SEREIMA BOKADI v STATE

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

25, 29 October 2002

[2002] FJHC 179

Criminal law — sentencing — application for appeal — Taking motor vehicle without owner's consent — Dangerous driving — Driving a motor vehicle without a driving licence — Driving motor vehicle in contravention of the third party policy risks — non-payment of fines — inquiry by the sentencing court — Constitution of Fiji s 23(2).

Sereima Bokadi (Appellant) was convicted and sentenced for four counts involving driving offences. She was ordered to pay fines in default of imprisonment and also disqualified from driving for 12 months. She appealed against these sentences on the ground that she had no means to pay them. She asked that the fines be reduced and be given a year to pay them.

Held — (1) Although it is a fundamental principle of sentencing that financial obligations must be matched to the ability to pay, that does not mean that the court has to set out on an inquisitorial function and dig out all the information that exists about the Appellant's means. The Appellant knows what his means are and he is perfectly capable of putting them before the court.

R v Wright [1977] Crim LR 236, considered.

(2) Where an offender does not pay his/her fine, the court must make an inquiry as to means in the presence of the offender before issuing a warrant of commitment to prison. The Constitution provides that a person may not be deprived of personal liberty by court order on the ground of failure to pay a fine unless the court considers that the person has willfully refused to pay despite having the means to do so.

(3) The court record shows that there was some inquiry as to means before the fines were imposed. However it does not appear that the learned magistrate knew that the Appellant's employment was spasmodic.

(4) The period given for the payment of fines is unrealistic in relation to the Appellant's means. This was not a case of dishonesty but of irresponsibility probably fuelled by alcohol. In the circumstances, the fine of $250 excessive on Count 1 is reduced to $100. The total fine to be paid is therefore $505. It is ordered that the fines be paid within 12 months in instalments of $42 per month. The in default periods of imprisonment on each count remain as does the period of disqualification.

Appeal allowed as to the extent of the fines.

Cases referred to

Haroon Khan v State 40 FLR 182; *In the Matter of Eroni Delai* Miscellaneous Proceedings No HBM 15/2000; *R v King* (1970) 2 All ER 249; *R v Lewis* [1965] Crim LR 121, cited.

Earle Underwood v Reg Crim App No 69/1983; *R v Markwick* (1953) 37 Crim App R 125; *R v Wright* [1977] Crim LR 236, considered.

Appellant in person

D. Toganivalu for the State

Judgment

Shameem J. The Appellant was convicted on the 26th of July 2002 in the Suva Magistrate's Court of the following offences:

First count

Statement of Offence

Taking motor vehicle without owner's consent: Contrary to ss 100(1) and 114 of the Land Transport Act 35 of 1998.

Particulars of Offence

Sereima Bokadi, on the 13th day of April 2002 at Navua in the Central Division, took and drove away private motor vehicle registration number CX 346 on Queens Road, Batinikia without the consent of the lawful owner Eliki Losione.

Second count

Statement of Offence

Dangerous driving: Contrary to ss 98(1) and 114 of the Land Transport Act 35 of 1998.

Particulars of Offence

Sereima Bokadi, on the 13th day of April 2002 at Navua in the Central Division, drove a private motor vehicle on Queens Road, Batinikia in a manner which was dangerous to the public having regards to all the circumstances of the case.

Third count

Statement of Offence

Driving a motor vehicle without a driving licence: Contrary to ss 56(3)(a)(6) and 114 of Land Transport Act 35 of 1998.

Particulars of Offence

Sereima Bokadi, on the 13th day of April 2002 at Navua in the Central Division, drove a private motor vehicle registration number CX 346 on Queens Road, Batinikia without being the holder of a driving licence in respect of the said motor vehicle.

Fourth count

Statement of Offence

Driving motor vehicle in contravention of the third party policy risks: Contrary to s 4(1) (2) of the Motor Vehicle Third Party Policy Insurance Act 177.

Particulars of Offence

Sereima Bokadi, on the 13th day of April 2002 at Navua in the Central Division, drove a motor vehicle on Queens Road when there was not in force in relation to the use of the said motor vehicle by the said Sereima Bokadi, a policy of insurance in respect of third party policy risks as complies under the provisions of this Act.

After her pleas of guilty were entered, the prosecution outlined the facts. They were that on 13th April 2002 at 7 am, one Eiliki Losione drove the Appellant and another friend to Pacific Harbour in his car. At Pacific Harbour, while they were drinking, Mr Losione went for a swim. The Appellant, without his permission, took the car keys and drove away in the vehicle with her friend. She was driving at high speed, could not control the vehicle and caused it to tumble over. Her friend received injuries as a result of the accident. The Appellant did not possess a driving licence. She agreed with these facts and was convicted on all counts.

In mitigation, the Appellant expressed remorse and said that she worked at Mandola & Associates and earned $100 per week. She said she looked after her family. The learned magistrate sentenced her as follows:

Count 1: $200 fine in default 40 days imprisonment;
Count 2: $250 fine in default 50 days imprisonment;

Count 3: $100 fine in default 20 days imprisonment;
Count 4: $55 fine in default 11 days imprisonment.

She was disqualified from driving for 12 months.

The Appellant appeals against these sentences. She quite candidly said that she had not paid the fines within the 28 days given to her because she had no means to pay them. She asked that the fines be reduced, and that she be given a year to pay them.

In answer to my questions, she said that she has worked on a temporary basis for Majolo & Associates in Walu Bay where she earns $100 per week when she is working. She said that she supports her mother and a son who is at school. She said that his school fees are paid for by her brothers. She said that she has no skills other than for household work but could pay her fines if she was given enough time to do so.

State counsel agreed that she should be given more time to pay her fines, but strongly objected to the reduction of the fines, saying that it was a serious case of its kind and that the fines were not excessively heavy.

The principles applicable to fines

Fines may be imposed for most offences in addition to or instead of, any other sentence. On imposing such a fine, the court may order that a term of imprisonment be served in default of payment, under s 35(1)(d) of the Penal Code. Section 28(4) of the Penal Code provides that a sentence of imprisonment in default of payment of a fine shall be served consecutively with a former sentence.

Fines are generally imposed when the facts of a case suggest that the sentencer should pass a sentence at the lower end of the tariff, and where a deterrent sentence is considered necessary but the offence is not so grave that a custodial sentence is required. In principle, a fine must only be imposed when the facts of the case do not call for a custodial sentence. As D A Thomas says in his *"Principles of Sentencing"*, 2nd ed, p 318: "It is wrong in principle to impose a heavy fine on a wealthy man in a case where a person of less substantial means would normally be sentenced to imprisonment. The court has indicated in earlier decisions that the power to impose fines should not be used to 'give persons of means an opportunity of buying themselves out of being sent to prison' (*R v Markwick* (1953) 37 Cr App R 125)".

After deciding that the case does not warrant a custodial sentence, the sentencer must then decide on the appropriate level of fine. In traffic cases, there is usually a tariff of fines for particular offences. The Land Transport Act provides a schedule of ranges of fines. Tariffs of fines in non-traffic cases may be more difficult to ascertain. In deciding on the appropriate fine, the court is entitled to take into account any profit the offender made from the offending, and his or her means to pay.

The only reference to a means inquiry in the Penal Code is in s 37, which provides for a means inquiry before a committal warrant is issued under s 37(1) for non-payment of fine. However, the common law requires some inquiry into means before the fine is imposed. As DA Thomas (above) states at 320:

> *… A fine should not normally be imposed without an investigation of the offender's means, and the amount appropriate to the offence considered in the abstract should be reduced, where necessary, to an amount which the offender can realistically be expected to pay.*

In *Haroon Khan v State* 40 FLR 182, Pathik J, after referring to *R v King* (1970) 2 All ER 249 and *R v Lewis* [1965] Crim LR 121, said that where a magistrate failed to inquire into means before imposing a fine, the sentence was wrong in principle and would be quashed. In *Earle Underwood v Reg* Crim App No 69/1983, Kermode J said:

> *Where a Magistrate proposes to impose what he considers might be a large fine for the person he has convicted, a lot of time, trouble and expense would be saved if he made inquiry of that person's means before imposing the fine.*

In assessing means, the sentencing court should consider regularity of employment, expected and current wages, financial burdens on the offender, and other sources of income. Fines should not be ordered to be paid over excessive periods of time, and it is wrong in principle to order payment of fines expecting another person to pay it (other than the offender). The exception is the payment of a juvenile's fines by his parent or guardian. Lastly, in assessing the offender's means, a court is entitled to rely upon information given to it by the offender and is under no duty to conduct an independent means of inquiry. In *R v Wright* [1977] Crim LR 236, the court said:

> *Although it is … a fundamental principle of sentencing that financial obligations must be matched to the ability to pay, that does not mean that the Court has to set out on an inquisitorial function and dig out all the information that exists about the Appellant's means. The Appellant knows what his means are and he is perfectly capable of putting them before the court.*

Where an offender does not pay his/her fine, the court must make an inquiry as to means in the presence of the offender before issuing a warrant of commitment to prison. Section 23(2) of the Constitution provides that a person may not be deprived of personal liberty by court order on the ground of failure to pay a fine unless the court considers "that the person has wilfully refused to pay despite having the means to do so".

The effect of this section of the Constitution on s 37(4) of the Penal Code was fully discussed by Scott J in *In the Matter of Eroni Delai* Miscellaneous Proceedings No HBM15/2000. For the purpose of this judgment, it is enough to say that where a means inquiry has been conducted when the fine was imposed, then unless there has been a significant change of means between imposition of sentence and the default period, a further inquiry before the committal warrant is issued will not normally be necessary. Where the offence was "formally proved" and the accused was not present at the hearing, then, unless the court had proceeded on the basis of an "NAC" which warned the accused that he might be fined in his absence and would be given 8 days to pay (which period could be extended by application), fines imposed are liable to be quashed and committal orders similarly quashed for lack of compliance with s 23(2) of the Constitution. This is because an offender cannot be assumed to have wilfully refused to pay his/her fine, when he/she did not know that a fine had been imposed.

This appeal

The court record shows that there was some inquiry as to means before the fines were imposed. However it does not appear that the learned magistrate knew that the Appellant's employment was spasmodic.

In the circumstances I consider the period given for payment of fines unrealistic in relation to the Appellant's means. Further, although the offence of taking a motor vehicle without the owner's consent is a serious and prevalent offence, in this case the Appellant went on a "joy-ride" in a friend's car. This was

not a case of dishonesty, rather one of irresponsibility probably fuelled by alcohol. In the circumstances I consider the fine of $250 excessive on Count 1, and I reduce it to $100. I decline to reduce any of the other fines on the ground of gravity. The total fine to be paid is therefore $505. I order that the fines be paid within 12 months from today in instalments of $42 per month. The in default periods of imprisonment on each count remain; as does the period of disqualification.

The sentences are therefore as follows:

Count 1: $100 in default 40 days imprisonment;
Count 2: $250 fine in default 50 days imprisonment;
Count 3: $100 fine in default 20 days imprisonment;
Count 4: $55 fine in default 11 days imprisonment.

This appeal succeeds to this extent.

Appeal allowed as to the extent of the fines.