RC0217

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

CRIMINAL APPEAL NO. AAU0002 OF 2007
(High Court Criminal Case No. HAA126 of 2006)

BETWEEN:	**JOELI TAWATATAU**	*Appellant*
AND :	**THE STATE**	*Respondent*

Coram:	**Ward, President** **Barker, JA** **Scott, JA**
Hearing:	**Wednesday 7th March 2007**
Counsel:	**Appellant in person** **Ms A Driu for respondent**
Date of Judgment:	**Friday 23rd March 2007**

JUDGMENT OF THE COURT

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[1] This is an appeal, under section 22 of the Court of Appeal Act, from a decision of the High Court sitting in its appellate jurisdiction. The appellant appealed against a sentence of six months imprisonment, passed by the trial magistrate, for escape. The High Court reduced the sentence to five months. By section 22 (1A) (a), any appeal to this Court against sentence must be on the ground that the sentence was an unlawful one or was passed in consequence of an error of law.

[2] The facts may conveniently be taken from the ruling by the single judge of this Court on the application for leave to appeal.

[3] The [appellant] was a serving prisoner and, shortly after midnight on 8 July 2005, he and other prisoners removed the ceiling of the dormitory, climbed onto the roof and then scaled the prison wall. He was recaptured on 6 October 2005 having been at liberty for 2 months 28 days and was returned to prison.

[4] He was charged with escape, contrary to section 138 of the Penal Code (Cap 17), and first appeared in the Magistrates' Court on 11 October 2005. It appears he must have pleaded not guilty although there is no reference in the court record to any plea being entered until a note, on 11 April 2006, records, "Accused; Present and still maintains his not guilty plea". Even that note is not clear because it is immediately followed by a statement that the accused was not present.

[5] On 14 August 2006, the [appellant] changed his plea to guilty and was sentenced to six months imprisonment consecutive to the term he was then serving. He filed a petition of appeal against sentence to the High Court on 28 August 2006.

[6] Prior to this, he had been charged with two prison offences under Prison Regulations arising from the same escape and was sentenced, on 29 December 2005, to one month loss of remission for each by a prison tribunal. The offences, both contrary to regulation 123, were escape from lawful custody and loss of government property. The latter related to the uniform he was wearing when he escaped.

[7] One ground of appeal to the High Court was that the appellant had been subject to double jeopardy in respect of sentences for escape as they related to the same offence albeit under different legislation. The appeal was heard by Shameem J. She pointed out:

> *"It was never drawn to [the magistrate's] attention that the appellant was disciplined by the Prison Tribunal for escaping and losing his prison uniform. No doubt if it had been, concession would have been made for such discipline. ... The six months term was correct in principle as was the order for a consecutive sentence. However, he lost his right to remission by two months as a result of the prison discipline and I consider that this would have been taken into account by the learned magistrate, had he known of it. I therefore reduce the sentence by one month to 5 months imprisonment."*

[8] It should be mentioned that the record of the Magistrates' Court shows that the appellant told the court in November 2005 that he had been already been "sentenced for this charge". That was stated to, and recorded by, the magistrate, John Semisi. By the time the appellant had changed his plea and was convicted and sentenced in August 2006, the magistrate was Ajmal Khan. The record on that day does not record any reference to an earlier sentence.

[9] This man was unrepresented and cannot be expected, whenever he is confronted by a different magistrate, to remember to repeat all he had said previously. It is not uncommon for cases to be passed from one magistrate to another but it is the duty of a magistrate receiving a file in those circumstances to ensure he has read the minutes of all previous hearings.

[10] The claim of double jeopardy relates to the sentence in the Magistrates Court because, as a result of the inordinately long delay in hearing the case, that sentence was passed after the punishments had been imposed for the prison offences.

[11] At the hearing in chambers before the single judge of this Court, counsel for the respondent conceded that, even if the appeal fails, the reduction of the sentence should have been two months because the loss of the uniform was part of the overall offence of escape and should have been taken into account.

[12] The appellant contends that the sentence imposed by the magistrate breached his rights under section 28(1) (k) of the Constitution:

> "28. - (1) Every person charged with an offence has the right: ...
>
> (k) not to be tried again for an offence of which he or she has previously been convicted or acquitted;"

[13] Our law appears to give no definition of the word 'convicted' but counsel for the respondent suggests it must mean convicted by a court of competent jurisdiction; see, for example, *Lewis v Mogan* [1943] 1 KB 376. We do not need to decide that question for reasons which we hope will become apparent.

[14] The protection against double jeopardy, as opposed to cases strictly of autrefois convict, is more specifically addressed to punishment by section 20 of the Penal Code:

> "20. A person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the same act or omission."

[15] By section 59 of the Interpretation Act (Cap 7), an offence may be prosecuted and punished under more that one law but the offender is still protected from double punishment:

> "59. Where an act or omission constitutes an offence under two or more written laws, the offender shall, unless a contrary intention appears, be liable to be prosecuted and punished under any of such laws, but shall not be liable to be punished twice for the same offence."

[16] Part XX of the Prisons Act (Cap 86), is headed "Discipline of Prisoners" and, in that Part, section 82 provides a similar reference to punishment rather than conviction:

> "82. Any prisoner who commits any prison offence as may be prescribed under the provisions of this Act shall be guilty of a prison offence and shall be liable to suffer punishment in accordance with the provisions of this Act:
> Provided that-
> (a) nothing in this connection shall be construed to exempt any prisoner from being proceeded against for any offence by any other process of law;
> (b) save as expressly provided by the provisions of this Act, no prisoner shall be punished twice for the same offence."

[17] Section 83 establishes the prison tribunals which can try the prison offences and prescribes the punishments they can impose.

[18] Part XIII of the Prisons Regulations deals with the discipline of prisoners and regulation 123 provides:

> "123. Any prisoner who commits any of the following offences shall be guilty of a prison offence for the purposes of section 82 of the Act;- ...
>
> (3) escapes, conspires with a person to procure the escape of a prisoner, or assists another prisoner to escape from the prison in which he is detained or from any other lawful custody; ..."

[19] The offence to which the appellant pleaded guilty in the Magistrates' Court was escape contrary to section 138 of the Penal Code:

> "138. Any person who, being in lawful custody, escapes from such custody, is guilty of a misdemeanour."

[20] Apart from the opening words of regulation 123, there is no further definition of a 'prison offence' in the Act or the Regulations. However, the Interpretation Act, section 2 provides the following definitions:

> "offence" means any crime, felony, misdemeanour or contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided.
> "written law" means all Acts (including this Act) and all subsidiary legislation.
> "subsidiary legislation" means any legislative provision … made in exercise of any power on that behalf conferred by any written law by way of … regulation …"

[21] Counsel for the respondent points out that the protection of section 28(1)(k) of the Constitution only confirms the protection from further trial, long recognised by the common law courts, of anyone who has been tried for a criminal offence. It gives rise to the pleas in bar of autrefois convict and autrefois acquit. The wording of that section is clearly a protection against such a person being charged and tried again for the same offence. The proceeding in the prison was not, she suggests, a trial nor the result a conviction and so the section does not assist the appellant.

[22] She cites the case of R v Hogan [1960] 3 WLR 426 in support. The appellants in that case were serving a sentence in prison. They planned with another man to escape and did so by cutting the wires to a skylight. The three men escaped through the skylight and were pursued by prisons officers. In the ensuing struggle, one of the prison officers was injured. Apart from charges relating to the injury to the officer, they were charged with prison breach, which is an offence of escaping by force, simple escape and aiding the third prisoner (who made good his escape while the officers were capturing the appellants) to escape.

[23] By the time of the trial, the prisoners had been dealt with by the visiting justices at the prison for an offence against discipline under the Prison Rules which provide: "A prisoner shall be guilty of an offence against discipline if he escapes from prison or legal custody". They were sentenced to loss of various privileges and

cellular confinement for 15 days, reduced diet and loss of remission. When the trial judge was told of the order of the visiting justices he struck out the count charging simple escape but allowed the trial for prison breach to proceed.

[24] On appeal, counsel suggested that prison breach is really the offence of escape with aggravation and that if a man has been convicted already, albeit for a different offence, namely for simple escape, a charge cannot be brought against him subsequently for the aggravated offence where both offences arise on exactly the same matter.

[25] Having set out that argument, Lord Parker CJ continued:

> *"That that as a principle of law is undoubtedly true as can be seen from R v Miles [1890] 24 QBD 423. ... That decision, as I understand it remains good law; the only qualification to be put upon it is that the principle does not apply where the consequences have changed. That clearly appears from the decision of this court in R v Thomas [1950] 1 KB 26, where a man having been convicted of wounding with intent to murder was subsequently charged with murder, the person assaulted having in the interval died. But where the circumstances remain the same, the decision in R v Miles is still good law. ...*
>
> *The court, however, feels that the principle in R v Miles is meant to apply and can only apply to the decision of courts of competent jurisdiction. Though not strictly a case of autrefois convict, it is very much on those lines. It so happens that the offence created under the Prison Rules, an offence against discipline, is in fact the same as the common law offence of escape, but the visiting committee dealt with the matter as an offence against discipline under the Prison Rules. They have not dealt with the common law offence of simple escape. It follows therefore in our judgment that, strictly, Hilbery J need not have struck out the first count as to simple escape, though clearly it was the sensible thing to do, because if convicted of simple escape alone the judge, in deciding upon the sentence, would have to take into consideration what had already happened as a matter of prison discipline."*

[26] The principle in Miles' case as applied in Thomas' Case to which Parker LCJ referred, is now enacted in Fiji in section 20 of the Penal Code.

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[27] Counsel also cites the Australian case of The Queen v White ex p Byrnes [1963] 109 CLR 665, in which the High Court confirmed that an offence under the Public Service Act was a disciplinary matter heard by an Administrative Tribunal, and the case of Sudi Yaku v Commissioner of Police ex p The State [1980] PNGLR 27, where the issue was the effect of police disciplinary charges. In particular, she relied on the comments by Andrew J in the Sudi Yako case:

> *"In my opinion a criminal conviction does not, in the absence of any statutory provision, bar subsequent disciplinary action. Any other result would be absurd. How could it be said that a public servant found guilty of stealing monies from the public service could not then be dismissed? It is clear law today that a professional body has the right to suspend or expel a member following conviction in a criminal court."*

[28] Those cases do not assist in the present case. There can be no challenge to the right of administrative bodies to discipline their members following a criminal conviction but the issue here is the effect of two punishments by different tribunals for the same offence under different laws but both based on the same facts. In the Sudi Yaku case, the officer had been convicted of a Criminal Code offence of unlawful assault and was sentenced to six months imprisonment. He was subsequently charged under the Police Act with the disciplinary charge of disgraceful conduct in that he committed the unlawful assault. Neither of those cases involved the same offence. In the latter case, there would have to be proof that the assault amounted to disgraceful conduct; an element which is not needed to prove unlawful assault itself.

[29] This question of double jeopardy has been considered in Fiji and we have been referred to two cases in the High Court involving the same two offences.

[30] The first is Taito Rarasea v The State [2000] HAA 27/00, 12 May 2000, in which the appellant was convicted and sentenced by the Magistrates Court for escape and sentenced to six months imprisonment. He subsequently appeared before the Commissioner of Prisons under section 83 who ordered that his remission be

reduced by one month and seven days and he have a reduction of rations. Madraiwiwi J ruled:

> *"... that was a clear breach of section 28(1)(k) of the Constitution as the appellant had already been sentenced to six months imprisonment by the court of first instance. The contention that the Penal Code and the regulation were separate instruments with their respective penalties has no merit. Both punished the same conduct i.e. escaping from lawful custody. ... Paragraph 123 of the Regulations itself is valid and may co-exist with section 138 of the Penal Code although the latter would take precedence being a statutory provision.*
>
> *However, the appellant can only be punished for breach of one of them because they are identical offences although framed under different legislation."*

[31] That case was considered shortly afterwards in the case of Serupepeli Cerevakawalu and another v The State [2001] HAA 42/01, 6 August 2001, where Shameem J considered an appeal from sentences imposed on the appellants for wrongful confinement and criminal intimidation in which the victims were prisons and police officers in the medium security prison in Naboro. The punishment imposed by the prison authorities had been reduction of privileges to the first stage category.

[32] One ground of appeal had been that the appellants had been punished twice for the same offence. The judge considered the cases of Hogan, Sudi Yako, White and Taito Rarasea and distinguished Rarasea's case in the following passage:

> *"His Lordship based his decision on the fact that, in his view, the prisoner was punished twice for the same conduct, because his sentence had in effect, been lengthened by the Commissioner of Prisons. That case is, of course, quite different from this one. There is no extension of the prison term nor a reduction of rations..."*

[33] Accepting dicta in Connelly v DPP[1964] AC 1254 and Lewis v Mogan that the term 'convicted' means 'convicted by a court of competent jurisdiction', she found that it is not a conviction if imposed by a domestic or internal tribunal and

an employee can thus be dismissed by a disciplinary tribunal and prosecuted for the same conduct. She concluded:

> *"I find therefore that where a criminal charge is laid in respect of conduct which has already been the subject of a prison disciplinary charge, the court can still try the criminal offence. The discipline imposed is however to be taken into account for the purpose of sentence."*

[34] The reference there to the charge being laid in respect of conduct the subject of an earlier prison offence is not the same as the situation where the offences charged are the same although under different laws and arising from the same facts. The reason for the judge's choice of that phrase may be seen in an earlier passage where she explains:

> *"It is unfortunate that the affidavit of [a prison official] fails to set out the exact nature of the [prison] offences charged and the exact nature of the discipline imposed. It is therefore unclear what offences were charged, and in what way they were similar to the criminal charges."*

[35] And later:

> *"In this case it is not clear whether the appellants were disciplined for the same conduct, or whether it was for conduct arising from the hostage situation. However, whichever is the case, the Magistrates' Court had powers to deal with the criminal charge. There was no double jeopardy and no breach of section 28 of the Constitution."*

[36] We find it surprising that the decision on the possibility of a breach of section 28 of the Constitution was considered in the absence of such evidence and the lack of that evidence makes the finding that there was no double jeopardy startling. We do not find this case is authority for the respondent's contention in this case.

[37] The authorities cited are dealing, at least indirectly, with autrefois convict. We do not see that is the issue in this case. Neither do we know whether there are provisions, in the laws of England and Papua New Guinea, similar to those found

in section 20 of the Penal Code or section 59 of the Interpretation Act with their specific references to punishment. It appears from *Sudi Yako's case* that the prisons legislation in Papua New Guinea has a similarly worded provision to the second limb of the proviso in our section 82.

[38] We consider that the question of conviction is not the critical aspect of this appeal and so the question of whether the prison tribunal is a court does not need to be resolved. Neither does the answer lie in a determination whether or not there has been a breach of section 28 of the Constitution. What sections 20, 59 and 82 all provide is the avoidance of double punishment for the same offence.

[39] Thus we must consider whether the charging of the offences of escape under section 138 of the Penal Code and under regulation 123(3), when they are based on the identical facts, amount to the same offence.

[40] The Prison Regulations are clearly part of the written law as defined in the Interpretation Act and a prison offence of escape under those regulations is patently a "contravention or breach of a written law for which a penalty is provided".

[41] The punishment imposed by the Magistrates Court was imposed for the same offence, albeit under section 138, as that ordered by the prison tribunal. It was therefore in breach of section 20 of the Penal Code and must be quashed.

[42] Not only does that appear to be the clear intention of the law but it is also the desirable result. In the present case, the Magistrates' Court was the second court dealing with the escape. As Shameem J stated when hearing the appeal in this case, had the punishment ordered by the prisons tribunal been brought to the attention of the magistrate, he would undoubtedly have made allowance for it. The difficulty with that approach is that the allowance made for any prison penalty is hard to quantify in many cases and justice is not well served by uncertain provisions. Where the penalty in prison is loss of remission, it is a

relatively simple calculation to make an appropriate reduction but where it is reduction of diet, loss of privileges or cellular or solitary confinement or some similar penalty, the calculation is imprecise and consistency is unlikely to be achieved. Furthermore, if as occurred in the present case, there is a true likelihood of double punishment, it should not depend solely on the discretion of the second court.

[43] An equally serious concern arises where the Magistrates' Court passes sentence first. The Court is aware that, in the majority of escape cases in Fiji, the escaper is brought before the Magistrates Court when he is recaptured and pleads guilty at the first appearance. It is only later that a prison tribunal hears any charges of prison offences. The result is that the prison tribunal has an unchecked power to adjust the sentence passed by the court. If it considers the punishment too lenient, it can use its powers to impose a heavier overall sentence. The prisoner may seek review by the Commissioner of Prisons if the order is made by a supervisor or senior officer but, if the order is by the Commissioner himself, there appears to be no appeal. Even where there is a right of review, the Commissioner cannot be seen as an independent tribunal.

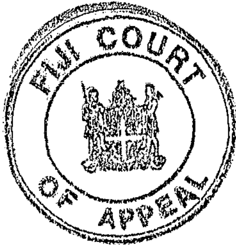
[44] In future, once an escaper is charged in the Magistrates' Court under section 138 of the Penal Code, no charge of escape under the Prison Regulations should be brought until the result of the Magistrates' Court hearing is known. If the prisoner is punished by the Magistrate, no further charge of escape should be brought under the Regulations.

[45] Similarly, a magistrate dealing with a charge of escape by a serving prisoner should ascertain, before a plea is taken, whether a prison tribunal has already imposed any punishment for escape. If it has, he should invite the prosecution to withdraw the charge.

[46] The appeal is allowed. The conviction and sentence imposed by the magistrate on 14 August 2006 is quashed.

Ward, President

Barker, JA



Scott, JA

Solicitors:

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