

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

APPELLATE CASE NO. 62 OF 2023
(Ba Magistrate Court Criminal Cases No. 226 /229 of 2023)

BETWEEN:

KOROI NACIWA

APPELLANT

AND:

STATE

RESPONDENT

Counsel: Appellant in Person
Mr Alvin Singh for Respondent

Date of Hearing: 02 April, 2024

Date of Judgment: 02 April, 2024

JUDGMENT

1. The Appellant with another is charged in two different files (CF 266/23 and 229/23) for the offence of one of Receiving. The Appellant in both the files had taken a progressive approach and pleaded guilty to the charges before the Learned Magistrate at Ba when he was unrepresented.
2. Having been satisfied that the guilty plea was unequivocal and after the summary of facts was read and admitted by the Appellant, the Learned Magistrate proceeded to record a conviction. The Learned Magistrate pronounced the Sentence on 11 August 2023.

3. The Learned Magistrate in case No. 226 of 2023 has ruled that *the suspended term of 5 months imposed on 16 September 2022 in CF: 423/21 by the Lautoka Magistrates' Court is hereby activated (if it had not been in any other matters before any other Court) and this sentence of 6 month imprisonment is to be served consecutively to the said activated sentence.*
4. Similarly in case no. 229 of 2023, the Learned Magistrate ruled that *the suspended term of 5 months imposed on 16 of September 2022 in CF:423/21 by the Lautoka Magistrates' Court is hereby activated (if it had not been in any other matters before any other Court) and this sentence of 4 months imprisonment is to be served consecutively to the said activated sentence and also consecutively to the sentence in CF:226/23.*
5. The Appellant being aggrieved with the final sentence in the two files, filed a timely appeal in the Lautoka High Court. The Appellant contends that the automatic activation of the suspended sentence is wrong.
6. The State is conceding to the Appeal. I agree that the activation of the suspended sentence should not have been automatic. No charge was laid before the activation so as to give the Appellant an opportunity to defend.
7. In *Nausa v State* [2011] FJHC 23; HAA022.2010 (28 January 2011), the Court considered the issue of activating a suspended sentence and stated the following:-

[6] Apart from punishing the appellant twice for offending while on a suspended sentence (aggravating feature and activating) the Magistrate unfortunately fell into error in activating the previous sentence.

[7] The new laws of procedure and sentencing now in place for one year have completely changed the Court's approach to suspended sentences. Whereas previously suspended sentences could be activated at the discretion of the tribunal.

[8] All judicial officers, all Counsel (including State Counsel) and all police officers should by now know that activation of suspended sentences can only be effected pursuant to section 28 of the Sentencing and Penalties Decree 2009. If a suspect is in breach or thought to be in breach of a suspended sentence he must be charged with breach under section 28 (1) and if he is found guilty of the breach then and only then MUST a Court activate the sentence.

8. Section 28 of the Sentencing and Penalties Act (SPA) provides as follows:

28(1) If at any time during the operational period of a suspended sentence of imprisonment, the offender commits another offence punishable by imprisonment, the offender is guilty of an offence against this section.

(2) A proceeding for an offence under sub-section (1) may be commenced at any time up to 3 years after the date on which the offence is alleged to have been committed.

(3) **Upon charging an offender with an offence under sub-section (1)** a warrant to arrest the offender may be issued.

(4) **If on the hearing of a charge under sub-section (1) the court finds the offender guilty of the offence**, it may impose a fine not exceeding 100 penalty units and in addition the court must restore the sentence or part sentence held in suspense and order the offender to serve it, but if the court considers that exceptional circumstances exist that make this unjust, the court may instead—

(a) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or

(b) in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order under this sub-section; or

(c) make no order with respect to the suspended sentence.

(5) Any order for an offender to serve a term of imprisonment under sub-section (4) must be served —

(a) immediately; and

(b) unless the court orders otherwise, consecutively on any other term of imprisonment previously imposed on the offender by that court or any other court. (emphasis added)

9. In light of Section 28 of the SPA and the above case authority of Nausa (supra), I find that the Learned Magistrate had fallen into error when he activated a suspended sentence, without the Appellant being charged and found guilty of an offence contrary to Section 28(1) of the SPA. Therefore, this ground, though vaguely framed, should succeed.
10. The Appellant has already served approximately 9 months in the correction facility. Therefore he should be released forthwith.
11. The following orders are made:-

- (i) The Appeal filed by the Appellant is allowed.
- (ii) The Appellant is released forthwith.



A handwritten signature in black ink, appearing to read "Aruna Aluthge".

Aruna Aluthge
Judge

At Lautoka
02 April 2024

Counsels:

- Appellant in Person
- Director of Public Prosecution for Respondent