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v

STATE

[HIGH COURT, 1990 (Fatiaki J) 16 February]

Appellate Jurisdiction

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Sentence- imprisonment- suspended term- whether may be imposed subject to additional conditions- whether may be activated for an offence committed outside the operational period- Penal Code (Cap 17) Sections 29, 30 and 31.

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Allowing an appeal against the imposition of a residential condition on a suspended sentence of imprisonment and the activation of a suspended sentence for the commission of an offence before the operational period of the sentence had commenced the High Court HELD: (i) that the Court has no power to impose conditions upon a suspended sentence of imprisonment other than those provided by the Penal Code and (ii) that a conviction for an offence committed before the commencement of the operational period provided by Section 29 of the Penal Code did not provide a ground for activating the sentence.

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No case was cited.

Appellant in Person
R. Perera for the State

Appeal to the High Court against a sentence imposed in the Magistrates Court.

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Fatiaki J:

On the 10th of November 1988 the appellant appeared before the Chief Magistrate and pleaded guilty to and was sentenced on various charges then pending against him and contained in three separate court files as follows :

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(1) Suva Criminal Case No. 1280/88

2 counts of Damaging Property sentenced on each to 12 months imprisonment suspended for 18 months;

1 count of Arson sentenced to 2 years imprisonment suspended for 2 1/2 years; and

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1 count of Criminal Intimidation sentenced to 6 months imprisonment suspended for 12 months.

All sentences were ordered to be served concurrently making a total effective sentence of 2 years imprisonment suspended for 2 1/2 years.

(2) Suva Criminal Case No. 661/88

The appellant was convicted for Larceny of 2 pre-recorded cassette tapes worth \$13.90 and sentenced to 4 months imprisonment suspended for 12 months. This latter sentence was ordered to be served concurrently with the sentence imposed in the above Criminal Case No. 1280/88.

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(3) Tailevu Criminal Case No. 1072/88

In which the appellant was convicted of Being in Possession of a Dangerous Drug and given a suspended sentence.

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In addition to the suspended sentences the learned Chief Magistrate purported to impose a condition that the appellant was to return to his home island of Ono-i-Lau and remain there for a continuous period of 3 years and not to return to Suva except for urgent medical attention.

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I say "purported" advisedly because the condition if indeed it was imposed by the Chief Magistrate on the 10th of November 1988 is not clearly and expressly recorded in either court file as being a condition of suspension although it was subsequently treated as such by the learned Chief Magistrate when he activated them all.

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Be that as it may on the 19th of May 1989 (6 months after the above-mentioned condition was imposed) the appellant was re-arrested in Suva and taken before the learned Chief Magistrate and was dealt with for a pending charge in Suva Criminal Case No. 2407/88 in which he was charged with an offence of being Found in Possession of Dangerous Drug on the 20th day of June 1988 (i.e. almost a year before).

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On this last occasion the appellant pleaded guilty and was sentenced to a term of 9 months imprisonment. In addition the learned Chief Magistrate activated all the afore-mentioned suspended sentences i.e. 2 years imprisonment and ordered that the sentences be served concurrently.

In activating the suspended sentences the learned Chief Magistrate is recorded as having said:

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"The accused was, when he last appeared before this Court, on 10.11.88, properly explained that the condition of suspension was for him to remain in Ono-i-Lau, away from Suva for a continuous period of 3 years except if there was urgent medical reasons. He came to Suva because, according to him his uncle died and secondly to purchase diving equipment for use back in the village.

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There has been a clear breach of the condition by this accused. The court went into a lot of explanation in informing accused of the conditions imposed. The Court I must say leaned over backwards to assist this accused

A but only to be abused. It makes a mockery of the system if the Court having imposed such conditions the accused abused it. The Court will not see its processes and its orders abused in this way. Let it be a warning to those who have been given this privilege of going away to the village on similar conditions. If they follow in the footsteps of the accused this Court will put them straight into prison.

B The suspended sentences given in those files are hereby activated. As those sentences were concurrent to each other, the longest is the 2 years imprisonment suspended for 2 1/2 years."

C Although the appellant has filed an identical petition of appeal in all 4 criminal cases urging 6 grounds of appeal, his appeal is not against the length of the individual sentences imposed in respect of each offence which if anything erred on the side of leniency, rather, his complaint or appeal is directed against the initial imposition of the condition and subsequent activation of the suspended sentences for breach of the condition.

It is therefore necessary for the Court to consider the powers of a Magistrate to impose a suspended sentence and in this regard the provisions of Sections 29, 30 and 31 of the Penal Code fall to be considered.

D Firstly, Section 29 empowers :

E "(1) A Court which passes a sentence of imprisonment for a term of not more than two years for an offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year nor more than three years from the date of the order, the offender commits in Fiji another offence punishable with imprisonment and thereafter a court having power to do so orders under the provisions of section 30 that the original sentence shall take effect; and in this and in sections 30, 31 and 32 "operational period" in relation to a suspended sentence means the period so specified in the order."

F Thereafter subsection (2) and (3) provide respectively that suspended sentences shall not be combined or mixed together with a probation order and prohibits the suspension of a sentence of 6 months imprisonment in several enumerated circumstances.

G Subsections (4) requires the sentencing court to explain to the offender in ordinary language the meaning and effect of a suspended sentence in terms of Section 30 of the Penal Code; and Subsection (5) reinforces the view that a suspended sentence is a sentence of imprisonment for the purposes of disqualification and loss or forfeiture of office and delineates the date from which an activated sentence begins to run.

Section 30 in turn deals with the powers of the Court upon activation of a suspended sentence in the following terms :

“(1) Where an offender is convicted of an offence punishable with imprisonment committed during the operational period of a suspended sentence and either he was convicted by or before a court having power under the provisions of section 31 to deal with him in respect of the suspended sentence or who subsequently appears or is brought before a court, then, unless the sentence has already taken effect, that court shall consider his case and deal with him by one of the following methods:

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(a) the court may order that the suspended sentence shall take effect with the original term unaltered;

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(b) it may order that the sentence shall take effect with the substitution of a lesser term for the original term;

(c) it may by order vary the original order made under the provisions of subsection (1) of section 29 by substituting for the period specified therein a period expiring not later than three years from the date of the variation; or

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(d) it may make any order with respect to the suspended sentence, and a court shall make an order under paragraph (a) unless the court is of 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.”

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Subsections (2) and (3) of Section 30 provides a right of appeal against any order activating a suspended sentence and enable the Court in its discretion to order that the activated sentence shall be served concurrently or consecutive to any other sentence of imprisonment that might have been passed on the offender at the same time or which was being served by him at the time.

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Finally Section 31 identifies the court by which the suspended sentence is to be dealt with and restricts it in the case of a suspended sentence passed by the Magistrate Court, to a magistrate, and by the High Court, to a Judge.

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It is clear that these three fair comprehensive sections provides a complete code to which reference must be made whenever a court is dealing with suspended sentences, whether it be a question of the existence of the power, the actual imposition or the subsequent activation.

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This appeal raises for determination 2 fairly basic questions with regards suspended sentences, the first is whether a court passing a suspended sentence is empowered or entitled to impose conditions additional to that prescribed by the legislature?; and secondly whether a Court has power to activate a suspended sentence upon the subsequent conviction of the offender for an imprisonable

offence committed prior to the date on which the suspended sentence was passed as occurred in this case?

A With respect to the learned Chief Magistrate the answer I would provide to both questions is a loud and emphatic : "NO".

B Dealing then with each question in turn - the Magistrates Court is a creature of statute subordinate to the High Court with a limited jurisdiction. Its criminal jurisdiction is that which is conferred upon it by the Criminal Procedure Code Cap. 21. In particular, Section 4 delimits the offences that can be tried by a Magistrates Court and Section 7 prescribes a resident magistrate's sentencing powers.

C More important however for our present purposes Section 29 of the Penal Code in contradistinction to the provisions of Sections 42(1) and 44(1), nowhere expressly provides or empowers a court passing a suspended sentence to impose conditions.

In Thomas' "Principles of Sentencing" there is a sentence in the text dealing with suspended sentences which reads (at p. 225). :

D "It is not necessary for the offender to consent to the suspension of the sentence and there is no power to insert additional requirements as in the case of a probation order." (my underlining)

That disposes shortly of the first question and the appeal but for the sake of completeness I shall now turn to deal with the second question which can also be disposed of very briefly.

E In regard to the second question the short answer is to be found in the opening words of Section 30 of the Penal Code which reads :

F " Where an offender is convicted of an offence punishable with imprisonment committed during the operational period of a suspended sentence then, unless the sentence has already taken effect, (the) court shall consider his case and deal with him....."(my underlining)

G Clearly then it is not the mere conviction for any offence during the operational period that is the determining factor but additionally the offence itself must satisfy two pre-conditions, namely it must be an offence "punishable with imprisonment" AND it must have been "committed during the operational period".

The offence for which the appellant was convicted by the learned Chief Magistrate and upon which his suspended sentences were activated was one of Being Found in Possession of a Dangerous Drug: contrary to Section 8(b) and 41(2) of the Dangerous Drugs Act Cap. 114.

It is an offence which is punishable with a maximum fine of \$2,000 or 8 years

imprisonment or both and as such the first above-mentioned pre-condition is satisfied but the date on which the offence is alleged to have been committed is "..... on the 20th day of June 1988....." (some 5 months before the suspended sentences were imposed).

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In this case the relevant operational period began on the 10th of November, 1988 and was to continue for a period of 2 1/2 years until the 10th of May, 1991. Clearly then whilst the appellant's latest conviction on the 19th of May 1989 was a conviction within the operational period, the offence for which he was convicted was not "..... committed during the operational period".

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The second afore-mentioned pre-condition not being fulfilled the learned Chief Magistrate had no jurisdiction to activate any of the suspended sentences on that score.

Accordingly the appellant's appeal is allowed and the learned Chief Magistrate's order activating all the suspended sentences is hereby set aside together with the condition restricting the appellant's residence to Ono-i-Lau.

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The appellant has already served 9 months of his activated sentences and it would be unfair to deactivate them now but in any event he must be released immediately and it is so ordered.

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Having said that I would point out that the sentences imposed by the learned Chief Magistrate are exceedingly lenient and were undoubtedly motivated by the knowledge that the appellant was required to return and remain on Ono-i-Lau.

At the hearing of the appeal the appellant expressed a wish to return to his wife and new born child on Ono-i-Lau. He promises not to appear in Court again and asks for one last chance. I am releasing the appellant in the hope that he will stand by his entreaties and that he will return to his home island.

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(Appeal allowed; sentence varied)

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