

SAIMONI TUCILA

v.

THE STATE

[HIGH COURT, 1996 (Pain J) 22 March]

Appellate Jurisdiction

Crime- sentence- activation of suspended sentence- opportunity for mitigation- reasons for sentence imposed- criminal damage- appropriate scale. Penal Code (Cap. 17) Section 324 (1).

On appeal the High Court reduced a sentence imposed for criminal damage. The Court emphasised that before passing sentence magistrates must give the accused an opportunity to mitigate and, where activation of a suspended sentence is in question an opportunity to show why activation should not take place. The High Court gave sentencing guidelines for criminal damage and stressed that prison sentences for non violent petty offenders "should be as short as possible".

Cases cited:

Abdul Kutty v The State Labasa Crim App 33 of 1994
Ashok Kumar v The State, Labasa Crim App No 8 of 1995
Levi Nasaumalumu v The State Crim App 56 of 1987
MacDonald v R (1976) 29 CCC (2d) 257
R v Bibi [1980] 1 WLR 1193
R v Bocskel (1970) 54 Cr App R 519
R v Ithell & Ors (1969) 53 Cr App R 210
R v Upton [1980] 2 Cr App R (S) 132
Tanoa Naiceru v R (1963) 9 FLR 48

Appeal against conviction and sentence imposed in the Magistrates' Court.

Appellant in Person

S. Karavaki for the Respondent

Pain J:

This is an appeal against conviction and sentence imposed in the Magistrates' Court.

In view of the arguments to be addressed in this decision it is appropriate to set out the record of the Magistrates' Court in full.

"22/8/1995 Prosecution: P.C. Tukana S.
 Accused: Present.
 Ch. read & explained: Understood.
 Plea: G.

Pros:

A On 23.7.95, at about 2.30 am the accused walked to the Service Station drunk, he had an argument with the Security Officer. He fisted the show glass of the said service station valued at \$800.00. The matter was reported to the Police. The Accused was interviewed and subsequently charged.

B Accused: I admit the facts.
 Court: Guilty and convicted as charged.
 Pros: 12 P.C's Admitted.

Court:

C Refer Cr. File 224/95. Accused was sentenced to 18 months suspended for 2 years activated. For this offence, he is sentenced to 12 months imprisonment. Sentence to run consecutively. A total of 2 years 6 months."

The Appellant appeals against conviction on the ground that the charge was a reconcilable offence and against the sentence (including the activation of the suspended sentence) on the ground that it is harsh and excessive.

D An appeal against conviction is precluded by Section 309 of the Criminal Procedure Code because the Appellant pleaded guilty to the charge. Furthermore, although the offence is one for which reconciliation can be promoted under Section 163 it is not mandatory for the Magistrate to invoke the provisions of that section. The question of reconciliation and whether the proceedings should have been stayed or terminated under Section 163 is an issue for consideration on the general appeal against sentence.

E The real issues on this appeal are whether the sentence (including the consecutive activated sentence) is manifestly excessive and whether the learned Magistrate acted correctly in activating the suspended sentence for its full term.

F There are three matters to be noted from the record of the Magistrates' Court.

1. The learned Magistrate failed to give the Appellant the opportunity to make any statement or submissions in mitigation, after accepting his plea of guilty on the charge of wilful damage.
- G 2. The learned Magistrate failed to give the Appellant the opportunity to show cause why the suspended sentence should not be activated.
3. The learned Magistrate gave no reasons for the sentence he imposed.

The failure to give a defendant the opportunity to mitigate is a denial of justice. (see Tanoa Naiceru v R (1963) 9 FLR 48). In such circumstances the sentence could be quashed and the case remitted back to the Magistrates' Court for proper consideration or the matter could be remedied in this Court.

A

The activation of a suspended sentence is provided for in Section 30 of the Penal Code. The power arises when the offender "is convicted of an offence punishable with imprisonment committed during the operational period of a suspended sentence". In that event the "court shall consider his case" (S.30(1)) and 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" (S.30(1)(d)).

B

Thus there is a statutory obligation on the Magistrate to consider the offenders case and, in considering whether or not it would be unjust to activate the suspended sentence for its full term, the offender must be given the opportunity to show cause why it would be unjust. The practice approved by this Court, is for the offender to be given the opportunity to show such cause on oath. (See Levi Nasaumalumu v The State (5.4.88) Crim App 56 of 1987; Abdul Kutty v The State (10.2.95) Labasa Crim App 33 of. 1994 and Ashok Kumar v The State (11.5.95) Labasa Crim App 8 of 1995). The failure to give the offender the opportunity to show cause may result in this Court setting aside the activation. Alternatively the sentence (including the activation of the suspended sentence) could be quashed and remitted back to the Magistrates' Court for proper consideration or the matter could be remedied in this Court.

C

D

Although there is no statutory obligation or general rule of law requiring a Magistrate to give reasons for sentence, it is good practice to do so. To adopt the words of Laskin CJC in MacDonald v R (1976) 29 CCC (2d) 257, "the desirability of giving reasons is unquestionable." They are required in the interests of the offender, in the interests of the due administration of justice and in the public interest. This does not mean that a lengthy judgment is required for every decision and sentence. That would be totally impractical in a busy Magistrates' Court. Reasons need only be provided that are adequate for the occasion. They ought to be given when a sentence of imprisonment is imposed. A failure to do so may render the sentence vulnerable on appeal.

E

F

In view of the three matters mentioned above I did consider quashing the sentence and remitting the case back to the Magistrates' Court. However 7 months has elapsed since the sentence was imposed and, in the interests of justice, the matter should be finalised with expedition. I therefore invited the applicant to make submissions in mitigation *de novo* and, if he wished, to give evidence on oath as to why it would be unjust to activate the suspended sentence. Counsel for the Respondent concurred in this course. The Appellant gave evidence on oath and was cross-examined. The Court now has all relevant material needed to review the sentence imposed by the learned Magistrate.

G

A The Appellant pleaded guilty to a charge under Section 324(1) of the Penal Code of "wilfully and unlawfully damaging the show glass of Bajpai's service station valued at \$800". This offence carries a maximum penalty of two years imprisonment. The facts are that the defendant went to the service station at 2.30 a.m. He was drunk. In the course of an argument he punched and broke a window worth \$800. In mitigation he said that he was employed by Bajpais as a security officer. He had not been dismissed following this incident but had been suspended for two weeks. He had begun paying compensation from his wages at the rate of \$40 per week. Counsel for the Appellant advised that for B sentences imposed for wilful damage under Section 324 of the Penal Code, statistics showed that in most instances the provisions of Section 163 of the Criminal Procedure Code have been invoked for the promotion of reconciliation and payment of compensation. In those cases where imprisonment has been imposed, the terms have ranged from three to six months.

C This was a serious case of wilful damage as the value of the property was \$800. It is deserving of a salutary penalty. The appropriateness of Section 163 of the Criminal Procedure Code is diminished because the value of the property is an "aggravating" feature and it would be difficult to categorize the case as being "substantially of a personal or private nature". The Appellant was not entitled to any discount for good character. He had numerous previous convictions D including one for the offence of damaging property.

In all the circumstances the learned Magistrate was entitled to impose a sentence of imprisonment. This Court may have been minded to consider an adjournment to give the Appellant the opportunity to pay compensation. However it cannot be said that a sentence of imprisonment was wrong in principle for this offence E committed by the Appellant. However a sentence of 12 months imprisonment is outside the acceptable range. The statistics from other cases show the appropriate range to be 3 to 6 months. In view of the value of the property in this case, a sentence of six months imprisonment would be appropriate.

F Having considered an immediate custodial sentence to be appropriate, the Court must then consider activation of the suspended sentence. It should be activated unless "it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed". In this case less than four months had elapsed from the imposition of the suspended sentence until conviction and sentence for the subsequent offence. The Appellant had paid \$54 reparation on those earlier offences by way of deduction from his wages. The Appellant G was unable to raise any other matter which would make it unjust for the suspended sentence to be activated. At the time it was imposed he had been given a clear warning by the Magistrate of the consequences of any further offending. The subsequent offence was not trivial. The activation of the suspended sentence for its full term was fully justified in terms of the statute.

If a suspended sentence is activated it should normally be ordered to run consecutively to the new immediate sentence imposed on the further offence.

However the Court must consider the overall or aggregate sentence to see whether it is just and appropriate for the total criminality represented by both offences. If the total is excessive then the term of the activated suspended sentence may be reduced. (See Archbold 1992 Vol 1 paras 5-207 page 759; R v Ithell & Ors (1969) 53 Cr App R 210; R v Bocskel (1970) 54 Cr App R 519; Ashok Kumar v The State, Labasa Crim App No 8 of 1995.)

In this case the sentence on the wilful damage charge of six months imprisonment and a consecutive sentence of 18 months imprisonment on the activated suspended sentence would total two years imprisonment. This would be for an offence of stealing a carton of beer valued at \$24, stealing cash of \$30 from a garage attendant and wilfully damaging a plate glass window valued at \$800. In each case the property belonged to his employer who retained his services. Compensation was paid for the beer and cash stolen. These were all property offences. None, considered separately, could be categorized as really serious offending. A total sentence of two years imprisonment is out of proportion to the offending. It is appropriate to bear in mind that a prison sentence should be "as short as possible, consistent only with the duty to protect the interests of the public and to punish and deter the criminal" (R v Bibi [1980] 1 WLR 1193, 1195) and that prison sentences for non-violent petty offenders "should be as short as possible" (R v Upton [1980] 2 Cr App R (S) 132, 134). On the other hand, one of these offences was theft from a person, the property damaged was of substantial value and the Appellant has shown a continuing propensity for offending.

Weighing up all matters a total sentence of 18 months imprisonment would be proportional to and appropriate for the three offences. This can be achieved by reducing the activated suspended sentence to 12 months.

Accordingly the appeal is allowed. The sentence of 12 months imprisonment and activation of the suspended sentence of 18 months imprisonment in the Magistrates Court on 22nd August 1995 are quashed and in substitution therefore:

1. The Appellant is sentenced to 6 months imprisonment on the charge of wilful damage (Mag. Ct. Case No 564/95).
2. The suspended sentence of 18 months imprisonment imposed in the Nausori Magistrates' Court on 28th March 1995 on charges of larceny and larceny from a person (CR 224/95) are activated for a reduced term of 12 months to be served consecutively to the sentence of 6 months imprisonment imposed on the charge of wilful damage.
3. The total sentence is therefore 18 months imprisonment which commenced on 22nd August 1995.

(Appeal allowed; sentence varied.)