

A

DIRECTOR OF PUBLIC PROSECUTIONS

v.

JOLAME PITA

B

[SUPREME COURT, 1974 (Grant Ag. C.J.), 24th January]

Appellate Jurisdiction

Criminal law—practice and procedure—facts material to sentence challenged—magistrate must hear evidence on oath to decide disputed facts.

C *Criminal law—sentence—when imposition of suspended sentence justified.*

If the facts establishing the ingredients of an offence are admitted, but the accuracy of the facts material to sentence are challenged, the dispute must be properly resolved. The trial magistrate must hear evidence on oath limited to the disputed facts and make a finding as to which version of events he accepts.

D In order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate.

Cases referred to:

R. v. Gulam Hussein (1946) 13 E.A.C.A. 167.

R. v. O'Keefe 53 Cr. App. R. 91; [1969] 1 All E.R. 426.

E Appeal by the Director of Public Prosecutions against the sentence imposed in the Magistrate's Court for assault with intent to commit rape.

GRANT Ag. C.J.: [24th January 1974]—

On the 3rd December 1973 at Suva Magistrate's Court the respondent was convicted on his own plea of Assault with intent to commit rape contrary to Section 279 (a) of the Penal Code, and was sentenced to twelve months' imprisonment suspended for a period of two years.

F The Director of Public Prosecutions on behalf of the Crown has appealed against the sentence imposed upon the ground that it is wrong in principle and/or manifestly lenient having regard to the nature and circumstances of the offence.

What is manifest in this case is the difficulty of ascertaining the precise circumstances of the offence.

G The respondent having admitted the offence charged, the facts put before the lower court by the prosecution were that the complainant was walking home after midnight when the respondent who was a stranger to her came up behind her, grabbed her wrists, asked her to go with him and proffered \$4. The complainant refused and started shouting and struggling. The respondent tightened his grip on her but she managed to release herself by sitting on the ground after which she ran away. The respondent chased her, caught her by the hair and started to drag her towards the Botanical Gardens while she held on to a post to prevent him.

H Fortuitously, a police officer passing in a car saw the struggle, went up to the respondent and ordered him to release the complainant. The respondent refused and the police officer was obliged to use force in order to free the complainant and with the help of a passer-by to arrest the respondent.

Counsel who appeared for the respondent in the lower court informed the trial Magistrate that these facts were "substantially admitted", whatever that may mean, whereupon a conviction was recorded. In mitigation counsel for the respondent then submitted that the respondent was drunk, that he and the complainant had a conversation and he gave her \$4 which she accepted, that when the lights of a motor car shone on them the complainant wanted to hide, sat down, and then wanted to go away whereupon the respondent having paid her \$4 for her favours insisted upon his rights, and that when the police officer intervened the respondent complained to him that he had paid the complainant.

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This version of events which incorporated an attack on the character of the complainant, the imputation being one of prostitution, was disputed by the prosecution; the prosecuting officer informing the trial Magistrate that the complainant did not accept payment of \$4, and that the respondent was very violent to such an extent that he tore the shirt and broke the spectacles of the police officer who intervened.

C

On passing sentence the trial Magistrate stated that he took into account the plea in extenuation by defence counsel. As intoxication is not mitigation the trial Magistrate appears to have taken into consideration that the complainant was a woman of easy virtue who withheld her favours after having accepted \$4 in payment, which would account to some extent for an adverse reaction on the part of the respondent, and that the respondent explained his grievance to the police officer who intervened. This the trial Magistrate was not entitled to do, as if facts relevant to sentence are in dispute they cannot be taken into account either in extenuation or aggravation until there has been an adjudication thereon.

D

On a plea of guilty to any offence, the question of what is admitted by an accused should be ascertained with certainty, as if facts are put before a court or explanations given which derogate from the plea of guilty or which appear to render equivocal what would otherwise have been an unequivocal plea, then the plea must be changed to one of not guilty and the case set down for hearing.

E

On the other hand, if the facts which are admitted clearly establish all the ingredients of the offence charged and any dispute is confined to facts which, in the opinion of the trial Magistrate, are not material to sentence, then he should say so and may proceed to sentence without resolving the conflict.

F

There is an intermediate position where the facts establishing the ingredients of the offence are admitted but the accuracy of facts material to sentence are challenged. In such circumstances the dispute must be properly resolved by the trial Magistrate hearing evidence on oath limited to the disputed facts and making a finding as to which version of events he accepts. Only then is he in a position to assess the appropriate sentence. As was stated by the Court of Appeal for Eastern Africa in *R. v. Gulam Hussein* (1946) 13 E.A.C.A. 167 at 168: "It seems to us that on a controversy as to the facts upon which sentence is to be based the same rules as to legal proof as in the substantive trial for the offence must apply."

G

Not only must the facts constituting the offence be ascertained and considered for the purpose of sentence, but so must the previous record of the offender. In the case of the respondent this is by no means his first lapse into drunkenness and violence. He has three previous convictions for drunken and disorderly behaviour and two previous convictions for assault, the most recent in July 1971 when he was sentenced to six months' imprisonment for assaulting a police officer in the execution of his duty.

H

A It is only in exceptional circumstances that the suspension of a term of imprisonment is warranted in cases involving violence; nor is there any point in suspending a committal to prison if an accused has already shown by his conduct that prison is not a deterrent, which can be determined from his previous record.

B It is perhaps unfortunate that in 1969 the power to suspend a sentence of imprisonment was introduced into Fiji, as prior thereto there were ample provisions for dealing with offenders, and it lends itself to abuse as an easy way out whenever the question of sentence poses a difficulty.

In England, where the power to impose a suspended sentence was introduced in 1967, the then Lord Chief Justice was obliged to comment in the Court of Criminal Appeal in 1968: "This Court has found many instances where suspended sentences are being given as what one might call a 'soft option,' when the court is not quite certain what to do" (Lord Parker in *R. v. O'Keefe* 53 Cr. App. R. 91 at 94).

C The same tendency is apparent in Fiji, and accused persons and the public in general have come to regard an offender as having 'got away with it' if a suspended sentence is imposed.

D Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate.

E As in this case the matter cannot be brought to a proper conclusion until the facts upon which the prosecution rely are either admitted by the respondent or adjudicated upon, the sentence imposed by the lower court is quashed and the case is remitted to the trial Magistrate for the appropriate procedure to be followed.

Sentence quashed; case remitted to trial magistrate.