed **one month** imprisonment as he had previous conviction for similar offence.
- [9] In considering activation of the suspended sentences the learned Judge bore in mind the totality principle if he had to activate the sentences in full. He then **activated 18 months** of the suspended sentence in Criminal Case 480/06 for indecent exposure and the one of six months in Criminal Case 431/06 [possession of illicit drugs] with both of these sentences to be concurrent. **One month** for the **present offence** was imposed by the learned Judge. Therefore the appellant was to serve a total of **19 months** imprisonment.

Consideration of grounds of appeal

- [10] The appellant's grounds of appeal are as follows [as summarized by the Respondent]:
- I. *The learned Sentencing Judge was wrong to activate part of the sentence imposed on 14 August 2007 for indecent exposure because that sentence, in itself, had been wrong in law: i.e. the learned Sentencing Magistrate in Criminal Case No. 480/06 had no powers to suspend a sentence for 3 years.*
 - II. *The learned Sentencing Judge considered the Appellant's previous convictions to be an aggravating factor in sentencing him.*
 - III. *The learned Sentencing Judge failed to appropriately apply the tariff for possession of a small amount of an illicit drug, i.e. 1.3 grams of cannabis.*

IV. *That, as such, the sentence was manifestly harsh and excessive in all the circumstances of the case.*

[11] The application for leave against sentence is made under **Section 21(1)(c)** of the Court of Appeal Act [Cap 12] which, inter alia, provides that:

“(1) A person convicted on a trial before the High Court may appeal under this part to the Court of Appeal (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.”

[12] **Ground 1** of Appeal concerns the activation of suspended sentence pursuant to **section 29(1)** of the Penal Code, Cap 17. The learned Magistrate was well within his rights to suspend the sentence and so was the learned Judge in activating it on the appellant’s conviction of 14 August 2007 and 21 December 2007 for the offences he had committed. The Judge gave his reasons for doing so and, as required, while activating he endorsed the activation in the respective files.

[13] The activation was done under **s30[1]** of the **Penal Code** which gives the Court the power to do so on conviction of further offence during the ‘operational period’.

[14] The procedure for activation of a suspended sentence is that the accused should be given an opportunity to **show cause** why the sentence should not be activated. [**Levi Nasaumalumu –v- the State** (Crim. App. No. 56/87 – Fatiaki J)].

[15] It is pertinent to note the following statement of **Goudie J** in **Kuar Vijay Bhan –v- R** [18 FLR 27] at 31 :

“(e) If a person is under suspended sentence and commits a subsequent offence, or in breach of a probation order by committing a subsequent offence, and he is not called upon to show cause why he should not be punished for such subsequent offence the whole object of the suspended sentence or probation order is defeated and the powers and authority of the Court brought into contempt.”

[16] Whilst on the subject of activation of suspended sentence the following practice as stated in **R-v-Ithell** [1969] 2 All ER. p 249 should be borne in mind which is that the suspended sentence should run **consecutively** to the ‘sentence given for the current offence: -

“ The proper approach, where a fresh offence has been committed during the period of the suspension of an earlier sentence and the accused is brought before the court, is that the court should first sentence him in respect of the fresh offence by punishment appropriate to that offence, and thereafter address itself to the question of the

suspended sentence. Furthermore, unless there are some quite exceptional circumstances, the suspended sentence should be ordered to run consecutively to the sentence given for the current offence.”
[emphasis mine]

- [17] I find that the appellant’s ground of appeal in regard to activation is without merit. This ground therefore fails. On the authority of **Ithell** the activation of “suspended sentence should run consecutively to the sentence given for the current offence.”
- [18] For the current offence the learned Judge imposed the sentence of one [1] month’s imprisonment.
- [19] After activating the said suspended sentence, the learned Judge said at item 13 of his sentencing remarks that “both these sentences is to be concurrent”. Which, with all due respect, is wrong in the light of the procedure stated in **Ithell** [supra]. The activated sentence **should be consecutive** to the current offence. I therefore vary the sentence order accordingly which does not make any difference to the total sentence of 19 months.
- [20] As for **Ground 2**, it could not be said from the record that the learned Judge took the appellant’s previous conviction to be an “aggravating factor”. All he said was that because of his previous convictions he was no longer entitled to a discount or to extra leniency.
- [21] The **Grounds 3 & 4** are also without merit. The appellant is fortunate that he did not get a higher sentence. It was well below the tariff for such an offence and for the quantity of drug. The learned Judge in this case, as he stated, had to bear in mind the totality principle in sentencing. The sentence is neither wrong in principle nor harsh and excessive. These grounds also fail.
- [22] For these reasons application for leave to appeal against sentence is dismissed.

Dated at Suva this 23rd day of October 2009.



D. Pathik
D. Pathik
Judge of Appeal