

CHINAMMA

v.

LAUTOKA RURAL LOCAL AUTHORITY

[SUPREME COURT, 1970 (Moti Tikaram P.J.), 29th May]

Appellate Jurisdiction

Criminal law—sentence—fine—imprisonment in default—offender destitute widow—first offence—whether fine excessive—principle of capacity to pay—Penal Code (Cap. 11) s. 38.

The appellant, a first offender, was fined \$20 (in default 4 weeks' imprisonment) and ordered to pay \$5.50 costs (in default 14 days' imprisonment) on a charge of developing land without the permission in writing of the Local Authority. The fact that the appellant was a widow and a destitute in receipt of an allowance of \$2 per month from the Government was not brought to the notice of the trial Magistrate.

Held: It was not a case for dismissal of the charge under section 38 of the Penal Code, but pursuant to the principle that in inflicting a fine a court should consider the capacity of the accused person to pay, the fine and order for costs imposed would be set aside and a fine of 50 cents substituted.

Case referred to:

Suva City Council v. Ram Lal (1958) 6 F.L.R. 13.

Appeal against a sentence imposed in the Magistrate's Court.

M. S. Sahu Khan for the appellant.

J. R. Reddy for the respondent.

The facts sufficiently appear from the judgment.

MOTI TIKARAM P.J.: [29th May, 1970]—

This is an appeal against sentence only. The appellant pleaded guilty to the charge of developing land without the permission in writing of the Local Authority. She was convicted and fined \$20 in default 4 weeks imprisonment. She was also ordered to pay \$5.50 costs in default 14 days imprisonment.

The learned Crown Council who appeared for the Respondent conceded that in view of the fact that the appellant is a destitute the sentence is excessive. The appellant in this case is a destitute who is in receipt of \$2 per month from the Government as an allowance. Furthermore she is a widow. Apparently some well-wishers had erected for her at Tavakubu a small dwelling for which there was no written permission. It is clear from the trial record that the fact that the appellant was a widow and a destitute was not brought to the notice of the trial Magistrate nor is there any record to show that her means were looked into.

Penal Code s. 38 (1): 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.

A The trial Magistrate presumably imposed a standard fine and ordered costs to be paid. The learned Crown Counsel appearing for the Respondent is anxious that the conviction should stand although he concedes that in the very special circumstances of this case, only a nominal fine is called for. The appellant Chinamma informed the trial Magistrate that she was not aware that a permission was necessary. Although ignorance is not an excuse it seems that this is not a case of a blatant breach. In *Suva City Council v. Ram Lal*, (1958) 6 F.L.R. 13, the Supreme Court in its revisional jurisdiction set aside conviction and fine in a similar case and discharged the offender under section 38 of the Penal Code. I have considered whether or not I should adopt a similar course. I have come to the conclusion that there is merit in the learned Crown Counsel's submission that conviction ought not to be disturbed lest similar offenders in future may be left with the impression that they can commit such offences with impunity.

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C It is a well-established principle of punishment that in inflicting a fine the capacity of the accused to pay should be considered. In the present case it is quite obvious now that the fine and costs imposed were quite beyond the offender's means. Non-payment would entail imprisonment, a consequence which I am sure the trial Magistrate did not intend. This is however not to suggest that a poor person can expect a nominal fine each time even though he repeatedly commits the same breach. A situation may arise where such a person will have to be fined substantially with the full knowledge that non-payment would entail imprisonment. However from the record this appears to be Chinamma's first offence. Consequently I set aside the fine and costs imposed by the trial Court and in lieu thereof substitute a fine of 50 cents. The appellant has 14 days in which to pay this fine.

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Appeal allowed.