IN THE FIJI COURT OF APPEAL

At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 15 OF 1991
(High Court Cr. App. No. 37 of 1991)

BETWEEN:

OSEA BALEASAVU — APPELLANT

-and-

S T A T E — RESPONDENT

Appellant in Person
Mr. I. Mataitoga and Ms S. Kaimacuata for the Respondent

Date of Hearing : 3rd March, 1992
Date of Delivery of Judgment : 3rd March, 1992

MR. BALEASAVU (Appellant) : My Lord, I have spent most of my time in prison serving this sentence I have been sentenced with. The 18 months I was to have served expired in December 1991. While I was in prison, my father passed away and I have been informed to go and be his substitute at the Fiji Sugar Corporation in Lautoka. I promise this Court that I will try my best not to go to prison again. I would like to go home and support my wife and family members. That is all I wish to say, Sir.

JUSTICE HELSHAM : Mr. Director, we are most grateful for your written submissions. We have read them. Is there anything you want to add to those at all?

MR. MAITOGA : I apologise only for giving a copy to the Appellant just now. I have nothing further to add, My Lord.

J U D G M E N T

On the 28th of January 1991, the accused pleaded guilty to a charge laid under section 270 of the Penal Code of Larceny from a Dwelling House. The goods were a video deck and screen valued at $1700. The goods were recovered before his conviction, a fact known to the learned magistrate.

The accused had a very bad record of criminal offences going back over a number of years and he had been imprisoned on more than one occasion. His record was taken into account by the learned magistrate, the notes of his sentence being as follows:-

> *"COURT*
>
> *Accused pleaded guilty - 26 PCs mostly involving breaking - robbery with violence. Clearly a menace to society. Taken into account accused's mitigation and plea of guilty.*
>
> *Custodial sentence warranted.*
>
> *Accused sentenced to 18 months imprisonment.*
>
> *Right of Appeal (sentence) 28 days.*
>
> *(Sgd) S. Prasad*
> *RESIDENT MAGISTRATE"*

The accused appealed to the High Court against his sentence. With his Notice of Appeal, there was a letter which set out the basis of his appeal and in it, he sought a suspended sentence based upon the various assertions therein.

The appeal was heard on 17th May 1991. The accused appeared in person before the learned High Court Judge who heard the appeal. The record indicates what happened.

"*IN THE HIGH COURT OF FIJI*
AT LAUTOKA

APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 37 OF 1991

BETWEEN: *OSEA BALEASAVU* *Appellant*

AND : *S T A T E*

Appellant in Person
Mr. I. Wikramanayake for the Respondent

IN COURT

In Maximum Security.

Appellant — *Nothing to add to my petition.*

Court — *I have in mind to increase sentence. Do you wish to say anything in that regard?*

Appellant — *May I be given another chance. I have turned a new leaf of life - not appear again - and I go straight to my village and stay there. No one to till our land. That is all.*

Court — *Quite correctly, the trial magistrate said a deterrent sentence should be imposed. However, 18 months is not a deterrent. Appellant gets 1/3 or 6 months taken off as he enters jail - thus reduced to 12 months, he is entitled to apply for extra mural punishment. It is possible for him not to serve 1 day in jail under lock and key.*

I vary the sentence from 18 months to 4 years imprisonment.

(Sdg) M J C Saunders
PUISNE JUDGE"

The accused has now appealed to this Court. Pursuant to Section 21 of the Court of Appeal Act, there is no right of appeal in a case such as this except on question of law. It must be pointed out that the learned High Court Judge, when dealing with this matter, was sitting not as a Judge of first instance but was sitting as an appeal Judge from the decision of a Magistrate. As such, the provisions of Section 319(2) of the Criminal Procedure Code were applicable, which section gives to the High Court, power to increase a sentence imposed by a Magistrate. However, the section requires that it must "pass such other sentence warranted in law" as it thinks ought to have been passed. This, we think means that a Judge in the position of the learned Judge in this case, should not only observe the ordinary principles of law and practice in relation to sentencing but the ordinary principles of natural justice should not be overlooked as they apparently were in this case.

There was no formal application by the State to increase the sentence and no application for this made at the hearing by the legal representative of the Respondent who was present. The accused was therefore not aware that he might have to meet an application to show cause why his sentence should be increased. It was the learned Judge who had formed the view that this should be done and confronted the accused with it without warning. The accused was given no intimation that he ought to be prepared on

his own appeal against the severity of a custodial sentence of 18 months to defend his position against a likely increase of that sentence. That does not seem to this Court to conform with the principles of natural justice.

Secondly, the accused, being met with this unexpected situation - in effect immediately asked for his appeal to be withdrawn and the Magistrate's sentence restored. This was not adverted to by the learned Judge except in the way indicated in the remarks of His Honour quoted above.

Thirdly, the basis of His Honour's decision to increase the sentence clearly lay in his belief that the ordinary practice as to service of sentences plus some legitimate application that it might be possible for the accused to make, might result in his not serving any period of his cutodial sentence under what the learned Judge described as *"lock and key"*.

This does not seem to us to be the correct approach in law to the imposition of a sentence "warranted in law". Such a sentence it would appear to this Court is to be imposed after consideration of the principles and practices as they should be applied to the offence in question, in the light of the factors that ought to be taken into account. That does not appear to

have occurred in this case. The amount of time that a convicted criminal may be entitled to by way of remission and how and where his custodial sentence may be spent, are not matters that a Court ought to have in mind when passing his sentence that is "..... warranted in law".

In this regard we are indebted to the Director for drawing our attention to the reasons for Judgment that Lord Goddard in the R v Maguire & Anor (1957) C.A.R. 92

Such matters as:-

> *"(i) Previous convictions of the Appellants on similar type offences in the last 5 years.*
>
> *(ii) Need for deterrent sentences due to prevalence of the offence.*
>
> *(iii) The fact that there are (sic) no violence".*

do not appear to have been considered by the learned judge when fixing the term that he did in this case, or, if they were, then the Accused was entitled to know what they were.

In the result I would grant leave to appeal and in all the circumstances I would restore the sentence imposed by the learned magistrate.

I am informed that my two brothers agree with that decision and we will make the appropriate Order.

MR. MATAITOGA : My Lord, there is difficulty in imposing the Magistrate's sentence because the accused person has served an extra three months.

JUSTICE HELSHAM : If we do plan as it were, to restore the Magistrate's sentence is there any problem that might arise out of that? Any problem of false imprisonment or anything of that nature?

MR. MATAITOGA : Just that there was an earlier Judgment that said that in cases like this, the reduced sentence should be a sentence which will ensure his immediate release.

JUSTICE HELSHAM : Is that sufficient? If we merely upheld the appeal and order his immediate release?

MR. MATAITOGA : That would be sufficient, Sir.

JUSTICE HELSHAM : Is the accused suffering under any other conviction?

MR. MATAITOGA : No Sir.

JUSTICE HELSHAM : Are you sure of that?

MR. MATAITOGA : Yes Sir.

O R D E R

JUSTICE HELSHAM : Appeal upheld

We order that the Appellant be discharged from custody forthwith.

.....

M. M. Helsham
PRESIDENT
FIJI COURT OF APPEAL

.....

(Sir Moti Tikaram)
JUSTICE OF APPEAL

.....

(Sir Mari Kapi)
JUSTICE OF APPEAL

MR. MATAITOGA : That would be appropriate Sir.

JUSTICE HELSHAM : Mr. Director, may I say that the Court is very grateful. It is not as easy as it appears on the surface, and we thank you.

The Court will now adjourn till tomorrow morning.

The Court adjourned at 4.05 p.m.