

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0019 OF 1998S
 (High Court Criminal Case No.HAA 007 of 1998)

BETWEEN:

RAVIN CHAND

Appellant

AND:

THE STATE

Respondent

Coram:

The Rt. Hon. Sir Maurice Casey, Presiding Judge
 The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing:

Monday, 15 February 1999, Suva

Counsel:

Appellant in Person
 Mr J. Naigulevu for the Respondent

Date of Judgment: Friday, 26 February, 1999

JUDGMENT OF THE COURT

This appeal is against the sentence imposed by Surman J. exercising the appellate jurisdiction of the High Court and an order made by him in the same proceedings activating a suspended sentence of imprisonment. Such an appeal can be only on a question of law (Court of Appeal Act (Cap.12)(s.22(1)). An appeal against sentence on a question of law is open to the appellant in this instance because the magistrate had not imposed a sentence of immediate imprisonment and Surman J. did so (Court of Appeal Act, s.22(1A)).

On 15 January 1998 part-way through his trial in the Suva Magistrates' Court the appellant (Chand) pleaded guilty to one offence of obtaining money by false pretences contrary to section 309 of the Penal Code (Cap.17). After he had paid compensation in the amount he had obtained, he was discharged absolutely without conviction, pursuant to section 44 of the Penal Code.

In October 1996 Chand had been convicted in Suva Magistrates' Court of another offence of obtaining money by false pretences; a sentence of six months' imprisonment was imposed but suspended for one year. In January 1997 he had been convicted in Sigatoka Magistrates' Court of a similar offence; a sentence of twelve months' imprisonment was imposed but suspended for eighteen months. The offence to which Chand pleaded guilty was committed on 30 April 1997, within the period of suspension of both the suspended sentences. The magistrate did not activate either of the suspended sentences but apparently extended the period of suspension of the second of them by six months.

The Director of Public Prosecutions appealed to the High Court against that order of discharge and against the magistrate's failure to activate two suspended sentences imposed for earlier offences of a similar nature. Surman J. allowed the appeal, set aside the order, imposed a sentence of eight months' immediate imprisonment, and activated the second of the two suspended sentences. He ordered that it be served consecutively with the sentence of eight months' imprisonment. As far as the appeal book discloses, he did not formally convict the appellant of the offence in respect of which he had been discharged absolutely.

Sections 30, 31 and 32 provide for the activation of a suspended sentence. Section 30(1) reads:

"30(1) Where an offender is convicted of an offence punishable with imprisonment committed during the operational period of a suspended sentence and either he was convicted by or before a court having power under the provisions of section 31 to deal with him in respect of the suspended sentence or who subsequently appears or is brought before a court, then, unless the sentence has already taken effect, that court shall consider his case and deal with him by one of the following methods:-

- (a) *the court may order that the suspended sentence shall take effect with the original term unaltered;*
- (b) *it may by order that the sentence shall take effect with the substitution of a lesser term for the original term;*
- (c) *it may by order vary the original order made under the provisions of subsection (1) of section 29 by substituting for the period specified therein a period expiring not later than three years from the date of the variation; or*
- (d) *to may make any order with respect to the suspended sentence,*

and a court shall make an order under a paragraph (a) unless the court is of opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent, offence and, where it is of that opinion, the court shall state its reasons."

Section 31(1) reads:

"31(1) An offender shall be dealt with in respect of a suspended sentence by the High Court or, where the sentence was passed by a magistrate's court, by any magistrate's court before which he appears or is brought."

Although not formally expressed as an order, it appears that the magistrate intended to take action in accordance with section 30(1)(c) to vary the original order suspending the sentence imposed in January 1997. However, as he discharged Chand without convicting him, he had no power to make any order in respect of either of the two suspended sentences. His purported extension of the period of the second suspended sentence was therefore *ultra vires*.

Appeal to the High Court against the magistrate's order discharging Chand without conviction was authorised by section 308 of the Criminal Procedure Code (Cap.21). Section 319(1) empowered that Court to make such orders "as to it [might] seem just" and by

such orders exercise any power which the Magistrates' Court might have exercised. It was, therefore, within the power of the High Court to set aside the order discharging Chand absolutely. Surman J. did that. Provided that he convicted Chand, as he had power to do, he could lawfully impose any sentence of imprisonment which the magistrate could lawfully have imposed if he had convicted him. If he convicted Chand, he was also authorised *and under a duty* to do one of the things provided for in section 30(1) of the Penal Code in respect of the two suspended sentences.

Chand's petition of appeal took the form of a letter written and signed by him. It raised no question of law. At the hearing of the appeal he tendered a handwritten submission in which he raised the question whether the activation of the suspended sentence was lawful in the absence of conviction. He also raised that question orally at the hearing. Otherwise none of his submissions raised questions of law. The sentence of eight months' imprisonment was well below the maximum sentence that could have been imposed for the offence by the magistrate. The combined total of that sentence and the suspended sentence that was activated was not so great that its legality can be in question.

Mr Naigulevu conceded that the learned judge, having decided to set aside the order of absolute discharge, should have formally convicted Chand before he imposed sentence and before he activated the suspended sentence. However, he referred us to the powers of this Court to dismiss an appeal, even if the appeal might have been decided in favour of the appellant, if it considers that no substantial miscarriage of justice has in fact occurred (Court of Appeal Act, section 22(6)) and, if it thinks that the decision of the High Court should be varied on the ground

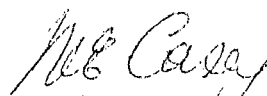
of its having made a wrong decision on a question of law, to vary the decision by making any decision which the Magistrates' Court or the High Court could have made (Court of Appeal Act, Section 22(3)).

The main error of law we find in the decision of Surman J. is that he failed to record a conviction before passing sentence and activating the suspended sentence. In all the circumstances the imposition of the sentence and the activation of the suspended sentence were entirely appropriate. We are satisfied that, if we vary the learned judge's decision by formally recording the conviction which he should have recorded, there will have been no miscarriage of justice. He also had a duty to make an order under section 30(1) of the Penal Code in respect of the first of the suspended sentences. His failure to do so was an error of law. However, we were not addressed on this matter by Mr Naigulevu; it would, therefore, be unfair to the appellant if we now made any order to his detriment in respect of that suspended sentence. We are, therefore, further varying Surman J's decision by ordering, as authorised by section 30(1) (d), that the first suspended order not be activated or varied.

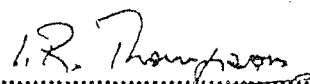
Accordingly, save to the extent of making those variations, we dismiss the appeal.

Decision: Appeal dismissed, except to the extent that the decision of the High Court is varied so as to include orders:-

- (a) that appellant is convicted of obtaining money by false pretences contrary to section 309 of the Penal Code (Cap.17); and
- (b) that the suspended sentence imposed on the appellant in October 1996 is not activated or varied.



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Sir Maurice Casey
Presiding Judge



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Mr Justice I.R. Thompson
Justice of Appeal

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent