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

CRIMINAL APPEAL NO.AAU0005 OF 1999S
(High Court Criminal Appeal No.108 OF 1998/S)

BETWEEN:

CAROL MITCHELL TEBBUTT

Appellant

AND:

THE COMMISSIONER OF INLAND REVENUE

Respondent

Coram: **The Hon. Sir Moti Tikaram, President**
The Hon. Justice I. R.Thompson, Justice of Appeal
The Hon. Sir David Tompkins, Justice of Appeal

Hearing: **Tuesday, 17 August 1999, Suva**

Counsel: **Mr. A.Gates for the Appellant**
Ms. B.Malimali and Ms.A. Uluiviti for the Respondent

Date of Judgment: **Friday, 27 August 1999**

JUDGMENT OF THE COURT

The appellant was charged in the Magistrates' Court at Suva with three counts of failing to comply with the provisions of section 50 of the Income Tax Act (Cap.201). On 31 March 1998 the respondent had delivered to her a letter requiring that by 30 April 1998 she should deliver to him-

" (a) returns of income derived by her during each of the years 1992, 1993, 1994 1995, 1996 and 1997;

(b) complete and detailed statements of all assets and liabilities, both business and personal, in and out of Fiji of herself, her wife (sic) and children as on 31 December in each of those years; and

(c) detailed analysis of her drawings account for those years."

She failed to deliver any of them to the respondent by 30 April 1998. The charge was laid on 9 June 1998; its three counts related respectively to the appellant's failure to deliver each of the things specified in (a), (b) and (c) above. However, the summons was not served on the appellant until 30 July 1998. In the meantime, on 16 July 1998, she had delivered all of them to the respondent. In the returns she stated that she had had no income chargeable with income tax in Fiji.

The appellant pleaded guilty to all three offences. The magistrate recorded that plea. The prosecutor then tendered a written statement of the facts, essentially as set out above. After she had done so, the appellant's counsel, Mr Gates, submitted that the appellant should be absolutely discharged and made in mitigation of the offences a number of assertions which the prosecutor did not dispute. They were summarised somewhat unclearly by the magistrate in his notes of the trial. Mr. Gates has restated them for the purposes of this appeal and the respondent accepts that the restatement is correct in substance. The assertions which he made were:

> "1. The Accused has pleaded guilty to all three charges. You have heard she has no previous convictions. Tax papers required have all been supplied. This was done 2 1/2 months after the date fixed by the Commissioner.
>
> 2. When you look at the Demand Letter, it makes draconian requests for information. Probably further time for compliance should have been requested by her advisers in any event.

3. However, there was no failure to respond to correspondence on the part of the Accused's professional advisers. Correspondence passed and there were meetings with the Revenue. The advisers acted in a timely fashion and queried at first the necessity for the Demands and the liability to any Fiji tax. This concerned Company and personal income. They maintained all along she was not resident for tax purposes.

4. The history of dealings between the Accused and her advisers (lawyers here, accountants from Fiji and Australia) on the one hand and the Revenue Officers on the other was unfortunate, and during the course of dealings, relations deteriorated. It became *warfare.*

5. In order to comply with the Revenue's requests, a good deal of work was needed of the Accused and a trip to Sydney, to gather the information from her own papers and from her accountants there.

6. Previous cases have found that it is the responsibility of the taxpayer to ensure his tax advisers act without delay. He cannot escape liability by saying the papers are with his accountants and that they are still working on them. He must demonstrate that he did all he could in the circumstances.

7. One asks did the Accused act as a responsible taxpayer should have conducted herself. However this case is distinguishable from the Fiji cases. The Accused and her advisers maintained close contact with the Revenue by telephone, with correspondence being exchanged and with meetings between the Revenue's Officers and herself with her lawyer and accountant present.

8. But those then advising the Accused should have ensured that the Commissioner gave his written approval for the demand under Section 50 (1) **to be placed in abeyance** until these consultations and deliberations were resolved. If they could not achieve this approval, then they should have advised their client to arrange full and timely compliance, or at least to have applied for an extension of time within which to comply.

9. This was their mistake. But it was not the mistake of the taxpayer nor does any fault attract to her for such error. She kept close contact with her advisers, as did the advisers with the Revenue. She attended meetings with the Revenue.

10. (Brief comparison with other cases).

11. In this case, there was no delay. Contact between the Accused's advisers and the Revenue was frequent. Eventually her then advisers admitted that their

initial advice that the Demand need not be met because she was resident for tax purposes in Australia, was wrong. They realised that even if she were, the Commissioner's demands had to be met, even if fruitless.

12. The indulgence of the Commissioner should have been secured first. The Revenue was adamant - comply first with the Demand and then the matter of residency can be discussed.

13. Taxpayer did do everything a prudent and responsible businessman should have done.

14. In spite of constant contact, this prosecution was brought. Much depends on the reasonableness of the Commissioner's demands.

15. On 9th June 1998, Inland Revenue Department sent a letter that the matter should be sorted out within the period of Amnesty. The day before, 8th June 1998, Mr. Bale of Inland Revenue Department wrote to the Accused's lawyers denying a threat to issue a summons. Yet charges were then filed on 9th June 1998, the next day." (Emphasis in original)

The magistrate discharged the appellant without conviction on each count, presumably exercising the discretion conferred on him by section 44 of the Penal Code (Cap.17). That is certainly the only statutory provision under which in the circumstances he had power to

do so. In a statement headed "Sentence" and containing the orders of discharge, the magistrate, giving his reasons for making them, referred to "the matters placed before me including ... the reasons you and your advisors had in not acceding to the demand". He ordered the appellant to pay $50 costs.

The respondent appealed to the High Court against the discharge orders. In the High Court the learned judge held that the magistrate should not have discharged the appellant without conviction, set aside the discharge orders, convicted her on all three counts and sentenced her to pay a fine of $1 per day on each count for each of the 77 days of her default in complying with the respondent's demand, a total of $ 231. He did not disturb the order for payment of $50 costs. Giving his reasons, he stated in effect that the first statutory prerequisite for an order discharging an offender under section 44 of the Penal Code, namely that, when regard is had to the nature of the offence and the character of the offender, an opinion can properly be formed that it is inexpedient to inflict punishment, was not met in the instant case because there had been "an inexcusable failure" to comply with "clear statutory obligations" and the offences "must be regarded as serious". He referred to a number of recent cases in the High Court from which guidelines could be distilled for the matters to be taken into account in assessing an appropriate sentence. He did not state what they were but said that when they were applied to the case before him the following matters were of consequence -

"(a) The fact that there were lengthy periods of time in respect of which the returns were not made and although made by the time the case was heard it was after very considerable delay.

(b) There was no evidence that anyone was responsible for this matter other than the person charged. It was not a body in which communications had broken down nor were there any professional advisors who had been tardy in their actions.

(c) There is no evidence of illness or other exceptional circumstances calling for a merciful response.

(d) The amounts of money were not as large as is often the case."

He said that the charge related to "a failure to file tax returns for six separate years from 1992 to 1997 (inclusive)".

This appeal is against the order made by His Lordship convicting the appellant, not against the sentence imposed. By virtue of section 22(1) of the Court of Appeal Act (Cap. 12), the appellant's right of appeal is limited to questions of law. Her grounds of appeal are-

"The learned judge erred:

1. In finding that the Magistrate had erred in not proceeding to enter a conviction, in that it was a wrong principle.

2. In considering the Returns were not made until "after a very considerable delay" by confusing the years of potential assessment with the default period following the Commissioner's Demand.

3. In mistakenly finding there was fault or moral blame on the part of the Appellant rather than her professional advisers, whose timely action and advice the Appellant reasonably followed."

We sought clarification from counsel concerning some of the assertions made in the plea in mitigation. Mr. Gates assured us that, in spite of the assertions made in paragraph 2 and 14 of his plea in mitigation, he was satisfied that the appellant properly pleaded guilty to all three counts. In respect of paragraph 15 counsel agreed that the letter of 9 June 1998 related to PAYE deductions made by the appellant's company from the earnings of its employees and did not in any way concern her personal income tax obligations. We were shown a copy of the letter of 8 June 1998 referred to in paragraph 15; it was clear that the writer's main concern in relation to the alleged threat was to point out to the appellant's advisors that, if it was made, it was made by another officer of the Inland Revenue Department with whom they had been dealing and not by the writer of the letter.

In a written submission to this Court Mr. Gates contended that, in respect of the matters referred to in the grounds of appeal, His Lordship had "misapprehended the facts relevant to sentence ...[taken] a view of the facts that could not reasonably be entertained [and] in doing so...made an error of law." We have first to determine whether, if he did any of those things, that would constitute an error of law. If we determine that it would, we must then decide whether His Lordship's judgment discloses that he did any or all of them.

In *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 the House of Lords held that a judge or tribunal errs in law if he or it reaches a conclusion without any evidence or on a view of the facts which cannot be reasonably entertained (per Viscount Simonds at page 29) or if on the basis of the facts found no person acting judicially and properly instructed as to the relevant law could have come to that conclusion (per Lord Radcliffe at page 36). It also (at

page 35) approved a statement by Lord Normand in *Inland Revenue Commissioner v Fraser* [1942] SC 493, 497-8 that "the Appeal Court has always jurisdiction to intervene if it appears ...that...the tribunal has made a finding ...which is inconsistent with the evidence or contradictory of it."

In the present instance the learned judge had to consider the facts related to him by the parties, which were not in dispute, and, applying them, decide whether the statutory prerequisites set by section 44 of the Penal Code for the exercise by the magistrate of his discretion to make orders discharging the appellant absolutely had been met. The first of those prerequisites was, as stated above, that, when regard was had to the nature of the offences and the character of the appellant, the opinion could properly be formed that it was inexpedient to inflict punishment. Mr Gates' submission that the learned judge misapprehended the facts relevant to sentence was doubtless intended by him to refer to misapprehension of the facts relevant to that prerequisite for the exercise of the discretion to discharge the appellant. He is submitting, in effect, that His Lordship took into account facts to which he could not properly have regard for that purpose. We are satisfied that, if he did so, that constituted an error of law.

It is necessary, therefore, to consider whether he did commit such an error. The errors alleged relate to the nature of the first of the offences and the extent of the appellant's personal responsibility for all the offences. In respect of the first of those matters the facts preceding the making of the demand were clearly relevant to the seriousness of the appellant's failure to comply with it and the learned judge did not err simply by taking them into account. However, as noted above, the returns lodged by the appellant in July 1998 showed no income. Section 44 of the Income Tax Act requires "every person liable to taxation under the provisions

370

of [that] Act" to deliver a return of his or her total income derived in a tax year to the respondent before 31 March in the year following that tax year. However, a person is liable to taxation only if he or she has derived income in Fiji during that tax year. If he or she has not done so, section 44 imposes no obligation to deliver a "nil" return . At the time of the trial in the Magistrates' Court and at the time when the appeal was heard in the High Court the respondent had not issued an assessment in respect of any of the tax years requiring her to pay any amount of income tax; so there was no evidence that the appellant had had any obligation under section 44 to deliver any returns of her income. (Of course, she was obliged to do so when that was demanded by the notice given under section 50). Consequently the learned judge could not properly take into account as a factor aggravating the offences with which the appellant was charged, and therefore relevant to the forming of an opinion whether it was inexpedient to inflict punishment on her, the fact the she had not delivered returns for those six years before her belated compliance with the respondent's demand under section 50. In doing so he erred in law.

However, we do not accept that His Lordship misapprehended the facts relating to the appellant's responsibility for her failure to comply with the respondent's demand. Lawyers and accountants in Fiji and Australia who were acting on her behalf in the matter had made representations to the Inland Revenue Department that she was not liable to pay any income tax in Fiji in respect of any of the tax years concerned. There was correspondence between them and the Department up to the time when the summons was issued charging the appellant with the three offences. However, it is clear that the Department was unwilling throughout to accept their contention that, because in their view she was not liable to pay tax in Fiji, she ought not to be required to comply with the respondent's demand. In spite of that, they

did not seek an extension of time to comply with the demand in case their representations were unsuccessful. The obligation to comply, therefore, remained and rested on the appellant personally, as she was the person of whom the demand was made. A person in that situation cannot transfer responsibility to legal and accountancy advisors. He or she must keep in touch with them and ensure personally that the demand is complied with and that, and if there are grounds for extending the time for compliance, the extension is requested. The assertions made by Mr. Gates did not include any that the appellant was misled by her advisors to believe that either the demand had been complied with or an extension of time for compliance had been granted. The learned judge correctly stated, therefore, that there was no evidence that anyone was responsible for the offences other than the appellant.

Although we have found that the learned judge erred in law in taking into account the failure of the appellant over a period of six years to deliver returns of income to the respondent, we are satisfied that no substantial miscarriage of justice has occurred and that the appeal should be dismissed, as provided for in the proviso to section 23(1) of the Court of Appeal Act (Cap.12). The High Court (and its predecessor Supreme Court) has properly stressed in a number of cases the serious effect which non-compliance with demands made under section 50 of the Income Tax Act has on the respondent's ability to perform his statutory functions as one of the principal collectors of the revenue required for the well-being of the nation and its people. It delays the assessment and collection of tax and, by diverting the attention of the staff of the Department away from their proper functions to taking action to enforce compliance, it imposes an unnecessary cost burden.

372

In respect of the application of the provisions of section 44 of the Penal Code generally, we adopt with respect what was said on the matter by Scott J. in the High Court in *Commissioner of Inland Revenue v Atunaisa Bani Druavesi* (Criminal Appeal No.HAA 0012 of 1997: 3 July 1997:

> ***"Perhaps it is time to re-emphasize that the powers conferred by section 44(1) of the Penal Code should only be exercised sparingly (see Halligan v Police [1955] NZLR 1185) where the direct or indirect consequences of convictions are out of all proportion to the gravity of the offence and after the Court has balanced all the public interest considerations as they apply in the particular case (see Tipple v Police [1994] 2 NZLR 362)."***

There is nothing in the facts placed before this Court to cause us to find that the consequences to the appellant of a conviction being recorded against her are likely to be out of proportion to the gravity of the offence. The public interest considerations, discussed above, clearly require that a conviction be recorded both as a deterrent to the appellant and others who may be minded not to comply with demands made of them under section 50 of the Income Tax Act and as an indicator to taxpayers generally of the need to take seriously requirements made of them by or under that Act.

Neither party has appealed against the quantum of the fines imposed by the High Court or against the order for costs. As the appeal is dismissed, they stand unaltered. In this case appeal against sentence would have lain only if it was an unlawful one or passed in error of law (see section 22 (1A) of the Court of Appeal Act.)

If this Court had power to award costs in an appeal under Part IV of the Court of Appeal Act, this is an occasion on which we should be inclined to do so. However, it does not have the power to do so (see 32(1), Court of Appeal Act).

Decision

Appeal dismissed.

Sir Moti Tikaram
President

Justice I.R.Thompson
Justice of Appeal

Sir DavidTompkins
Justice of Appeal

Solicitors:

Messrs. Gates, Suva for the Appellant
Office of the Commissioner of Inland Revenue, Suva for the Respondent

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