

## EARLE UNDERWOOD

v.

## REGINAM

[SUPREME COURT, 1983 (Kermode A.C.J.) 28 October]

## Appellate Jurisdiction

*Criminal Law—Practice and procedure—procedure to be followed before imposing fine—Penal Code (Cap. 17) Section 35(1)(a).*

The appellant was a police officer who was convicted in the Magistrates Court and fined. No enquiry into the appellant's means was conducted before the penalty was imposed. On appeal to the Supreme Court against conviction and sentence:

*Held:* Offenders should be able to pay the fine imposed and the Magistrate should have conducted an enquiry into the Appellants means before fining him. Sentence varied.

[Note: Only that part of the decision of the Court dealing with sentence is reported].

Case referred to:

*R. v. Dewes* [1976] Crim L.R. 144

*H. M. Patel* for the Appellant

*G. E. Leung* for the Respondent.

KERMODE A.C.J.:

## Judgment

On the question of the severity of the sentence the Magistrate quite rightly considered the assault by the appellant, a policeman, to be a serious matter. He took into account all that was said by the appellant's senior officer in favour of the appellant which persuaded the Magistrate not to impose a term of imprisonment which he had in mind and which he would have been justified in imposing notwithstanding the appellant is a first offender and has an excellent police service record.

In *R. v. Dewes* [1976] Crim. L.R. 144 a policeman with 24 years' service and no previous convictions while off duty used violence against a suspect. He was sentenced to six months imprisonment. The term would have been longer but for his age. He had an excellent record.

It was stated in his appeal that the public interest must be served and that a police officer was in a position of great trust and if that trust was broken the results for him must be serious. It was held that the sentence was correct in principle and not excessive.

I have referred to *Dewes'* case to point out how seriously a court views an assault by a police officer on a member of the public.

A

Only one aspect of the sentence requires to be considered and that is the imposition of a fine of \$500 and the order that in default of payment the appellant was to serve a term of imprisonment for 180 days.

The record indicates that the Magistrate made no inquiries at all regarding the appellant's ability to pay a fine of \$500 before he sentenced him.

B

*Thomas in Principles of Sentencing* 2nd Edition at p. 320 states:

"Although the principle is not expressed in statute so far as the Crown Court is concerned, a fine should not normally be imposed without an investigation of the offender's means, and the amount appropriate to the offence considered in the abstract should be reduced, where necessary, to an amount which the offender can realistically be expected to pay. The Court has stated that 'it is axiomatic that where it is decided not to impose a custodial sentence, the court should be careful in imposing a fine not to fix that fine at such a high level that it is inevitable that that which the court has decided not to impose, namely a custodial sentence, will almost certainly follow'."

C

D

Under section 37 (4) of the Penal Code a warrant of commitment to prison in respect of non-payment of a fine by a person to whom time to pay has been given shall not be issued unless the Court shall first make inquiry as to his means in his presence.

The Court may, however, issue the warrant without any further inquiry as to means if it shall have made such inquiry in the presence in the presence of the convicted person at the time the fine was imposed.

E

The Magistrate was in no position to determine whether the appellant could pay a \$500 fine. In the Fiji context \$500 is a heavy fine for an individual to pay. Constables are not in receipt of large salaries and there is no information as to what living expenses the appellant had to meet.

F

If the appellant could not in fact pay the \$500, section 38 (3) would require the appellant to be sentenced to imprisonment for 180 days. If there was no remission and the appellant had to serve the whole 180 days the imprisonment would be equivalent to a nine month sentence where full remission of one third is given and not lost. Nine months is close to the maximum of 12 months for the offence.

G

The Magistrate apparently considered six months imprisonment would satisfy the justice of the case if the fine is not paid.

If that was the case then I consider some guidance can be obtained from the scale provided in section 35 (2) of the Penal Code as to what would be a proper fine in lieu of 6

H

- A months imprisonment. The scale provides that a fine of over \$150 but not exceeding \$300 the maximum default provision is six months imprisonment.

I consider a fine of \$500 excessive and contrary in all the circumstances to section 35 (1) (a) which specifies that a fine shall not be excessive.

- B I have no information regarding the appellant's means and what he could afford to pay but have accepted that six months imprisonment would not be excessive and have related that the quantum of the fine the appellant should pay. I propose to vary the sentence by reducing it to \$200. If he still cannot pay that sum, then he will have to serve a sentence of 180 days as I am of the view that such a sentence is not excessive in the circumstances. Any reduction below \$200 would not serve the purpose of stressing the seriousness of the offence. A \$200 fine for a constable is a stiff fine but not excessive.
- C

Where a Magistrate proposes to impose what he considers might be a large fine for the person he has convicted a lot of time, trouble and expense would be saved if he made inquiry of that person's means before imposing the fine. Had that been done in the instant case and the \$500 fine properly based on the appellant's ability to pay, there could be no jurisdiction for this Court to interfere with the sentence notwithstanding that this Court may have been disposed to inflict a different or lighter sentence had a Judge been hearing the case.

D

The appeal is allowed to the extent that the fine of \$500 is reduced to a fine of \$200 with no alteration to the order imposing 180 days imprisonment on the appellant in default of payment of the fine.

E

*Appeal against sentence allowed; sentence varied.*