

**MUKESH CHAND PRATAP**

v

**THE STATE**

[HIGH COURT, 1995 (Fatiaki J), 17 July]

Appellate Jurisdiction

*Crime-sentence-larceny by servant-improper deferral of sentence to allow repayment-need for consistency in sentencing-sentence reduced.*

The resident magistrate deferred sentence for 10 months to allow the accused to raise and repay moneys which he had stolen HELD: Such a course is irregular and in breach of Section 206(2) of the CPC. The sentence of 2 years imprisonment was reduced on grounds of parity.

Cases cited:

*Inwood* (1974) 60 Cr. App. R. 70

*Michael Parma Nand v. R.* (1966) 12 FLR 45

*R. v. George* [1984] 3 All ER 13

*R. v. Stroud* (1977) 65 Cr. App. R. 150

*R. v. Brown* (unreported)

Appeal against sentence imposed in the Magistrates Court.

Appellant in Person

*Ms. L. Laveti* for Respondent

**Fatiaki J:**

This is an appeal against a sentence of 2 years imprisonment imposed by the Savusavu Magistrate Court on the 3rd of February 1995. The appellant had pleaded guilty to an offence of Larceny by Servant and admitted facts which indicated that whilst employed in the Namalata Postal Agency, Savusavu he stole cash totalling \$4,258.12.

The Court record reveals that after his conviction the learned trial magistrate who was "... more interested in getting the money than sending the accused to jail ..." deferred sentence and released the appellant on bail so as to enable him to find and repay the stolen monies. In this way the appellant was permitted to remain at large for almost 10 months before being sent to prison.

If I may say so this was a highly unusual and irregular course to adopt and should not have been followed. In the first place it offends against the

A mandatory terms of Section 206(2) of the Criminal Procedure Code (Cap.21);  
 A secondly it gives the rather unsavoury appearance of allowing the accused  
 person to buy his way out of an otherwise wholly appropriate custodial sentence  
 and engenders in such an offender the erroneous but not unnatural expectation  
 that he will not be sent to prison.

B As was said by Lord Lane C.J. in R. v. George [1984] 3 All ER. 13 in discussing  
 the court's statutory power to defer sentencing, at pp. 14 and 15 :

C "The purpose of deferment is therefore to enable the court to  
 take into account the defendant's conduct after conviction or  
 any change in circumstances and then only if it is in the interests  
 of justice to exercise the power. It will, one imagines seldom  
 be in the interests of justice to stipulate that the conduct  
 required is reparation by the defendant. The power is not to  
 be used as an easy way out for a court which is unable to  
 make up its mind about the correct sentence. Experience has  
 shown that great care should be exercised by the court when  
 using this power."

(my underlining)

D

Furthermore in Inwood (1974) 60 Cr. App. R. 70 Scarman L.J. said of the use  
 of compensation orders at p.73 :

E "Compensation orders were not introduced into our law to  
 enable the convicted to buy themselves out of the penalties of  
 crime. Compensation orders were introduced into our law as  
 a convenient and rapid means of avoiding the expense of resort  
 to civil litigation when the criminal clearly has means which  
 would enable the compensation to be paid. ... Compensation  
 orders should certainly not be used when there is any doubt as  
 to the liability to compensate, nor should they be used when  
 there is a real doubt as to whether the convicted man can find  
 the compensation."(my underlining)

F

G Be that as it may, the appellant in presenting his appeal raised an issue of  
 disparity between his sentence and that imposed in the Savusavu Magistrates  
 Court on another postal worker convicted of an identical offence and involving  
 a slighter larger sum.

I am grateful to learned State Counsel for her assistance in providing the relevant  
 sentencing details of the case mentioned by the appellant. It is Taveuni Criminal  
 Case File No : 19 of 1995 in which the accused Taniela Daunibau the postal  
 agent on Qamea Island was convicted on his plea of guilty to an offence of

Larceny by Servant of a sum slightly in excess of \$5,000 and for which he was sentenced as a first offender to 18 months imprisonment 3 days after the sentence of the appellant was imposed.

A

In R. v. Stroud (1977) 65 Cr. App. R. 150 the English Court of Criminal Appeal approved the dictum of the Lord Chief Justice in R. v. Brown (unreported) when he said of the disparity principle :

“The practice of the court (is) to give effect to what is popularly called ‘the disparity argument’ ... It arises only when the would be appellant has received a sentence which the court thinks proper in itself but which is so disparate when compared with other sentences passed at the same time that a real sense of grievance may thereby be engendered in the person upon whom it is passed.”

B

In my view bearing in mind the information provided by Learned State Counsel, there can be no doubt that the appellant has received a sentence which is disparate from a sentence passed at about the same time in an identical even more serious case of offending, and that it has engendered in him a genuine sense of grievance which this Court can not allow to continue, more especially, when the only distinction between the cases appears to have been that they were dealt with by different magistrate.

C

D

In my view the difference between sentences passed for very similar offences must be justifiable on less capricious grounds based upon a proper application of sound sentencing principles and with a view to maintaining some uniformity and consistency between sentences passed by different magistrates.

E

As was said by Knox-Mower P.J. in Michael Parma Nand v. R. (1966) 12 FLR 45, 46 :

“It is desirable that the Supreme Court (now High Court), through its appellate jurisdiction, should, whenever feasible, ensure that there is some degree of uniformity of sentences imposed by the Courts below.”

F

Accordingly the appeal was allowed and the appellant’s sentence reduced to 18 months imprisonment with effect from the 3rd of February 1995.

*(Appeal allowed; sentence varied.)*

G