

VIJAY SINGH v STATE

HIGH COURT — APPELLATE JURISDICTION

5 SHAMEEM J

31 May, 5 June 2002

[2002] FJHC 124

10

Criminal law — appeal — binding over powers — sentence manifestly harsh and excessive — failure to consider special reasons — Minor Offences Act (Cap 18) s 7(1) — Penal Code ss 41, 41(1), 41(2), 41(2)(b), 44 — Justices of the Peace Act (1968) (UK) s 1(7).

15

Vijay Singh (the Appellant) pleaded guilty to the offence charged against him, using obscene language in a public place contrary to the Minor Offences Act. The court bound him over in the sum of \$200 on condition that he should not reoffend in the next 2 years. He appealed against this sentence.

20

Held:

(1) The powers to bind exist in two separate situations. One is after a conviction and the other is in a trial irrespective of its outcome where both defendant and witness may be bound over to keep the peace. It applies either where the defendant needs to keep the peace on a finding of guilt or even if there is no finding of guilt. A conviction refers to a determination of guilt either after trial or after a guilty plea and to a decision of the court to pass sentence. The finding of guilt together with the order constitutes a conviction for purposes of the law. The failure to record a conviction on the court record was therefore not a bar to the making of the binding over order.

25

(2) The court must hear from the complainant before a binding over order is made. No such duty exists in respect of an order regarding the defendant. The common law requires a court to allow the defendant to make representations about the order before it is passed and as to an appropriate amount for the condition but s 41(1) does not provide for such representations in respect of a defendant. There was no requirement on the learned magistrate to ask the appellant if he consented to the order or as to the amount of \$200 and she did not err in failing to consult him.

30

Appeal dismissed.

35

Cases referred to:*R v Cole* [1965] 2 QB 388, cited.*Robertson & Golder v R* (1987) 85 Cr App Rep 304, cited.*S (an Infant) v Manchester City Recorder* [1971] AC 481, considered.

40

The appellant appeared in person.

P Bulamainaivalu for the respondent.

45

Shameem J. The Appellant was charged with the following offence in the Suva Magistrates Court:

Statement of Offence

Using Obscene Language in a Public Place: Contrary to section 7(1) of the Minor Offences Act [Cap 18].

Particulars of Offence

50

Vijay Singh s/o Shiu Pal Singh, on the 18th day of July, 2001 at Suva in the Central Division, used obscene language in a public place namely, Yatu Lau Arcade.

On 26 February 2002 the Appellant pleaded guilty to the charge. The facts were outlined as follows:

5 *On 18/7/01 at about 7.30am at Yatu Lau, City Centre, the complainant the ex-wife of the accused working at Farah Garments, came to Yatu Lau Arcade talking to one Arvind. He got angry and swore at ex-wife.*

The Appellant admitted the facts. He was a first offender, and said in mitigation:

10 *At time complainant was my legally wedded wife, she was having an affair with Arvind. I took a photo of her and she swore and got angry with me. Divorced her in August. I will not do anything again.*

The court taking into account his plea of guilty, and his previous good record, and mitigation, bound him over in the sum of \$200 on condition that he should not reoffend in the next 2 years.

15 He now appeals against sentence on the grounds that the sentence was manifestly harsh and excessive, and that the magistrate failed to consider whether there were special reasons not to impose the binding over sentence.

Binding over powers

Section 41 of the Penal Code provides as follows:

20 (1) *A person convicted of an offence not punishable with death may, instead of or in addition to any punishment to which he is liable, be ordered to enter into his own recognizance, with or without sureties in such amount as the court thinks fit, conditioned that he shall keep the peace and be of good behaviour for a time to be fixed by the court, not exceeding two years, and may be*
 25 *ordered to be imprisoned until such recognizance, with sureties if so directed, is entered into; but so that the imprisonment for not entering into the recognizance shall not extend for a term longer than six months:*

Provided that no order shall be made under this section where the person convicted has been sentenced to a term of imprisonment of more than six months.

30 (2) *In addition to the powers conferred by sub-section (1), any magistrate shall have power in any trial before him, whether or not the complainant be dismissed, to bind both the complainant and defendant with or without sureties, to keep the peace and be of good behaviour for a period not exceeding one year and may order any person so bound, in default of*
 35 *compliance with the order, to be imprisoned for three months or until such earlier time as he so complies.*

The section provides for a power, similar to that of s 1(7) of the Justices of the Peace Act (1968) (UK). That section provides that any court of record has “the power to bind over to be of good behaviour a person who or
 40 whose case is before the court by requiring him to enter into his own recognizances or to find sureties or both and committing him to prison if he does not comply”. That provision derives from an old power, contained in the Justices of the Peace Act 1361 to “take of all them that they may find by
 45 indictment, or by suspicion, and put them in prison; and to take of all them that be not of good fame, where they shall be found sufficient surety and mainprise of their good behaviour towards the King and his people, and the other duly to punish; to the intent that the people be not by such rioters or rebels troubled or endamaged, nor the peace blemished”...

50 In England, a person may be bound over to keep the peace without a conviction. In Fiji, a person may only be bound over without a conviction, under s 41(2) and, in the case of the binding over of a witness, may only be bound over

after he or she has been given an opportunity to show cause why he or she should not be bound over. The purpose of the order is to prevent a breach of the public's peace and to prevent the commission of any further offences.

Turning therefore to the grounds of appeal, the learned magistrate had the power to bind the Appellant over to keep the peace, under s 41(1) of the Penal Code, after convicting him. Indeed, given the nature of the mitigation in the lower court, a s 41 binding over order was admirably suited to the circumstances of the offending. However the record shows no evidence of a formal conviction having been recorded. State counsel at the hearing of this appeal suggested that the learned magistrate must have been exercising her powers to discharge conditionally under s 44 of the Penal Code, in which case she erred in ordering a discharge for more than 12 months.

Section 44 provides:

(1) *Where a court by or before which a person is found guilty, of an offence not being an offence for which a fixed sentence is prescribed by law, is of opinion having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the Probation of Offenders Act is not appropriate, the court may, with or without proceeding to conviction, make an order discharging him absolutely, or if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, and subject to such other conditions, if any, including the payment of costs ...*

It is apparent that the learned magistrate was not purporting to invoke her powers to conditionally discharge the Appellant, not only because of the length of the binding over order, but also because she did not use the words "conditional discharge".

The question is whether she could have imposed the binding over order, without recording a conviction. The meaning of the word "conviction" differs according to statutory context. In *S (an Infant) v Manchester City Recorder* [1971] AC 481, the House of Lords considered the word "conviction" in the context of a plea of autrefois convict. It was held that ordinarily the word means a finding of guilt, and the final disposal of the case. Lord Guest at 504 said:

The primary meaning of the word "conviction" denotes the judicial determination of a case; it is a judgment which involves two matters, a finding of guilt or the acceptance of a plea of guilty followed by sentence.

In *R v Cole* (1965) 2 QB 388, it was held that a plea of guilt ranks as a conviction not when it is recorded, but when sentence is passed. That was a case in which it was held by the English Court of Appeal, that a plea of guilty to an alternative charge should stand until a trial on the remaining counts is heard, and that sentence can be passed (on the alternative count) if the defendant is acquitted on the other charge. If there is a conviction, then the count in respect of which there is a plea of guilty, remains on the file and no sentence should be passed on it.

In *Robertson & Golder v R* (1987) 85 Cr App R 304, the defendants had pleaded guilty but had not been convicted. In a subsequent trial the Crown applied to adduce evidence of the pleas of guilty as "convictions" under the Police and Criminal Evidence Act 1984. The Court of Appeal held that a plea of guilty was a conviction because (unless the plea had been withdrawn or quashed on appeal) it was a formal finding of guilt.

The recording of a conviction is therefore not always necessary, for a conviction to exist in law. In the context of s 41, the powers to bind over appear to exist in two separate situations. One is after a “conviction” and the other is in a trial (irrespective of its outcome) where both defendant and witness may be bound over to keep the peace. The section therefore appears to apply either where the defendant needs to keep the peace on a finding of guilt, or where the defendant and the witness need to keep the peace even if there is no finding of guilt. A “conviction” under s 41(1) of the Penal Code appears therefore to refer to a determination of guilt either after trial or after a guilty plea, and to a decision of the court to pass sentence. The finding of guilt together with the order under s 41(1) constitute a conviction, for the purposes of the section.

The failure to record a conviction on the court record was therefore not a bar to the making of the binding over order.

The Appellant says that the sentence was harsh and excessive. I do not agree. Indeed in the context of a bitter divorce, and the involvement of third parties in that divorce, the binding over order was an appropriate sentence for the Appellant. The length of it, is also appropriate. I note from the appellant’s submissions at the hearing of this appeal, that he is still bitter about the divorce and custody case, and that he anticipates that his wife’s relative may cause further trouble. If that is so, then the sentence of the lower court may well result in a prevention of further offences being committed. This ground of appeal fails.

The second ground of appeal is that the Appellant was not given an opportunity to address the court to raise special reasons, before the order was made. Under s 41(2)(b) of the Penal Code, the court must hear from the complainant before a binding over order is made in respect of him or her. No such duty exists in respect of an order passed in respect of the defendant. The common law requires a court to allow the defendant to make representations about the order before it is passed, and as to an appropriate amount for the condition, but s 41(1) does not provide for such representations in respect of a defendant. As such there was no requirement on the learned magistrate to ask the Appellant if he consented to the order, or as to the amount of \$200, and she did not err in failing to consult him. This ground also fails.

For the reasons given above, this appeal is unsuccessful.

Appeal dismissed.