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

CRIMINAL APPEAL NO: AAU0027 OF 2000S
(High Court Criminal Action No. HAC00006 of 1999L)

BETWEEN:

THE STATE

Appellant

AND:

DINESH CHAND

Respondent

Coram: Reddy, P.
Barker, J.A.
Davies, J.A.

Hearing: 22 February 2002, Suva

Counsel: Mrs. L. Fagbenro for the Appellant
Mr. A.K. Singh for G.P. Shankar for the Respondent

Date of Judgment: 1 March 2002

JUDGMENT OF THE COURT

The State filed an appeal against a sentence passed on the Respondent in the High Court. The Respondent filed a cross-appeal against conviction.

The Respondent had been found guilty after a defended hearing before Prakash, AJ and assessors in the High Court at Lautoka on one count of assault with intent to cause grievous harm to Rajnesh Singh. Respondent was acquitted on another count arising out of the same incident which occurred on 27 January 1996 where the complainant was Nilesh Vikash. The trial was held some 4½ years after the charge was

laid. On 29 August 2000, Prakash, AJ sentenced the Respondent to 9 months imprisonment, suspended for 18 months, and fined him $500. Respondent has paid the fine and the 18 months' suspended sentence has recently expired. The fine was ordered to be paid to the complainant as compensation. If the fine were not paid within 30 days, then the Respondent was to serve a sentence of 9 months' imprisonment.

When the appeals were called, counsel for the Respondent suggested that both appeals be withdrawn on the basis that Respondent had discharged his obligations incurred at the time of sentencing. The Court indicated to counsel its view that it would not be proper to contemplate increasing the sentence by imprisoning the Respondent 18 months after he had been sentenced and after his suspended sentence had expired. Counsel for the appellant, very properly, acknowledged the practical difficulty involved in increasing the sentence but explained that the Director of Public Prosecutions had filed the appeal in order that this Court might provide some guidelines for sentencing Judges and Magistrates in similar cases.

Accordingly, while the Court intends to dismiss both appeal and cross-appeal on the request of counsel for the appellant, it offers some guidelines.

The Court considers that prosecution appeals against sentence must be given priority - particularly where the State seeks a ruling from an appellate Court ordering the imprisonment of a criminal defendant not imprisoned by a lower court.

In this type of appeal, justice and humanity require that immediate attention be given to administrative matters such as the preparation of the record. The Court will always give priority to the hearing of such appeals. Often, in a prosecution sentence appeal, it should not be necesssary to prepare a full record of the trial. Suitable directions can be sought by the appellant. Usually, a summary of facts, medical, probation and other reports, plus the sentencing Judge's record of the sentencing hearing (including the sentencing remarks) would often be all the documentation necessary. If other documents are thought necessary, counsel could arrange their production to the Court. We hasten to say, in the present case, that no criticism is intended of counsel by these remarks. They apply to future cases. The cross-appeal against conviction required the provision of the full record of trial and there were other reasons for delay that were attributable neither to the parties nor to counsel.

The essential facts were that the Respondent wounded the Complainant in the stomach with an ice-cream scraper, an item of equipment in the Respondent's business as an ice-cream vendor. The wound caused the Complainant's intestines to protrude. The Respondent's defence was that he was acting in self-defence but this defence was rejected by the Judge and the assessors. The Complainant was hospitalised undergoing emergency surgery. According to the doctor who treated him, he would not have survived without the surgery, the other, less significant injuries.

Respondent was a first offender, married with 3 dependent children. He

201

was self-employed. He claimed he had been provoked by the Complainant and his companion who had allegedly made insulting remarks. The Judge seemed to accept that an element of provocation applied, although the evidence of provocation was not particularly strong. The Judge considered a merciful sentence was appropriate: he did not imprison the Respondent, imposing instead, a suspended sentence. The Judge noted that the maximum sentence for the offence was life imprisonment, but considered this one of those rare cases where an immediate custodial sentence was not required.

A discussion of the process which should be undertaken when a judicial officer is considering a suspended sentence is found in the decision of the New Zealand Court of Appeal in R v. Petersen [1994] 2 NZLR 533. There may be differences of details between the Fijian and New Zealand statutes. However, the principles stated in Petersen are helpful. These principles are summarised in the headnote thus:

> *"The principal purpose of [the relevant section] was to encourage rehabilitation and to provide the Courts with an effective means of achieving that end by holding a prison sentence over an offender's head. It was available in cases of moderately serious offending but where it was thought there was a sufficient opportunity for reform, and the need to deter others was not paramount. The legislature had given it teeth by providing that the length of the sentence of imprisonment was fixed at the time the suspended sentence was imposed, that it was to correspond in length to the term that would have been imposed in the absence of power to suspend, and that the Court before whom the offender appeared on further conviction was to order the suspended sentence to take effect, unless of the opinion it would be unjust to do so. So, there was a presumption that upon further offending punishable by imprisonment the term previously fixed would have to be served (see p.537 line 4).*

202

The Court's first duty was to consider what would be the appropriate immediate custodial sentence, pass that and then consider whether there were grounds for suspending it. The Court must not pass a longer custodial sentence than it would otherwise do because it was suspended. Equally, it would be wrong for the Court to decide on the shorter sentence than appropriate in order to take advantage of the suspended sentence regime (see p.538 line 47, p.539 line 5). R V. Mah-Wing (1983) 5 Cr App R (S) 347 followed.

The final question to be determined was whether immediate imprisonment was required or whether a suspended sentence could be given. If, at the previous stages of the inquiry, the Court had applied the correct approach, all factors relevant to the sentence were likely to have been taken into account already; the sentencer must either give double weight to some factors, or search for new ones which would justify suspension although irrelevant to the other issues already considered. Like most sentencing, what was required here was an application of commonsense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation (see p.539 line 8, p.539 line 37).

Petersen's case was a prosecution appeal against leniency of sentence. Petersen had pleaded guilty, at early opportunity, to reasonably serious drug offences:he was sentenced in the High Court to 18 months' imprisonment suspended for 2 years plus 9 months' periodic detention. He had no previous drug convictions and was aged 42 with family commitments. The New Zealand Court of Appeal considered Petersen's offending so serious that it quashed the suspended sentence and imposed one of 18 months' imprisonment concurrent on the several charges. The Court discussed at p. 539 the factors needing to be weighed in choosing immediate imprisonment or suspended sentence in these words:

203

"Thomas at pp.245-247 lists certain categories of cases with which suspended sentences have become associated, although not limited to them. We do not propose to repeat those in detail since broadly all can be analysed as relating either to the circumstances of the offender or alternatively the offending. In the former category may be the youth of the offender, although this does not mean the sentence is necessarily unsuitable for an older person. Another indicator may be a previous good record, or (notwithstanding the existence of a previous record, even one of some substance) a long period of free of criminal activity. The need for rehabilitation and the offender's likely response to the sentence must be considered. It is clear that the sentence is intended to have a strong deterrent effect upon the offender; if the latter is regarded as incapable of responding to a deterrent the sentence should not be imposed. As to the circumstances of the particular case, notwithstanding the gravity of the offence, as such, there may be a diminished culpability, arising through lack of premeditation, the presence of provocation, or coercion by a co-offender. Cooperation with the authorities can be another relevant consideration. All the factors mentioned are by way of example only and are not intended as an exhaustive or even a comprehensive list. The factors may overlap and more than one may be required to justify the suspension of the sentence in any particular case. Finally, any countervailing circumstances have to be considered. For example, in a particular case the sentence may be regarded as failing to protect the public adequately.

In concluding our consideration of the principles, we wish to add this. Understandably, the form of the legislation requires the sentencer to pass through a series of statutory gates, before reaching the point of availability of a suspended sentence. Subject to that however, like most sentencing what is required in the end is an application of commonsense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation. In many instances an initial broad look of this kind will eliminate the possibility of a suspended sentence as an appropriate response."

204

In the present case, the Judge, who had heard the evidence at a defended trial was well - placed to take into account mitigating factors on the Respondent's behalf. Nevertheless, he failed to give any weight to the deterrent factor. Wounding another person with a weapon should, almost always, be visited with immediate imprisonment. It does not matter, as apparently was thought significant by the Judge, that the weapon used was a tool of trade of the Respondent's. A short custodial sentence would have been appropriate as reflecting the mitigating factors in the Respondent's favour. A period of 6-9 months' imprisonment would have been more appropriate than the suspended sentence imposed..

However, as earlier indicated, the Court is not prepared to entertain the State's appeal. It would not be just to do so because of:

(a) the length of time since the sentencing - 18 months.

(b) the fact that Respondent has served the sentence and paid the fine.

(c) the unexplained delay of 4½ years in bringing this man to trial. Such does not seem a reasonable time in a relatively uncomplicated case such as this.

At the request of both counsel, both appeal and cross-appeal are dismissed by consent.

.....
Hon. Justice J.R. Reddy
President

.....
Hon. Sir Ian Barker
Justice of Appeal

.....
Hon. Justice J. Davies
Justice of Appeal

Solicitors:

Office of the Director of Public Prosecutions, Suva for the Appellant
Messrs. G.P. Shankar and Company, Ba for the Respondent