IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 21 of 2021

BETWEEN : **ZAHID ALI**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel	:	Mr. M. Yunus for the Appellant.
	:	Ms. L. Latu for the Respondent.
Date of Hearing	:	27 September, 2021
Date of Judgment	:	27 September, 2021

JUDGMENT

BACKGROUND INFORMATION

[1] The appellant was charged in the Magistrate's Court at Ba for one count of failure to comply with orders contrary to section 69 (3) of the Public Health Act, 1935 and Regulation 2 of the Public Health (Infectious Diseases) Regulation 2020, one count of breach of bail condition contrary to section 26 (1) of the Bail Act 2002 and one count of breach of order suspending sentence contrary to section 28 (1) of the Sentencing and Penalties Act 2002.

[2] The brief facts were:

On 8th August, 2020 at about 2346 hours at Maururu, Ba a police patrol saw the appellant and another walking along the Maururu road in breach of curfew hours which was from 11 pm to 4 am. The appellant told the police officer that they were returning from a kava session. The appellant was arrested and charged for one count of failure to comply with orders.

As a result of the above, the appellant was also charged with additional counts namely breach of bail condition and breach of order suspending sentence.

[3] On 13th October, 2020 the appellant pleaded guilty to the first count and also admitted the summary of facts read. On 8th December, 2020 the appellant pleaded guilty to the second and third counts and thereafter admitted the summary of facts read.

[4] The learned Magistrate upon being satisfied that the appellant had voluntarily entered an unequivocal plea and the summary of facts read satisfied all the elements of the offences charged, found the appellant guilty and convicted him accordingly.

[5] After hearing mitigation on 16th April, 2021 the appellant was sentenced to 1 month imprisonment for counts one and two to be served concurrently. In respect of the third count of breach of a suspended sentence the learned Magistrate activated the imprisonment term of 7 months imprisonment in CF. 206/19 to be served consecutively with 6 months imprisonment in CF. 289/19.

[6] Furthermore, the above sentences in count three were to be served consecutively with the one month imprisonment term in counts one and

two. This meant the appellant was to serve a total of 14 months imprisonment for all the three offences.

[7] The appellant being aggrieved by the sentence of the Magistrate's Court filed a timely petition of appeal in this court.

[8] Both counsel filed helpful written submissions and also made oral submissions during the virtual hearing for which this court is grateful.

APPEAL AGAINST SENTENCE

[9] The appellant relies on the following ground of appeal:

The learned Magistrate erred in fact and in law when disallowing the appellant's sentence to be served concurrently which is in contravention of the totality principle.

[10] The appellant's counsel argued that it was erroneous of the learned Magistrate to activate both the imprisonment terms in count three to be served consecutively with each other and also be served consecutively to the imprisonment term in counts one and two.

[11] Counsel further stated that although the appellant had breached the suspended sentences in case numbers CF. 206/19 and CF. 289/19, the sentences in these two files being consecutive to each other and then making it consecutive to the one month imprisonment term in counts one and two offends the totality principle of sentencing.

[12] Counsel finally submitted that by making the sentences consecutive the appellant has been punished with a harsh and excessive sentence.

DETERMINATION

[13] It is not in dispute that the appellant committed count one whilst on a suspended sentence in case nos. CF. 206/19 and CF. 289/19 (count three).

[14] In CF. 206/19 the appellant was charged with assault causing actual bodily harm and breach of domestic violence restraining order. The appellant was found guilty and convicted on 2nd September, 2019. In this file he was given an aggregate sentence of 7 months imprisonment suspended for 3 years.

[15] In CF. 289/19 the appellant was charged with absconding bail, he was found guilty and convicted on 19th September, 2019 and given a sentence of 6 months imprisonment suspended for 2 years.

[16] In view of the above, when the appellant committed the offence of failure to comply with orders it was during the operational period of the suspended sentence. The new offending by the appellant has been about 11 months after he was given a suspended sentence.

LAW

[17] The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration."

[18] The power to restore the imprisonment term wholly or partly held in suspense and ordering the offender to serve the same is governed by section 28 (4) and (5) of the Sentencing and Penalties Act. The law also provides an exception for the sentencing court to consider any exceptional circumstances which made the restoration of the imprisonment term unjust.

[19] If the sentencing court was satisfied that there are exceptional circumstances available the court may exercise the following options:

(a) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or

(b) in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order; or

(c) make no order with respect of the suspended sentence.

[20] From the copy record it is noted that on 12th February, 2021 the learned Magistrate had asked the appellant to show cause why his imprisonment term should not be restored *(see Isei Tamani vs. The State, HAA 90 of 2008, 28th November, 2008).* Unfortunately, there is nothing mentioned in response by the appellant, in this regard the court record is not helpful.

[21] In restoring the imprisonment term the learned Magistrate had stated the following at paragraph 19 of his sentence:

"The second defendant's suspended sentences in CF206 of 2019 of 7 months imprisonment is activated. His sentence in CF289 of 2019 of 6 months imprisonment is also activated. These sentences are to be served consecutively from the day the Police locate and escort the second defendant to the nearest Corrections facility to serve his sentence. These sentences are consecutive to the one month sentence in this matter".

TOTALITY PRINCIPLE

[22] I agree with the appellant's counsel that the learned Magistrate did not direct his mind to the totality principle of sentencing. This principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences or making sentences consecutive.

[23] In *Mill v The Queen [1988] HCA 70* the High Court of Australia in its judgment cited D.A. Thomas, Principles of Sentencing (2nded. 1979) pp. 56-57 as follows:

"the effect of the totality priniciple is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms; 'when a number of offences are being dealt with and specific punishment in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it

looks wrong'; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic producers. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

[24] In Fiji the above principles have been approved and applied by the court (see *Tuibua v The State, [2008] FJCA 77, Taito Raiwaqa v The State, [2009] FJCA 7)* and *Asaeli Vukitoga v The State, Criminal Appeal No: AAU 0049 of 2008.*

[25] In my view it was incumbent upon the learned Magistrate to consider the totality principle of sentencing and give his reasons why he had decided to restore the imprisonment term in count three (consecutively in both files) and then made it consecutive with the one month imprisonment term in counts one and two.

[26] From the mitigation presented the appellant was 32 years of age at the time of the offending with a young family who were dependent on him for support.

[27] In respect of the restoration of the imprisonment term it is noted that the appellant had served about 11 months of the operational period of the suspended sentence. A perusal of the sentence shows that the learned Magistrate also did not consider and/or direct his mind to whether there were any exceptional circumstances available before proceeding to activate the imprisonment terms in the suspended sentences and impose consecutive sentences.

CONCLUSION

[28] The learned Magistrate erred in the exercise of his sentence discretion which has resulted in an unjust sentence. In the interest of justice and in accordance with section 256 (3) of the Criminal Procedure Act the sentence of the appellant is quashed and set aside.

[29] Considering the exceptional circumstances presented by the appellant in his mitigation and the effect of any sentence on the appellant this court has to strike a balance between deterrence and rehabilitation of the appellant. In this regard the imprisonment term of 7 months in CF. 206/19 is restored by 5 months and the 6 months imprisonment in CF. 289/19 is restored by 1 month.

[30] In order to have a deterrent effect the above sentences are made consecutive to each other. This means the appellant has to serve 6 months imprisonment which is made consecutive to 1 month imprisonment in counts one and two. The above consecutive sentences under the principles of totality of sentencing in my view do not have a crushing effect on the appellant.

[31] For the above reasons, the appellant is sentenced afresh as follows:

(a) Count one - one month imprisonment;

(b) Count two - one month imprisonment;

(To be served concurrently).

(c) Count three – 5 months restored imprisonment term in CF. 206/19;

(d) Count four - 1 month restored imprisonment term in CF. 289/19.

(The above restored sentences are to be served consecutively to each other and with counts one and two).

ORDERS

1. The appeal against sentence is allowed.
2. The sentence of the Magistrate's Court is quashed and set aside.
3. The appellant is sentenced afresh to 7 months imprisonment with effect from 16th April, 2021 for all the three counts.
4. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

HIGH COURT OF FIJI
LAUTOKA

At Lautoka
27 September, 2021

Solicitors

Messrs. M.Y. Law, Ba for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.