

HAROON KHAN

v

THE STATE

[HIGH COURT, 1994 (Pathik J), 14 October]

Appellate Jurisdiction

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Crime-sentence-fine-default period-compensation-offender's ability to pay-need for enquiry as to means-Penal Code (Cap 17) Sections 35 & 37-Criminal Procedure Code (Cap 21) Sections 7, 160, 161.

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The appellant who had been fined in the Magistrates Court appealed on the grounds that the fine was excessive. The High Court HELD: given the appellants means (which the Magistrate had failed to enquire into) the fine and default period were excessive and beyond the Magistrates' jurisdiction. The compensation order was also set aside.

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Cases cited:

Earle Underwood v Reginam (Suva Cr. App. 69/83)
R v Daly [1974] 1 All ER 291
R v King [1970] 2 All ER 249
R v Lewis (1965) Crim L.R. 121

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M. Sadiq for the Appellant
Ms. L. Laveti for the Respondent

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Pathik J:

The appellant appeals against the sentence imposed on him upon his conviction on his own plea on a charge of fraudulent conversion contrary to section 279(1)(c)(ii) of the Penal Code, Cap. 17 by the learned Magistrate at Magistrate's Court, Labasa.

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The Particulars of Offence are:

Haron Khan son of Amir Khan on the 17th July, 1990 at Labasa in the Northern Division fraudulently converted to his own use and benefit certain property \$4,000.00 in cash being the sale of Van BL.601 entrusted to him by the said Serupepeli Tagivakatini for him the said Haroon Khan to repair the said van and retain in safe custody.

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The appellant was sentenced to 18 months' imprisonment which was suspended

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A for 3 years. This sentence was consecutive to the suspended sentence pending over him.

B He was also fined the sum of \$6000 in default 9 months' imprisonment and was given a months' time to pay. Further, it was ordered that upon payment of the fine \$4832 was to be paid to the said Ahmed Hussain and \$835 to the said Serupepeli Tagivakatini. It was also ordered that the van in question was to be released to the complainant (in this case the said Serupepeli Tagivakatini).

The grounds of appeal are as follows:-

- (a) that the sentence imposed by the Learned Magistrate is manifestly excessive and wrong in principle.
- C (b) that the Learned Magistrate erred in law in awarding the sum of \$4832 to Ahmed Hussain when he was not a party to the offence.
- (c) that the learned Magistrate exceeded his jurisdiction and thereby erred in law.
- D (d) that the learned magistrate failed to obtain the prior consent of the accused for the hearing of the said offence and thereby erred in law which renders the whole proceeding a nullity.

I shall deal with ground (d) first.

E By the Electable Offences Decree 1988 (22 F.R.G. 4 March 1988 p.219), the First Schedule to the Criminal Procedure Code, Cap. 21 (Vol 2 Laws of Fiji Ed 1978) was amended by providing in the schedule to the said Decree a list of electable offences which meant, as provided in section 3 of the Decree, that:

F "3. No person charged with an offence under the Penal Code shall be entitled to elect to be tried before the High Court unless the offence with which he has been charged is an electable offence."

Further by section 6 of the Decree there was a consequential amendment to the Schedule to the Criminal Procedure Code as follows:-

G "6. To the extent that this Decree deals with the right of trial in the High Court of offences prescribed in the Schedule, the Criminal Procedure Code is amended and shall be read subject to this Decree."

In the light of the above provision, Mr. Sadiq's argument that the Decree has to be read in conjunction with CPC holds no water. I agree with the argument

put forward by the learned State Counsel. The offence with which the appellant is charged is not an electable offence. There is therefore no need for the accused to be put to his election in this case.

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This ground of appeal therefore has no merits and it fails.

I shall deal with grounds (a), (b) and (c) together.

In addition to the suspended sentence the appellant was fined the sum of \$6000 in default 9 months' imprisonment. Learned counsel for the appellant submits that the learned magistrate exceeded his jurisdiction in this regard. He referred the Court to section 35 of the Penal Code under the caption "Fines" which states, inter alia, that the fine "shall not be excessive" and to section 7 of the Criminal Procedure Code which provides, inter alia, that:

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"7. A resident magistrate may, in the cases in which such sentences are authorized by law, pass the following sentences, namely:

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- (a)
- (b) fine not exceeding one thousand dollars.
(underlining mine)
- (c)

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There is nothing wrong in imposing a fine in addition to the suspended sentence. In the headnote to R v. King [1970] 2 All ER 249 C.A. it is stated:

"There is nothing in principle to prevent a court when imposing a suspended sentence from imposing a fine also, which adds a sting to what might otherwise be thought by the convicted person to be a 'let off'. But in imposing such a fine special care should be taken to see that it is well within the convicted person's means to pay."
(underlining mine)

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If the means is ignored then as Lord Parker C.J. said in King (supra) "otherwise if a fine is given which results in imprisonment, then the danger foreseen by the single judge might well arise".

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A similar view was expressed in R v Lewis (1965 Crim L.R. p.121-122) where it was stated that:

"... a fine should be within the defendant's own capacity (though not necessarily his present capacity) to pay, otherwise he may be saddled with a fine he cannot pay and have to go to prison..."

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In this case because the Magistrate imposed a suspended sentence and wanted to also fine the appellant, his intentions clearly were that he did not want him

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A to go to prison. However, subject to what I have to say hereafter on the excessive fine of \$6000 and the orders the learned Magistrate made, he impliedly ordered compensation and before imposing the fine, the magistrate made no inquiries regarding the appellant's ability to pay.

On this aspect Thomas on Principles of Sentencing 2nd Edition at p.320 states:

B “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.”

D In this case even at the committal stage the appellant was for non-payment of the fine committed to prison without inquiry having been first made as to his means. In this regard the magistrate did not comply with the provisions of section 37 (4), (5), & (6) of the Penal Code and particularly Section 37(4) which provides for inquiry as to means. The said Penal Code provisions are:

E “37 (4) A warrant of commitment to prison in respect of the non-payment of any sum of money by a person to whom time has been allowed for payment under the provisions of subsection (1), or who has been allowed to pay by instalments under the provisions of subsection (3), shall not be issued unless the court shall first make inquiry as to his means in his presence: (underlining mine)

F Provided that a court may issue such a warrant of commitment without any further inquiry as to means if it shall have made such inquiry in the presence of the convicted person at the time when the fine was imposed or at any subsequent time and the convicted person shall not before the expiration of the time for payment have notified the court of any change in his means or applied to the court for an extension of time to pay the fine.

G (5) After making inquiry in accordance with the provisions of subsection (4), the court may, if it thinks fit, instead of issuing a warrant of commitment to prison, make an order extending the time allowed for payment or varying the amount of the instalments

or the times at which the instalments were, by the previous order of the court, directed to be paid, as the case may be.

(6) For the purpose of enabling inquiry to be made under the provisions of subsection (4), the court may issue a summons to the person ordered to pay the money to appear before it and, if he does not appear in obedience to the summons, may issue a warrant for his arrest or, without issuing a summons, issue in the first instance a warrant for his arrest.”

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Here the Magistrate was in no position to determine the ability of the appellant to pay the fine. According to court record he is a motor mechanic which is an indication of his expertise. In his case this fine is a heavy one. The Magistrate evidently considered that in default of payment of fine nine months' imprisonment would satisfy the justice of the case for in section 35(2) of the Penal Code it is provided:

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“The term of imprisonment to which a person may be sentenced by a court in default of payment of a fine shall be such term as in the opinion of the court will satisfy the justice of the case but shall not exceed the maximum fixed by the following scale:-

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.....
Exceeding \$300 9 months.”
(underlining mine).

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In a similar situation where \$500 fine was imposed with six months' imprisonment in default on a constable for common assault Kermode J (the then Acting Chief Justice) held that it was excessive and he reduced it to \$200 (Earle Underwood v Reginam (Crim App. 69/83 cyclostyled judgment).

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There Kermode J said that “the Magistrate apparently considered six months imprisonment would satisfy the justice of the case” if the fine was not paid. His Lordship further stated:

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

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The scale in s.35(2) provides that in the case of fine of over \$300 the maximum imprisonment is nine months. Hence if the Magistrate had imposed the maximum fine of \$1000 (and that is what the extent of his power under section 7(c) of CPC is) then the maximum sentence will be nine months.

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A In all the circumstances of this case I consider that the fine was excessive having been imposed without inquiring into the means of the appellant and that is contrary to the provisions of s.35(1)(a) (subject to the provisions of section 7(c) of CPC relating to maximum fine of \$1000) which provides:

“35(1) where a fine is imposed under any law, then in the absence of provisions relating to such fine in such law the following provisions shall apply:

B (a) Where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive”. (underlining mine)

C In Underwood (supra) his Lordship, with whom I agree, said:

“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 justification 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.”

E I have already found that the fine is excessive for the reasons I have outlined hereabove.

F Now I would like to consider whether the monetary orders for payment out were appropriate or not in the circumstances of this case. Although the Magistrate does not say so, he impliedly made orders for compensation. He made an order for payment out the sum of \$4832 to the said Ahmed Hussain presumably for the \$4000 he is alleged to have paid the appellant for the purchase of the van in question. Clearly he ordered to be paid \$832 more than what he is alleged to have paid. Then the complainant was ordered to be paid \$835 in addition to the return of the van. The sum of \$835 was paid by the complainant for the repair of the van which the appellant did and hence the complainant was not entitled to this sum. According to my calculation out of the fine of \$6000 if what I regard as overpayment of \$1667 (made up of the said \$832 and \$835) is deducted it leaves a balance of \$4333; out of this balance the sum of \$4000 was ordered to be paid to the said Ahmed Hussain thus leaving the sum of \$337 as the actual fine going to Government revenue.

G In all the circumstances of this case, in the absence of the Magistrate failing to state how the fine of \$6000 is made up (particularly in view of the overpayment), this aspect of the sentence is most unsatisfactory.

If a certain amount is for compensation to be paid out of fine the Magistrate should have said so in so many words. As it stands orders for payment of the sums of \$835 and \$832 are clearly in error and such orders should never have been made.

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The Magistrate's powers to order compensation are set out in sections 160 and 161 of the Criminal Procedure Code. I disagree with the learned State Counsel that the learned Magistrate exercised his powers correctly under these sections.

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Section 160(2), in so far as it is relevant to the present case provides:

“(2) Any person who is convicted of an offence may be ordered to pay compensation to any person injured by, or who suffers damage to his property or loss as a result of, such offence and such compensation may be either in addition to, or in substitution for, any punishment or other sentence.”

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Section 161 provides for “power of courts to award expenses or compensation out of fine etc”. The relevant provisions are as follows:-

“161. - (1) Any court may, in its discretion, order the whole or any part of any fine imposed or money found on or in the possession of a convicted person to be applied in or towards -

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(a)

(b) the payment of any person of compensation for any loss or injury caused by the offence.

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(2)

(3) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section.”

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These provisions gave the Court the discretionary power to award compensation but this is subject to the overriding principle that in “in determining whether to make a compensation order against a person and in determining the amount to be paid by him under it, the Court must have regard to his means so far as they appear or are known to the Court” (Halsbury's Laws of England Vol 11 4th Ed. para. 804). This was not done in this case at all. Also as I have indicated above the Magistrate has not made himself clear under s.161(1)(b) what part of the fine was to be paid as compensation by saying so in so many words.

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In R v Daly [1974] 1 All ER 291 Lord Widgery C.J. said:

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“It must be remembered by courts making compensation orders that the civil remedy for the damage still exists. The machinery of the compensation order is a quick and simple way of dealing with the claim in simple cases, and in particular it should not be made where recompense involves a weekly payment over such a long period as the present. So we think appeal must be allowed and some adjustment must be made.” (underlining mine)

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As stated hereabove, although the court is empowered to make orders for compensation which is to be paid out of any fine imposed it should be done “in simple cases” (R v Daly supra) and even that after an inquiry into the means of the accused as discussed earlier in my judgment. In the circumstances of this case the learned Magistrate ought not to have made an order for payment out the sum of \$4832 to the said Ahmed Hussain (the alleged purchaser of the van), inter alia, without ample particulars of the alleged transaction between the accused and the said Hussain as I consider that the criminal court was not the correct forum for deciding on a matter of this nature involving such a large sum of money and it should have been best left for the civil court.

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To sum up, I find that the sum of \$6000 was far beyond the capacity of the appellant to pay bearing in mind that the sums of \$832, \$835 and \$4000 should not in the circumstances of this case have been ordered to be paid out as compensation for the reasons given hereabove.

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The appellant therefore succeeds on grounds (a), (b) and (c) of the appeal. I shall allow the appeal setting aside the fine of \$6000 and imposing a fine of \$500 with nine months' imprisonment in default of payment of the fine. He will be given 21 days from the date of this judgment in which to pay. The rest of the sentence is not disturbed.

(Appeal allowed in part; sentence varied.)

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