

VILIAME MATAI

v.

THE STATE

[HIGH COURT, 1993 (Pathik J) 24 September]

Appellate Jurisdiction

Crime- procedure- imprisonment- activation of suspended sentence- entitlement of accused to be heard- Criminal Procedure Code (Cap 21) Section 30.

On an appeal against sentence from the Magistrates Court the High Court stressed that when consideration is being given to activating a suspended sentence the accused must be given an opportunity to be heard before an order for activation is made.

Cases cited:

Kuar Vijay Bhan v. R 18 F.L.R. 27

Levi Nasaumalumu v. The State (Cr. App. 56/87)

R. v. Ithell [1969] 2 All ER 449

Appeal against sentence imposed in the Magistrates Court.

Appellant in Person

I. Wikramanayake for the State

Pathik J:

On the 19th July, 1993 at Labasa Magistrate's Court the appellant was convicted on his own plea of burglary contrary to section 299 and larceny in dwelling-house contrary to section 270 of the Penal Code and sentenced to imprisonment for 18 months.

He appeals against sentence on a number of grounds the main one being that the sentence is harsh and excessive.

Learned State Counsel does not consider that it is excessive.

The appellant told me that he is 20 years of age; he says that the properties stolen have been recovered; he is showing remorse and is asking for a reduction in sentence.

The appellant has 9 previous convictions for similar offences involving larceny. When he committed the present offence he was subject to a suspended sentence imposed on him of 12th January, 1993 for the offence of house-breaking entering and larceny.

HIGH COURT

A It is clear from the record that the learned Magistrate in the length of sentence that he imposed, took into consideration everything that he could in favour of the appellant including the fact that the properties (substantially) have been recovered. The term of imprisonment imposed for this type of offence is in no way either excessive or wrong in principle.

There is however, one aspect of the sentence on this appeal which merits attention. This relates to the activation of the said suspended sentence.

B Before sentencing the accused for the present offence the learned Magistrate activated the suspended sentence of 6 months imprisonment (which was suspended for 12 months) imposed on this appellant on the 12th January, 1993 by the Taveuni Magistrate's Court for the offence of house-breaking entering and larceny. The appellant committed the present offence during the operational period of the suspended sentence and the sentence of 18 months imprisonment
C for the present offence was ordered to be served consecutive to the said suspended sentence.

The procedure followed by the learned Magistrate in activating the suspended sentence is wrong in law.

D In a similar case of Levi Nasaumalumu v. The State (Criminal Appeal No. 56 of 1987) Fatiaki J. indicated the Court's concern that the Magistrate's Court record, as in this case, did not disclose that the appellant was given an opportunity by the learned trial Magistrate to show cause (underlining mine) and the activation of the suspended sentence was set aside.

E The appellant in the present case should have been asked to show cause as to why his suspended should not be activated. I agree with Fatiaki J. and his reasoning behind this requirement of the law and for ease of reference at the risk of being lengthy I can do no better than set out hereunder an extract of what appears in his Lordship's judgment on this subject:-

F "However at the hearing of the appeal I had indicated the Court's concern that the Magistrate's Court record did not disclose that the appellant was given an opportunity by the learned trial magistrate to show cause.

Indeed the court record suggests that the activation of the suspended sentence occurred conjointly with the imposition of the sentence of 2 years imprisonment.

G Section 30 of the Penal Code Cap. 17 reads as follows:-

"30 - (1) Where an offender is convicted of an offence punishable with imprisonment committed during the operational period of a suspended sentence and either he was convicted by or before a court having power under the

provisions of section 31 to deal with him in respect of the suspended sentence or who subsequently appears or is brought before a court, then, unless the sentence has already taken effect, that court shall consider his case and deal with him by one of the following methods:-

- (a) the court may order that the suspended sentence shall take effect with the original term unaltered; A
- (b) it may order that the sentence shall take effect with the substitution of a lesser term for the original term; B
- (c) it may by order vary the original order made under the provisions of subsection (1) of section 29 by substituting for the period specified therein a period of expiring not later than three years from the date of the variation; or C
- (d) it may make any order with respect to the suspended sentence, and a court shall make an order under paragraph (a) 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. D
- (2) Where a court orders that a suspended sentence shall take effect with or without any variation of the original term, the court may order that that sentence shall take effect immediately or that the term thereof shall commence on the expiry of another term of imprisonment passed on the offender by that or any other court. E
- (3) For the purposes of any written law conferring rights of appeal in criminal cases, any order made by a court under the provisions of subsection (1) shall be treated as a sentence passed on the offender by that court for the offence for which the suspended sentence was passed". F

It is to be noted that the mandatory requirement of the section is contained within the words "... the court shall consider his case" Thereafter the four orders open to the Court are all prefaced by the expression "... may ..." indicating a discretion in the Court then considering the suspended sentence as to the particular order it proposes to make. G

In this instance the learned trial Magistrate activated the original sentence of 6 months imprisonment without variation as was required under paragraph (d) of section 30.

In doing so the learned trial Magistrate must be taken to have concluded that it was not "... unjust to do so in view of all the circumstances that have arisen since the suspended sentence was passed"

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The court record does not reveal whether or not the learned trial Magistrate had applied his mind to this proviso and I cannot see how if the trial Magistrate had applied his mind to the proviso then the accused would not have been called upon and heard or that the activated sentence would remain unaltered.

B

State Counsel in response to the Court's expression of concern stated that it was not mandatory for a court activating a suspended sentence to ask an accused person to show cause why it should not. Counsel argued that that requirement was not expressly contained in section 30 and it was only a practice.

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If it is only a practice then it is one that this Court commends to all Magistrates and should be adopted in all future cases when Magistrates are considering the activation of a suspended sentence of imprisonment.

I am satisfied that the proviso in paragraph (d) together with the mandatory requirement in subsection (1) that the "court shall consider his case ..." (my underlining) gives rise to a need to hear the accused in the matter.

D

I am fortified in my view by the judgment of Goudie J. in Kuar Vijay Bhan v. R 18 F.L.R. 27 where he stated at p. 31 para. E:

"If a person is under suspended sentence and commits a subsequent offence, or in breach of a probation order by committing a subsequent offence, and he is not called upon to show cause why he should not be punished for such subsequent offence the whole object of the suspended sentence or probation order is defeated and the powers and authority of the Court brought into contempt."

E

The fact that in that case the appellant was dealt with some time later on the same day does not in my view alter the clear dictum".

F

There is one other point I would like to make and that is that the learned Magistrate dealt with the activation of suspended sentence first before passing sentence for the present offence. The proper practise should be as follows as stated in the headnote to R. v. Ithell [1969] 2 All ER p. 449:-

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"The proper approach, where a fresh offence has been committed during the period of the suspension of an earlier sentence and the accused is brought before the court, is that the court should first sentence him in respect of the fresh offence by punishment appropriate to that offence, and thereafter address itself to the question of the suspended sentence. Furthermore, unless there are some quite exceptional circumstances, the

suspended sentence should be ordered to run consecutively to the sentence given for the current offence”.

For the reasons given here above the appellant’s appeal against sentence is allowed in part to the extent that the order of the learned Magistrate activating the suspended sentence of 6 months is set aside.

The accused therefore will now serve the said sentence of 18 months only with effect from the date of sentence namely the 19th July, 1993.

(Appeal allowed in part: sentence varied)

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