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

CRIMINAL APPEAL NO. AAU0011 of 2001
(High Court Criminal Appeal No. HAA20 of 2001)

BETWEEN:

ANTHONY GRAHAM SMITH

Appellant

AND: THE STATE

Respondent

Coram: Eichelbaum JA, Presiding Judge
Tompkins JA
Smellie JA

Hearing: Friday, 16 November 2001, Suva

Judgment: Friday, 16 November, 2001

Counsel: The Appellant in Person
Mr. P Ridgway for the Respondent

Reasons for the Judgment: Thursday, 22 November 2001

REASONS FOR THE JUDGMENT OF THE COURT

Following the hearing of this appeal on 16 November 2001, the Court dismissed the appeal. We now give our reasons.

The appellant was charged with seven counts of obtaining credit by fraud, relating to the fraudulent use of an American Express credit card number, and one count of possession of Indian hemp, or cannabis. He pleaded guilty to each count. He was sentenced by the Magistrates' Court at Nadi on 2 March 2001. On the first count he was sentenced to 3 months imprisonment, on the remaining obtaining credit by fraud counts to five months imprisonment on each, and on the drug

count to 3 months imprisonment. These sentences were all cumulative, resulting in a total term of imprisonment of three years.

He appealed to the High Court against the sentences imposed. In a judgment delivered on 13 June 2001, Prakash J allowed the appeal. Counts 3 to 7 of the charges filed were dismissed. On counts 1 and 2 he was sentenced to 12 months imprisonment on each to be served concurrently, and on count 8, the drug count, the 3 months sentence imposed in the Magistrates' Court was confirmed, that sentence to be cumulative on the other sentences. From that decision he has appealed to this court.

Facts

The appellant is an Australian. On 21 February 2001 he arrived at a resort in Fiji, booking in until 6 March 2001. He produced a fax letter with an American Express card number, saying that the card belonged to him and he did not bring cash because it was not safe to do so. The credit card to which the number related did not belong to him. He had obtained the number from a copy of a rental car contract he had found.

He obtained from the resort credit balances totalling $4,130. From that credit he drew cash on six occasions totalling $2,700. In addition there were charges against his account of $709.54.

In the High Court counsel for the respondent conceded that there was a duplication in the number of counts, given the statement of account now available from the resort. It was for this reason that counts 3 to 7 of the charges filed before the Magistrates' Court were dismissed.

The Grounds of Appeal

In his notice of appeal the appellant made detailed submissions on the judgment delivered in the High Court. Prior to the hearing of the appeal the appellant filed additional written submissions setting out the grounds of his appeal more concisely. He elaborated on these grounds in the course of his oral submissions.

The appellant's basic submission is that the judge in the High Court erred when he increased by the sentences imposed on counts 1 and 2 from the sentences of three months on count 1 and five months on count 2 imposed in the Magistrates' Court to sentences of 12 months on both counts to be served concurrently. The appellant submitted that such an increase in sentence was contrary to s 28 (1) (j) of the Constitution of Fiji. That subsection provides:

> (1) Every person charged with an offence has the right:
>
> (j) Not to be found guilty in respect of an act or omission unless the act or omission constituted an offence at the time it occurred, and not to be sentenced to a more severe punishment than was applicable when the offence was committed.

The appellant's submission misunderstands this provision in the Constitution. It does not prevent an appellate court from increasing the sentence. It does prevent a court, whether appellate or not, from imposing a sentence more severe than the maximum sentence at the time the offence was committed. That is not the situation in the present case. The maximum sentence at the time the offence was committed for the offences with which the appellant was charged in counts 1 and 2 was imprisonment for five years.

In the course of his submissions the appellant referred to an observation made by the Magistrate at the time of his sentence in the Magistrates' Court when the Magistrate said that the accused is a veteran criminal - not a tourist but a pollutant. This comment received publicity in the local newspaper. The appellants says that as a result of the publicity given to this comment, he was treated with particular severity in prison. We consider that the observation made by the Magistrate was inappropriate. Despite his lengthy list of previous convictions, he was entitled to be treated with appropriate courtesy in court. A court may, and in some circumstances should, express its views on a prisoner's conduct clearly and forcefully. But it should not do so in terms that can be regarded as offensive or rude. If, as a result of the Magistrate's observation, he was treated with particular severity in prison, we consider that that too was inappropriate.

The appellant also submitted that the sentence imposed in the High Court was excessive.

Conclusion

Section 21 (1A) of the Court of Appeal Act (cap 21), as inserted by s 4 of the Court of Appeal (Amendment) (No 2) Act 1998 provides:

> (1A) No appeal under subsection (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground -
>
> (a) That the sentence was an unlawful one or was passed in consequence of an error of law.

Consequently, this being an appeal from the sentence imposed by the High Court in its appellate jurisdiction, the appeal can only succeed if the sentence imposed was passed in consequence of an error of law.

It follows that there can be no appeal on the ground that any sentence imposed in the High Court was excessive, as that is not a ground that, in this case, involves an error of law.

The only error of law raised by the appellant in his submission was his contention that the judge did not have jurisdiction to increase the sentences that had been imposed in the Magistrates' Court in respect of counts 1 and 2.

Section 31 of the Criminal Procedure Code (cap 21), dealing with the powers of the High Court, provides in subs (2):

> (2) At the hearing of an appeal whether against conviction or against sentence, the [High] Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the magistrate's court and pass such other sentence warranted in law, whether more or less severe, in substitution therefor is it thinks ought to have been passed.

This provision puts beyond doubt the jurisdiction of the High Court on appeal from the Magistrates' Court to quash the sentences imposed by the Magistrate on counts 1 and 2 and pass a more severe sentence if it considers it appropriate to do so. Increasing the sentences on these two counts, therefore, does not involve any error of law.

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Result

It is for these reasons that we determined that the appellant's appeal against the judgment in the High Court cannot succeed.

Eichelbaum JA, Presiding Judge

Tompkins JA

Smellie JA

Solicitors:

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

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