PREM CHAND & ANOTHER

A

v.

REGINAM

[COURT OF APPEAL, 1976 (Gould V.P., Marsack J.A., O'Regan J.A.), 27th, 30th July]

B

Criminal Jurisdiction

Criminal law—sentence—whether phrase "severity of sentence" restricted to questions of the actual length of term imposed—Court of Appeal Ordinance (Cap. 8) s. 22(1)—Criminal Procedure Code (Cap. 14) s. 289(1)(3)(4)— Penal Code (Cap. 11) s.28(A).

C *Appeal—sentence—whether Court of Appeal has jurisdiction under any circumstances to entertain an appeal against severity of sentence—Court of Appeal Ordinance (Cap. 8) s.*22 (1)*—Criminal Procedure Code (Cap.* 14*) s.* 289 (1) (3) (4)*—Penal Code (Cap.* 11*) s.* 28*(A)*

When the appellants appeared before the Magistrate's Court charged with wounding with intent to cause grievious bodily harm, they were sentenced to two years imprisonment suspended for three years. The Director of Public Prosecutions

D being dissatisfied with the sentence appealed to the Supreme Court where the judge removed the suspension and so imposed an immediate term of imprisonment of two years. Further appeal to the Court of Appeal could not be entertained against severity of sentence, but counsel for the appellants argued that the appeal was not against the sentence of two years imprisonment, but against the decision of the Supreme Court to remove the order suspending the sentence.

E

Held: The phrase "severity of sentence" could not be so restricted to questions of the actual length of the term imposed.

Per curiam: 1. It might seem an apparent injustice that no further appeal lay at the suit of the prisoner where the first appeal had been brought by the Director of Public Prosecutions, but this was a matter for the legislature to remedy if it

F thought fit.

2. Although by Court of Appeal Ordinance s. 22(1), there was no jurisdiction to entertain an appeal against sentence which went to the quantum, even if a question of law was involved, this did not prevent an appeal if the sentence was beyond the power of the Magistrate's or Supreme Court. A question of law would be involved

G which would need to be resolved to determine the existence or otherwise of the sentence.

Cases referred to:

R. v. Chanan Singh Criminal Appeal 29 of 1975—unreported.

R. v. Shaukat Ali 22 F.L.R. 85.

Jagdishwar Singh v. R. 22 F.L.R. 155.

H *R. v. Masla Mani* Criminal Appeal 13 of 1976—unreported.

Appeal against the decision of a judge of the Supreme Court allowing an appeal against sentence imposed in the Magistrate's Court on the appellants for wounding with intent to cause grievious harm. A

S. M. Koya for the appellants.
D. Williams for the respondent.

Judgment of the Court (read by Gould V.P.) [30th July 1976]— B

This is an appeal against the decision of a judge of the Supreme Court of Lautoka allowing an appeal by the Director of Public Prosecutions against the sentence imposed by a magistrate on the appellants for the offence of wounding with intent to cause grievious harm; the sentence imposed upon each was two years imprisonment suspended for three years.

The Director of Public Prosecutions brought an appeal against these sentences under section 289(1) of the Criminal Procedure Code (Cap. 14). The ground alleged was that the sentences were wrong in principle and manifestly lenient, having regard to the nature, circumstances and prevalence of the offence. The facts, as set out in the judgment of the learned judge in the Supreme Court, are as follows:— C

"In sentencing the respondents the learned magistrate pointed out that Prem Chand was 23 years of age and Ram Pratap 37 and that the offence arose out of a dispute between members of a cane gang over the use of a truck for carting cane. The injured man was against the use of the particular truck favoured by the respondents. He thought there was provocation as second respondent's cane was being harvested and a stoppage would do him considerable damage. He pointed out that the offence had been hanging over the respondent's heads for over a year, and had doubtless caused them considerable mental strain, and that the injured man might be able to claim damages. D E

The learned magistrate in his judgment found that Ram Pratap hit Gyenendra Pratap on the head with an iron bar and that Prem Chand struck him on the right with a cane knife. Prem Chand had admitted striking Gyenendra Pratap but said that he hit him with a stick. The learned magistrate held that the assault was with a knife. Ram Pratap denied the assault, altogether, and said that Gyenendra Pratap came to his house and started fighting with him." F

The learned judge went on to say that he had no doubt that the magistrate was quite right in rejecting the suggestion that the appellants should be admitted to probation. He found, however, that there was no reason for suspending the sentence of two years imprisonment which was a proper sentence. In his opinion there was no provocation in the legal sense which would justify the use of an iron bar and knife on the part of the appellants. He continued— G

"I have considered all the matters urged by Mr Koya on behalf of the respondents, but in my view, in a case where persons are convicted of assault with intent to cause grievious harm, the need for a deterrent sentence out-weighs all other considerations. In my view the learned magistrate erred in principle in suspending the sentence and I set aside the learned magistrate's sentence in each case against the respondents and impose upon each a sentence of two years' imprisonment." H

In arguing the appeal in this court Mr Koya relied mainly on the expression by the judge in the passage just quoted of the opinion that a deterrent sentence outweighed all other considerations. Such an expression of opinion by a judge of the Supreme Court might mislead magistrates into thinking that in any offence of the nature mentioned, the deterrent aspect of sentence was all that he needed to consider. We do not ourselves on a fair reading of the whole of the judgment consider that it should be interpreted in this way and we think that the danger of magistrates being mislead would be minimal. He had earlier, in his judgment, related the facts and considered matters personal to the appellants in relation to the alleged provocation and he mentioned the possibility of the appellants having been under some mental strain.

Mr Koya also submitted that as far as practicable there should be uniformity or consistency between sentences passed by the various courts for like offences. He was not however able to demonstrate from other judgments relating to the area in which this offence took place that the sentence passed by the learned judge in the Supreme Court was in fact out of line with those passed for other like offences. *R. v. Chanan Singh* in which a suspended sentence of two years' imprisonment was passed for the crime of manslaughter, was obviously a case of very special circumstances.

Counsel for the respondent submitted that the sentence was consistent with those in recent cases such as *R. v. Shaukat Ali* 22 F.L.R. 85 and *Jagdishwar Singh v. R.* 22 F.L.R. 115, and *R v. Masla Mani* S.C.A. 13/76 which indicated the concern with which the judges in the area viewed the use of cane knives as weapons in that part of Fiji. If judges in a certain area come to the conclusion that cases of crimes of violence of a particular type are so prevalent that great prominance must be given to the deterrent aspect of punishment that is a matter within their province. Therefore while we think that the learned judge might well have qualified his reference to a deterrent sentence by some such words as "except in very unusual circumstances" we do not think that he misdirected himself in coming to his decision in the particular case. We would not therefore, on appeal, come to the conclusion that his finding was wrong in law.

We come now to a matter which is really a preliminary point. It was strongly argued by counsel for the respondent that no appeal to this court could be entertained from the judgment of the learned judge. The right of further appeal in criminal cases after an appeal to the Supreme Court from a Magistrates' Court, is contained in section 22(1) of the Court of Appeal Ordinance (Cap. 8). The section reads:

> "22 (1). Any party to an appeal from a Magistrate's Court to the Supreme Court may appeal, under this part of this Ordinance, against the decision of the Supreme Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only (not including severity of sentence):
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> Provided that no appeal shall lie against the confirmation by the Supreme Court of a verdict of acquittal by a Magistrate's Court."

The original appeal to the Supreme Court was brought by virtue of section 289 (1) of the Criminal Procedure Code, which reads:

> "289(1). Save as hereinafter provided, any person who is dissatisfied with any judgment sentence or order of a magistrate's court in any criminal cause or

matter to which he is a party may appeal to the Supreme Court against such judgment, sentence or order." A

It is provided by subsections 3 and 4 of that section that an appeal to the Supreme Court may be on a matter of fact as well as a matter of law, and that for the purposes of the particular part of the Code the extent of the sentence shall be deemed to a matter of law. The last mentioned provision has no application to the second appeal to this court.

It is Mr Koya's submission that the appeal to this court does not involve a matter B of the severity of sentence. He submits that when section 22 above quoted, came into being there was no such thing as a suspended sentence, the right to order which, was enacted by amendment of the Penal Code in 1969. With respect this fact does not prevent the operation of section 22 in relation to a suspended sentence if it is otherwise applicable. But it is argued further that the appeal to the Supreme Court by the present respondent was against, not the sentence of two years, but the order sus- C pending that sentence; the appeal did not touch on the sentence, which remained unchanged. Section 28(A) of the Penal Code, which authorises suspended sentences opens with the words "a Court which passes a sentence of imprisonment for a term of not more than two years for an offence, may order that the sentence shall not take effect....." during a period specified in the order. Mr Koya argued therefore that the appeal to this court lay from a "decision" of the Supreme Court "sitting on appeal D from an order" and that the length of the period of imprisonment was not touched.

This is a persuasive argument though in fact the appeal to the Supreme Court was worded as an appeal against "the sentence" and the order of the learned judge was that he set aside the sentence in each case and imposed a sentence of two years' imprisonment. The difficulty concerning this argument is that it is open to the Supreme Court to vary the term of imprisonment imposed by the magistrate and this E has, we were informed by counsel for the respondent, been done in the two cases abovementioned *R. v. Shaukat Ali* and *R. v. Jagdishwar Singh.* It is no doubt only incidental that the learned judge in the present case did not find it necessary to vary the term of years.

We do not think that it is possible to restrict the meaning of the phrase "severity of sentence" in section 22(1) of the Court of Appeal Ordinance to questions of the F actual length of term imposed. The difference between the severity of a suspended sentence of two years' imprisonment and one which is not so suspended, is manifest. Other instances where a similar principle would be involved, readily come to mind. If the magistrate for example imposed a fine and the Supreme Court on appeal replaced the fine by a prison sentence would not an appeal to this court raise the question of severity? If a magistrate admitted a person to probation, and again a G term of imprisonment was substituted by the Supreme Court there is no escape from the fact that an appeal to this court would involve severity of sentence. It may seem an apparent injustice that where the first appeal to the Supreme Court is brought by the Director of Public Prosecutions and he is successful, that no further appeal will lie at the suit of the prisoner. This, however, is a matter for the legislature to remedy, if it is considered a defect. But it is undoubtedly the position in a straightforward appeal where the original sentence is (say one year) and the Director of Public Pro- H secutions is successful in having that sentence increased in the Supreme Court. It is not possible, the terms of section 22(1) of the Court of Appeal Ordinance being as

they are, to hold that the right of further appeal to this court can in any way hinge on
A the question, which party to the magisterial proceedings brought the first appeal.

We read section 22(1) as meaning that there is no jurisdiction to entertain an appeal against sentence which goes to the quantum or extent of a sentence even if a question of law is involved. In our opinion the question of severity is not eliminated by the substitution of one category of punishment for another. It might seem that such an argument would prevent an appeal even if the sentence were beyond the
B powers of the Magistrate's Court or the Supreme Court. We do not think so. Such a sentence would be illegal and without jurisdiction; as such it would be a nullity and could impose no degree of severity at all, which would result in there being a question of law to be resolved on the second appeal the result of which would determine the existence or otherwise of the sentence.

For these reasons we consider that the present appeal involves severity of sen-
C tence and we have no jurisdiction to entertain it. In case we should be wrong in this respect, we have considered the submissions of counsel *de bene esse* and have indicated our opinion above that the appeal would have failed on the merits.

The appeal is dismissed for want of jurisdiction.

Appeal dismissed.

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