

A

ATTORNEY-GENERAL

v.

JOVECI BALE

[SUPREME COURT, 1967 (Hammett J.), 27th October, 3rd November]

B

Appellate Jurisdiction

Criminal law—sentence—dismissal by magistrate of charge on ground of extenuating circumstances—dismissal not equivalent to “a fine not exceeding £5 only”—leave to appeal unnecessary—Penal Code (Cap. 8) s.38 (1)—Criminal Procedure Code (Cap. 9) s.315 (2)—Penal Code (Kenya) s.35—Trade Unions Ordinance 1964 s.54 (1).

C

Appeal—leave to appeal—dismissal by magistrate of charge on ground of extenuating circumstances—no leave under s.315(2) of the Criminal Procedure Code (Cap. 9) necessary—Penal Code (Cap. 8) s.38 (1)—Penal Code (Kenya) s.35.

The dismissal by a magistrate of a charge in exercise of his powers under section 38(1) of the Penal Code on the ground of extenuating circumstances is not “a sentence of a fine not exceeding £5 only” within the meaning of section 315 (2) of the Criminal Procedure Code. Therefore the requirement of the last mentioned section that the leave of the Supreme Court be obtained to an appeal in a case where such a sentence has been passed does not apply to a dismissal under section 38(1) of the Penal Code.

D

Case referred to: *Obiero v. Reginam* [1962] E.A. 650.

E

Application for leave to appeal against an order of discharge by the Magistrate’s Courts.

T. U. Tuivaga for the applicant.

B. C. Ramrakha for the respondent.

HAMMETT J.: [3rd November, 1967]—

F

This is an application by the Hon. Attorney General for leave to appeal against the sentence passed at the Magistrate’s Court of the first class sitting at Suva. The accused was charged in the Court below with the following offence:—

Statement of Offence

G

FAIL TO SUBMIT ANNUAL RETURN: Contrary to Section 54(1) (4) of Trade Union Ordinance No. 4 of 1964.

Particulars of Offence

JOVECI BALE, on the 22nd day of July, 1967 at Suva in the Central Division, being the Secretary of a registered trade union namely, AIRPORT, HOTEL AND CATERING WORKERS’ UNION, failed to furnish the annual return to the Registrar as required by the provisions of Section 54 (1) of the Trade Unions Ordinance No. 4 of 1964.

H

He pleaded guilty and from the record of the proceedings the facts appear to be as follows:—

A The accused was elected Secretary of the Union on the 24th January 1967. In February 1967 the Treasurer was convicted of a criminal offence and sentenced to three months' imprisonment. As a result on 28th April, 1967 the President of the Union telephoned the Acting Commissioner of Labour and asked in the circumstances if he could have an extension of time in which to submit his annual return which was due on 30th April, 1967.

B The Acting Commissioner of Labour told him to have the return submitted as soon as possible and if it were late to explain why this had happened. A reminder was sent out on 21st July, 1967 and on the 14th August, 1967 the necessary return was duly made. On the 24th August i.e. 10 days after the return had in fact been made the Summons in this case was issued.

C The accused had no previous convictions and the record of proceedings shows that the learned senior Magistrate after hearing the facts, said:—

"There are mitigating circumstances in this case and I feel that a conviction is not called for because the accused, a newly appointed Secretary, found himself in a difficult situation which he had not created. Dismissed under Section 38 of the P.C. Cap. 8."

D This order of dismissal was made under Sec 38(1) of the Penal Code which reads as follows:—

"Where, in any trial before a magistrate's court, the court thinks that the charge against the accused person is proved but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the trivial nature of the offence or to the extenuating circumstances in which the offence was committed, it is not expedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge."

The ground upon which the Hon. Attorney General wishes to appeal is:—

F "THAT the appellant desires to appeal against such order of discharge on the ground that it was wrong in principle having regard to the circumstances and nature of the offence."

The relevant provision of the Criminal Procedure Code under which leave is sought is Sec. 315(2) which reads:—

G "Save with the leave of the Supreme Court, no appeal shall be allowed in a case in which a magistrate's court has passed a sentence of a fine not exceeding five pounds only notwithstanding that a sentence of imprisonment has been passed by such court in default of the payment of such fine, if no substantive sentence of imprisonment has also been passed."

H My attention has been drawn to the decision of *Obiero v. Reginam* [1962] E.A. 650 in which it was held that an order of absolute discharge under Sec 35 of the Penal Code (Kenya) is technically a sentence. For similar reasons it is submitted that an order of dismissal under Sec. 38 of the Penal Code in Fiji is also a "Sentence".

Before deciding whether the provision of Sec. 315(2) of the Criminal Procedure Code applies to an order of dismissal under Sec. 38 of the Penal

Code and that leave to appeal is therefore necessary it has first to be considered whether such an order of dismissal falls within the meaning of the term "a sentence of a fine not exceeding £5 only" in Sec. 315(2). **A**

After considering all that has been urged before me by learned Crown Counsel, I am of the opinion that an order of dismissal under Sec. 38 of the Penal Code is not "a sentence of a fine not exceeding £5 only".

In these circumstances the provisions of Sec. 315(2) of the Criminal Procedure Code do not apply and I rule that no leave to appeal is required in this case. **B**