

A

## DIRECTOR OF PUBLIC PROSECUTIONS

v.

## APETE PULUMEAU

B

[SUPREME COURT, 1973 (Mishra J.), 28th September]

Appellate Jurisdiction

*Criminal law—sentence—activation of suspended sentence with a reduced term—whether such a reduction justified—Penal Code (Cap. 11) s. 28B(1).*

C

The respondent was sentenced to 3 months imprisonment on a charge of larceny from the person. Three months earlier he had been sentenced to a suspended sentence of 9 months imprisonment for assault with intent to commit a felony. The magistrate ordered that the respondent serve a reduced term of 3 months of the suspended sentence.

D

The Director of Public Prosecutions submitted that there was nothing on the record or in the circumstances of the case to justify the reduction of the suspended sentence.

It was held that a suspended sentence should be activated in its entirety except when exceptional circumstances made it unjust to do so. There was nothing in the present case to warrant a reduction and accordingly the full 9 months term would be activated.

E

Cases referred to:

*R. v. Preece* [1970] Crim. L.R. 296.*R. v. Fitzgerald* [1972] Crim. L.R. 583.*R. v. Metcalfe* [1971] Crim. L.R. 112.*R. v. Beeskei* [1970] Crim. L.R. 593.

F

Appeal by the Director of Public Prosecutions against the leniency of the sentence imposed in the Magistrates' Court.

*Q. Bale* for the appellant.

Respondent in person.

G

MISHRA J. [28th September 1973]—

On 3rd July 1973 the respondent pleaded guilty to a charge of larceny from the person contrary to section 303 of the Penal Code and was sentenced by the Magistrate's Court Lautoka to 3 months' imprisonment. According to the facts admitted by the respondent he had snatched a handbag from a woman tourist as she was walking with companions outside a hotel. He later took all the cash out of it and threw it into a drain. Before he was sentenced the respondent denied having taken anything out of the handbag but this matter remained unresolved.

H

The respondent had one recent previous conviction for larceny from the person for which he had been fined \$20.

The Court then dealt with a suspended sentence of 9 months' imprisonment imposed on the respondent for assault with intent to commit a felony contrary to section 279(a) of the Penal Code. The learned trial Magistrate said:—

"Also that you have pleaded guilty to the present charge and that there is no suggestion that you offended the complainant in the charge against you today and therefore order that the sentence imposed on you on 14.5.73 shall take effect with substitution of the term of 3 months for the original term of 9 months, this term to be consecutive with today's sentence."

The Director of Public Prosecutions appeals against the order activating the suspended sentence with a reduced term on the ground that there is nothing on the record, or in the circumstances of the case, to justify the reduction of the term of the suspended sentence. In support of his submission learned counsel for the appellant draws this court's attention to the commentary at the end of the case of *R. v. Preece* (1970 Crim. L.R. 296) the relevant part of which is in the following terms—

"It is now accepted that the triviality of the later offence is a ground for not enforcing the suspended sentence at all; if it is also a ground for reducing the length of a sentence which is enforced, it will be necessary to develop two scales of triviality for this purpose—one scale of offences so trivial that the enforcement of the sentence is unjust, and a second scale of a slightly greater degree of gravity which is sufficient to require enforcement of the sentence, but still sufficiently trivial to justify some reduction in its length. It is submitted that it would be preferable to let only one issue—the decision whether or not to enforce the sentence—depend on the triviality of the later offence; reduction of the length of the sentence could be granted on other grounds such as mitigating factors which have arisen since the suspended sentence was passed."

Whatever the merit of this commentary, the courts would appear not to have accepted the view that cases are bound to occur where it would be appropriate to activate a suspended sentence with a reduced term. Examples of such cases are *R. v. Preece* (supra), *R. v. Fitzgerald* (1972 Crim. L.R. 583) and *R. v. Munday* (1972 Crim. L.R. 195).

Section 28B (1) of the Penal Code provides, inter alia, that where the question of activating a suspended sentence is under consideration—

- " (a) the court may order that the suspended sentence shall take effect with the original term unaltered;
- (b) it may order that the sentence shall take effect with the substitution of a lesser term for the original term;
- (c) .....
- (d) .....
- and a court shall make an order under paragraph (a) of this subsection unless the court is of opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence and, where it is of that opinion, the court shall state its reasons."

The wording of this section clearly requires that a suspended sentence of imprisonment be activated in its entirety except where exceptional circumstances make it unjust to do so. A court activating a suspended sentence should not view it, as an appellate court would, to see if it was wrong in principle or manifestly excessive.

**A** It should act on the assumption that the suspended sentence properly reflected the gravity of the offence for which it was imposed and that it should not be reduced except for compelling reasons [*R. v. Metcalfe* [1971] Crim. L.R. 112]. Such compelling reasons would generally arise where the imposition of a suspended sentence in its entirety would offend the more important general principle that, in case of a multiplicity of offences committed by the same accused, the total sentence should not be excessive [*R. v. Beeskei* [1970] Crim. L.R. 593].

**B** In the instant case, the suspended sentence of 9 months' imprisonment was not, on any view, excessive for molesting a young woman with intent to commit a felony. The current offence of larceny from the person to which the respondent pleaded guilty was equally serious and a sentence of 3 months' imprisonment for it was unusually lenient particularly as the respondent had been convicted of a similar offence by the same Magistrate only two months earlier.

**C** While this court rarely makes an order which would have the effect of enhancing a sentence imposed by a trial court, I must accept the submission of the Director of Public Prosecutions that no adequate reason appears on the record of this case for activating the suspended sentence with a reduced term.

The order of the trial court activating the suspended sentence with a reduced term of 3 months is, therefore set aside and in its place substituted an order activating the suspended sentence of 9 months' imprisonment in its entirety.

**D** The trial court's sentence of 3 months' imprisonment for the present offence will remain unaltered.

*Appeal allowed and suspended sentence activated in its entirety.*