ABRAHAM LINCOLN -v- REGINAM

**High Court of Solomon Islands**
**(Muria ACJ)**
Criminal Case No. 6 of 1992
Hearing: 8 April 1992
Judgment: 10 April 1992

A. Radclyffe for Appellant
R. B. Talasasa for the Respondent

MURIA ACJ: On 10 April 1992, I varied the sentence imposed by the learned Principal Magistrate upon the appellant and I said I would give my reasons later. I do so now.

This appellant pleaded Guilty at the Central Magistrates Court to four counts of conversion. He was sentenced on Count 1 to 9 months imprisonment on count 2 to 9 months imprisonment, concurrent, on count 3 to 9 months imprisonment, concurrent and on count 4 to 18 months imprisonment, consecutive, making it a total of 27 months imprisonment. The learned Magistrate then ordered that 21 months of the sentence to be suspended for one year and only 6 months were to be served.

The appellant appealed on two grounds namely:-

"1. *That the learned Magistrate did not take sufficient account of the delay in prosecuting the case.*

2. *That the learned Magistrate did not take sufficient account of the fact that a sentence of 6 months or more will lead to his (appellant) disqualification as a member of Western Provincial Assembly.*"

In the course of argument, I invited both counsel to address the Court on the extent of the discretionary power of the learned Magistrate to suspend a sentence of imprisonment.

I deal first with the grounds of appeal. In support of the first ground, Mr Radclyffe submitted, in essence, that the delay in prosecuting the case was so inexcusable that had the learned Magistrate properly took it into account he would have imposed a sentence of less than that which he imposed upon the appellant. Mr Talasasa, for the respondent, submitted that the learned Magistrate did not turn a blind eye to the

issue of delay in this case and that the learned Magistrate had properly considered the question of delay and weighed it against the seriousness of the offences.

Having seen the record and hearing what counsel submitted, I am more than convinced that the learned Magistrate had properly considered the question of delay in this case. The learned Magistrate said in his reasons for sentence:-

> *"What is of significance here though, is the delay in bringing up the case for prosecution. Learned counsel for the defendant pointed out that a full confession was made by the defendant as far back as 18/10/90. However, no charges were laid until March, 1992, some 17 months later. No satisfactory explanation has been given for the delay."*

The learned Magistrate then referred to a decision of this Court, ***R -v- Dalo*** *Crim. App. Case No. 20 of 1987 (Unrep.)* and continued:-

> *"The High Court has made it quite clear that where there has been serious delay by the prosecution and no reasonable explanation is given then the Magistrates should consider reducing the sentence substantially."*

Having imposed the 27 months sentence of imprisonment, the learned Magistrate stated that because of ***"the unreasonable delay by the prosecution"*** the appellant would only serve 6 months and 21 months was to be suspended for one year. It must therefore be obvious to the appellant that he was fortunate to be dealt with in the manner taken by the learned Magistrate substantially due to the delay on the part of the prosecution in bringing the case to court. I say, fortunate, because had it not been for the delay in bringing this matter to court, the sentence of 27 months imprisonment is in my view inadequate in the circumstances of the appellant.

Ground 1 of this appeal must be dismissed.

On the second ground, Mr Radclyffe argued that in the course of the delay in bringing this matter to court, supervening events had taken place and the appellant had contested and was elected unopposed as a Member of the Western Provincial Assembly. Had the case been brought to Court earlier, he would not have stood and been elected during the election in late 1991. The effect of the sentence now imposed on the appellant, says Mr Radclyffe, would greatly affect, not only his position as a Provincial Minister but also the people whom he represents in the Assembly and who have now placed their confidence in him. Mr Radclyffe further submitted that the appellant had already secured arrangement to repay the amount he converted and that the DBSI have agreed to the arrangement. In those circumstances, Mr Radclyffe submitted that, the appellant could properly be dealt with on individualised basis and the proper sentence should be one which, still reflecting the seriousness of the offences, but still enabling

the appellant to retain his responsible office as an elected Member of his people and a Minister in the Provincial Government.

The case is a sad one not only for the appellant but also for the family and I have considered whether or not to individualised the appellant's position and to deal with him in the manner suggested by Mr Radclyffe. There are two alternatives I am faced with and these are: to deal with the appellant on a tariff basis or on an individualised measure. A tariff sentence is a punitive measure reflecting the gravity of the offence and is designed to have a deterring effect; whereas individualised measures are designed to help the offender to conform with the law and not so much as a deterrence. In some instances both objectives may be achieved in one and the same measure, such as, imposing a suspended sentence and that is the measure which I feel the court should take in this case.

There are considerable mitigating factors in this appellant's case. There is the frank admission to the police when the appellant was questioned by the police about the offence. The appellant pleaded guilty in Court which saves time and expense. He is a man of previous good character. There is also the unreasonable delay as found by the learned Magistrate in this case in bringing the case to Court. As the facts reveal, during the interval the appellant had already been accepted by his own people and elected him as their representative in the Western Provincial Assembly and had occupied a responsible position as a Provincial Minister in the Western Provincial Assembly. The above factors clearly justify the lenient approach taken by the learned Magistrate of imposing a short sentence upon the appellant.

The next step is to decide whether or not the sentence of 27 months imprisonment should suspended in full or in part.

The power to suspend a sentence is provided by section 43 A(1) of the Penal Code which provides that:

> *"(1) Subject to the provisions of subsections (2) and (3), a court which passes a sentence of imprisonment on any offender for a term not more than two years for any offence, may order -*
>
> *(a) that the sentence shall not take effect during a period specified in the order; or*
>
> *(b) that after the offender has served part of the sentence in prison, the remainder of the sentence shall not take effect during a period specified in the order,*

*unless during the period specified in the order, the offender commits another offence punishable with imprisonment and a court thereafter orders under section 43B that the original sentence shall take effect:*

*Provided, that the period specified in the order shall not be less than one year or more than two years."*

It will be observed that under section 43 A(1), the discretionary power to suspend a sentence is limited to a sentence of imprisonment of a term ***"not more than two years"***. The sentences passed on the appellant are 9 months on each of the first three counts which sentences are to run concurrently to each other and 18 months on the fourth count. The 18 months imprisonment sentence is to run consecutive to the 9 months concurrent sentence on the first three counts.

The next matter for consideration is whether the sentence of 18 months being made to run consecutive to the 9 months sentence can be said to be ***"a sentence of imprisonment"*** for the purpose of section 43A(1) of the Penal Code. The answer to that is to be found in section 9(3) of the Criminal Procedure Code which provides:

*"(3) For the purposes of appeal or confirmation the aggregate of consecutive sentences imposed under this section in the case of convictions for several offences at one trial shall be deemed to be a single sentence."*

The position in this case must therefore be that since the two sentences were made consecutive they should be treated as a single sentence of 27 months of imprisonment. Having been so treated, it would thus be obvious that the discretionary power to suspend the sentence under section 43A(1) does not apply. Accordingly the sentence passed on the appellant in this case is one which is not authorised by law and I must set it aside.

The powers of this Court at the hearing of an appeal are those provided under section 292 of the Criminal Procedure Code. I feel the circumstances of this case would justify this Court in the exercise of its powers under that section to direct that the sentence of 18 months imprisonment imposed on count 4 should run concurrently with the sentence of 9 months passed in count 3, and not consecutively. The total sentence will therefore be 18 months imprisonment which now enable the Court to suspend it. I allow the appeal on that basis and I order whole of the sentence to be suspended for one year.

Sentence varied accordingly.

**(G.J.B. Muria)**
**ACTING CHIEF JUSTICE**