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KUAR VIJAY BHAN

v.

REGINAM

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[SUPREME COURT, 1972 (Goudie J.), 23rd, 24th March]

Appellate Jurisdiction

Criminal law—sentence—suspended sentence—subsequent offences committed towards end of period of operation of suspension—relevance—sentence activated—appeal out C *of time against original sentence—observations on intention behind suspension of sentences—Penal Code (Cap. 11) ss.28B(1) (b), 28B(1) (d). 81, 277, 288—Penal Code (Amendment) Ordinance 1969, s.4.*

The appellant was convicted on the 6th May, 1970, of the offence of riot and was fined $60 and sentenced to eighteen months' imprisonment suspended for two years. On the 2nd February, 1971, he was convicted of common assault and fined. On the 22nd February, 1972, he pleaded D guilty to assault occasioning actual bodily harm; he was again fined and was bound over to keep the peace for twelve months. On the same day he was called upon to show cause why the suspended sentence of eighteen months imprisonment should not be given effect, and on his failure to show cause he was imprisoned accordingly. He then applied for and was granted leave to appeal out of time against the sentence on the conviction for riot of the 6th May, 1970.

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Held : 1. There was no ground for saying that the sentence was manifestly excessive or wrong in principle.

2. The fact that a period of suspension has almost expired before the subsequent offence is committed is not sufficient reason to justify interfering with the original sentence.

F 3. The subsequent conviction of the appellant for assault occasioning actual bodily harm was neither trivial nor of a different character from the conviction for riot.

Observations on the intention behind the imposition of suspended sentences and the desirability of calling upon the accused to show cause in the event of a subsequent offence.

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Cases referred to:

R. v. Butters; R. v. Fitzgerald (1971) 55 Cr. App. R.515.

R. v. Gunn [1971] Crim. L.R.551.

R. v. Cobbold [1971] Crim. L.R.436.

H Appeal to the Supreme Court against a sentence imposed by the Magistrate's Court, suspended in the first instance but later activated.

M. V. Bhai for the appellant.

G. Mishra for the respondent.

The facts appear from the judgment of Goudie J.

24th March 1972

GOUDIE J. :

The Appellant was convicted on 6th May 1970, together with seven other accused, of the offence of Riot Contrary to Section 81 of the Penal Code. All the accused, including the appellant, pleaded guilty, and all admitted the facts as stated by the prosecutor, which were as follows :—

> "Fourth and fifth accused are neighbours. They are also related. Had been feud between famlies for some time.
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> On 10th March 1970 the accused met and it was four against four. A fight ensued during which a wire whip was used. A number of the accused sustained injuries, in particular the first accused. The whip was weilded by the seventh accused. Members of the public were put in fear."

The appellant was the eight accused in the trial Court and had no previous convictions.

Each accused was sentenced to 18 months imprisonment, suspended for two years, and, in addition each was fined $60.00, payable by instalments, and, in default of payment of the fine, three months imprisonment.

The appellant was informed of his right to appeal against sentence but did not choose to exercise it.

On 2nd February 1971 the appellant was convicted of common assault and fined $20, which he paid. As the conviction occurred during the operational period of a suspended sentence the provisions of Section 28B of the Penal Code applied. As it would appear that the trial Magistrate did not consider this aspect of the matter he must either have overlooked it or been unaware of the previous conviction.

On 22nd February 1972 the appellant pleaded guilty to a charge of Assault occasioning actual bodily harm, contrary to Section 277 of the Penal Code. The facts were outlined by the Prosecutor and admitted by the appellant to have been as followe :—

> "Complainant, a bus driver, living in same area as accused. A week before incident (18. 12. 71) complainant and accused attended wedding in village. Accused quarrelled with complainant's brother and a fight [occurred]. Later same day accused threw stones at complainant on his way home. 25. 12. 71 p.m. complainant on way home with another person; accused lay in wait on road. Complainant asked accused, "I taught you how to box and you want to throw fist at me?" Argument started.
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> Accused came closer to complainant and threw punches at complainant's face and complainant fell to the ground. Complainant got

up and a stone thrown. As a result of blows complainant started bleeding from nose and face.

Large crowd gathered. Complainant carried away home by his companions. Complainant attended hospital. Produce Medical Report."

The Medical Report showed "two lacerated wounds upper lip, one lacerated wound forehead, multiple superficial lacerated wounds in his scalp."

Counsel for the accused, present appellant, said the accused was aged 23 years and single, worked in his father's farm and helped in shop, that complainant was a good boxer, that fight took place on road, that accused was sorry, and that the parties had "compromised amongst themselves." The prosecutor said the accused had a previous conviction for Riot and another for (common) assault. Both were admitted by the accused. He was then fined $30, in default 6 weeks imprisonment. Additionally, and in my view quite wrongly, the accused was "bound over in own recognizance $100 to keep peace and be of good behaviour for 12 months — in default 14 days." In passing I would remark that 14 days default sentence for refusal to enter into a $100 recognizance to keep the peace and be of good behaviour for 12 months was entirely disproportionate anyway. Immediately the trial Magistrate became aware of the fact that the accused had committed other offences punishable with imprisonment committed during the operational period of a suspended sentence he ought to have taken cognizance of Section 28B of the Penal Code and decided what he ought to do about the suspended sentence on the Riot Charge. It is possible he did not enquire as to the details of the previous offences and sentences imposed. In the circumstances, in my view, he clearly ought to have done so having regard to the fact the trial Magistrate was aware of a previous conviction for Riot and a subsequent conviction for common assault and a present conviction for assault occasioning actual bodily harm.

However, on the same day, 22nd February 1972, the appellant was again brought before the same Court and called upon to show cause why the original suspended sentence of 18 months "should not be given effect to." The record reads :—

"Accused. No cause to show.

Court: Since the imposition of the suspended sentence, and during actual period of the suspension, accused convicted twice of similar type of offence. On the conviction before today the suspended sentence not put into effect but accused given another chance, and on 22. 2. 72 he is again convicted of an assault under Section 277. I see no reason in the circumstances why the suspended sentence should not be put into effect with the original term unaltered."

The appellant was imprisoned accordingly and bail pending appeal later refused.

On 17th March 1972 the appellant was granted leave to appeal out of time against the original sentence on the Riot Charge. The Petition of Appeal contains two grounds of appeal. First, that the original sentence on the Riot Charge was too severe for the crime committed having regard

to the fact that the appellant was a first offender and "he played a minor role in the crime". Secondly, or alternatively "that on 22nd February 1972, while activating the suspended sentence, the learned Magistrate erred in law when he did not properly draw his attention to the Penal Code (Amendment) Ordinance 1969 amending the Penal Code Cap. 8, especially to Section 28B(1) (b) and Section 28B(1) (d)". A

As regards the original sentence on the Riot charge I can see no ground whatsoever for saying that this sentence was manifestly excessive or wrong in principle. The learned defending Counsel submitted that the appellant took a "minor part" in the Riot. There is nothing in the admitted facts to support this conclusion. The most that can be said is that it was not the appellant, but another accused, who used a wire whip. It was also submitted that because certain of the other accused had previous convictions, whereas the appellant was a first offender, it must necessarily follow that different sentences ought to have been imposed. I am unable to agree with this submission. It seems to me that it was a matter entirely within the discretion of the trial Magistrate, and I am unable to say that he erred in principle when he regarded all the accused as equally blameworthy in an offence of this particular nature, particularly having regard to the fact that the sentences of imprisonment which were imposed on each accused, including the appellant, were suspended sentences. Finally, as regards the severity of sentence, if the appellant considered the sentence excessive he clearly ought to thave appealed shortly after the original sentence was passed. (See *R. v. Butters* [1971] Crim. L.R.662). In that case the Court even found no grounds for extending time for appeal when the appellant delayed his appeal for a long time and then "found that the existence of the suspended sentence was awkward for him." B C D

I am unable to accept that when the learned trial Magistrate activated the suspended sentence, on the 22nd of February 1972, he in any way misunderstood or misapplied the provisions of Section 28B of the Penal Code. It was submitted that the Court then had power to substitute a lesser term for the original term of imprisonment imposed, under the provisions of sub-section 1(1) (b), or might have varied the original order under the provisions of sub-section 1(1) (d). However, it is expressly provided in the Section and it is mandatory, that the Court *shall* order that the suspended sentence shall take effect with the original term *unaltered* "unless the Court is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence and, where it is of that opinion, the Court shall state its reasons." E F

When the learned trial Magistrate put into effect the suspended sentence on a subsequent *second* offence he made the following remarks:— G

> "Since the imposition of the suspended sentence, and during actual period of the suspension, accused convicted twice of similar type of offence. On the conviction before today the suspended sentence not put into effect but accused given another chance, and on 22nd February 1972 he is again convicted of an assault under Section 277. I see no reason in the cricumstances why the suspended sentence should not be put into effect with the original term unaltered." H

He therefore clearly recognised his power to alter the original term and vary the original sentence.

I am grateful to the learned Director of Public Prosecutions for drawing my attention to the case of *R. v. Gunn* [1971] Crim. L.R., at p.551, which, in effect, decided that the fact that the period of operation of the suspension had almost expired before the subsequent offence was committed, is insufficient reason to justify interfering with the original sentence. Again, he drew my attention to *R. v. Cobbold* [1971] Crim. L.R., at p.436, in which it was stressed that a suspended sentence should be enforced following a conviction for a subsequent offence unless the subsequent offence was both trivial and of a different character from the original offence.

I do not see how it can reasonably be argued that a conviction for assault occasioning actual bodily harm is either trivial or of a different character from a conviction for Riot.

Finally, I consider it ought to be very clearly understood by trial Magistrates that the intention behind the imposition of a suspended sentence is basically the same as that which underlies the imposition of a probation order; it is to give the accused another chance. If an accused chooses to abuse such leniency,, then, in all normal circumstances, the Court ought to consider very seriously whether there are sufficient ground for not putting into effect, or imposing, a prison sentence.

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. In this connection I also consider it important to draw attention to the duty of the Probation Service to bring anyone subject to a Probation Order before the Court to be dealt with if he commits a breach of his Probation Order by committing any subsequent offence during his probationary period.

The appeal is dismissed.

Appeal dismissed