IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 12 of 1966

Between:

STEPHEN BETA HILTON DUI Appellant

and

REGINAM Respondent

Marquardt-Gray for Appellant

Palmer for Respondent.

J U D G M E N T

On 25th April, 1966, the appellant pleaded guilty before the High Court of the Western Pacific at Honiara to charges of burglary and simple larceny, and was sentenced to five years' imprisonment on the first charge and three months' imprisonment on the second charge, the sentences to be concurrent. This appeal is brought against sentence only and concerns the major charge. No argument was addressed to us with regard to the sentence imposed for larceny.

It is clear that in passing sentence of five years' imprisonment the learned trial judge took into account the previous convictions of the appellant and commented :-

> "It appears that accused is an incorrigible house-breaker and thief."

In our opinion if the previous convictions, of which details are given in the Record, were duly proved in evidence and taken into account, the sentence of five years' imprisonment would be a proper one and this Court would not disturb it.

Counsel for the appellant contends however that the alleged previous convictions were not properly before the Court and should not have been taken into consideration. The Record shows that after pleas of guilty on

each charge had been entered the prosecutor stated the facts surrounding the two offences in question; and the appellant thereupon admitted that these facts had been correctly stated.

The prosecuting police officer then continued to make a statement as to the appellant's personal circumstances and character, and put in what he referred to as a "schedule" of previous convictions. The copy of this "schedule" which appears in the Record purports to be signed by the "Officer in Charge Criminal Records" and emanates from the Criminal Records Office, C.I.D. Honiara; that is to say, a police office.

It would appear from the Record that the statement was made by the prosecuting officer from the floor of the Court and the Certificate of Previous Convictions was handed up to the trial judge without being certified on oath. It is possible that sworn evidence was given by the prosecutor to verify the list of previous convictions but this does not appear on the Record before us. We are not entitled to speculate as to what may have happened, but must treat the matter as appears, on the face of it in the Record.

Section 269 of the Criminal Procedure Code, 1961, in force in the British Solomon Islands Protectorate provides :-

> "The court may, before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the sentence proper to be passed."

In counsel's contention the important word in the section is "evidence", which must mean sworn evidence either in the form of a statement made on oath by the witness or in the form of a list of previous convictions verified upon oath. As that procedure was not followed in this case, counsel submits that the previous convictions should not be taken into account in assessing sentence but that the appellant should, for that reason, be treated as a first offender.

Counsel for the respondent refers us to section 125 of the Criminal Procedure Code which reads as follows :-

P.C. 122

"(1) In any inquiry, trial or other proceeding under this Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force -

(a) by an extract certified, under the hand of the officer having the custody of the records of the court in which such conviction was had, to be a copy of the sentence or order; or

(b) by a certificate signed by the officer in charge of the prison in which the punishment or any part thereof was inflicted, or by the production of the warrant of commitment under which the punishment was suffered,

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted. "

It is however to be noted that the certificate attached to the list of previous convictions produced in this case is signed by an officer of the C.I.D. Honiara, and not by the officer having the custody of the records of the Court or the officer in charge of the prison in which the sentences were served. In any event it does not appear on the face of the Record that the certifying officer holds either of the posts referred to in section 125.

Counsel for the respondent contends that the prosecutor had referred, in open Court, to the five previous convictions of the accused for housebreaking and larceny and had seen the prosecutor hand the list into the trial judge. Thereafter the appellant said that he was calling no witnesses for character and had nothing to say. Counsel contends that the appellant must be taken to have implicitly accepted the accuracy of the statement made by the prosecuting officer.

It does not however appear that the list of previous convictions was actually shown to the appellant and there is no record of his being invited to confirm or deny the accuracy of the list tendered to the Court.

Section 227 of the Criminal Procedure Code provides that, subject to the provisions of the Code and of any

Rules of Court, the practice of the High Court of the Western Pacific in its criminal jurisdiction shall be assimilated as far as circumstances admit to the practice of Her Majesty's High Court of Justice. In this regard we refer to the Practice Direction given by the Court of Criminal Appeal on 31st January, 1955 and reported in (1955) I All E.R. page 386. It is not considered necessary to quote this Practice Direction, which concerns proof of previous convictions and the history of the accused, in full. It suffices to say that in accordance with that Direction a statement of previous convictions should not be handed to the Court or to defending counsel until the officer producing it is sworn.

In this case we find that the statement of previous convictions was not verified upon oath; it was not certified under the hand of either of the officers empowered by section 125 of the Code so to certify; and it was not expressly acknowledged by the accused as correct.

In these circumstances we have no option but to hold that the list of previous convictions was not properly before the Court and these convictions should not have been taken into consideration when the sentence was determined. Accordingly we uphold counsel's contention that the appellant should be treated, for the purposes of sentence on these convictions, as a first offender.

We therefore quash the sentence of five years' imprisonment and pass sentence of two years' imprisonment in its place. This sentence of two years' imprisonment will date from the commencing date of the original sentence of five years' imprisonment and will also run concurrently with the sentence of three months' imprisonment imposed for simple larceny.

(Sgd) C.J. Hammett (Sgd)
PRESIDENT

(Sgd) T.J. Gould (Sgd)
JUDGE OF APPEAL

(Sgd) C.Marsack
JUDGE OF APPEAL

SUVA,
13th June, 1966.