# RAJIV KUMAR

v.

# THE STATE

[HIGH COURT, 1996 (Fatiaki J) 10 July]

Appellate Jurisdiction

A

*Sentence- several offences constituting one course of criminal conduct- principles of aggregation- Penal Code (Cap. 17) Section 28 (4).*

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On appeal against a sentence imposed in the Magistrates' Court the High Court stressed that where multiple sentences are imposed in respect of offences essentially forming part of one criminal transaction they should ordinarily be ordered to run concurrently. Where sentences are ordered to run consecutively the total sentence should not be disproportionate to the gravity of the offences committed.

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Cases cited:

*D.P.P. v. Solomone Tui* 21 F.L.R.4
*Krishna v. R.* 8 F.L.R. 236

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Appeal against sentence imposed in the Magistrates' Court.

*Appellant* in Person
*Ms. L. Tabuya* for Respondent

**Fatiaki J**:

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On the 20th of December 1995 the appellant was charged before the Magistrates' Court, Nausori with seven counts arising out of the theft of a bank savings account passbook in December 1995 and two attempts (one successful and one unsuccessful) to withdraw money from the passbook.

In particular, Count 1 charged the appellant with an offence of Larceny from a Dwelling House. The items alleged to have been stolen were, cash, dungaree trousers and a pair of sandals, no mention whatsoever is made of the complainant's savings bank account passbook yet the remaining six counts in the charge sheet, all relate either directly or indirectly, to the passbook !

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Next, Counts 2 and 5 charge the appellant with an offence of Forgery of a withdrawal slip' contrary to Section 335(1) of the Penal Code. That section however, makes reference to "wills, codicils or other testamentary documents" [para.(a)] ; "deeds, bonds" [para.(b)] ; and "currency notes or bank notes" [para.(c)]. None of these paragraphs, to my mind, covers a savings bank account withdrawal slip which is more properly included within the definition of a valuable security i.e. Section 335(2), insofar as it is "... an order or a request for the payment of money". (see : definition at Section 4 Penal Code).

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Finally, Count 7 charged the appellant with Attempting to Obtain Money on a Forged Document : Contrary to Sections 381 and 347 of the Penal Code. Section 381 is correctly referred to in the Statement of Offence insofar as it refers to attempts, but Section 347 has nothing whatsoever to do with the case, in that it refers specifically to implements and paper used to forge bank notes or currency notes. Quite plainly the correct section is Section 345 of the Penal Code. (cf. Particulars of Offence in Count 4)

The above may be considered minor irregularities in the charge which may or may not have been cured by the Particulars provided, as State Counsel appeared to suggest at the hearing of the appeal.

But, as was said by Mishra J. in D.P.P. v. Solomone Tui 21 F.L.R.4 at 6 :

> "The charge passed through the hands of the police, (an) experienced police prosecuting officer ... and (an) experienced Magistrate ; and it is inconceivable that the glaring defects in this charge were overlooked by all concerned ... Justice demands the highest standards and nothing less will do."

I respectfully echo those sentiments and would add that where an accused is unrepresented (as in this case), prosecuting authorities and Magistrates must exercise a greater vigilance in the discharge of their respective duties and functions.

Be that as it may the appellant initially pleaded not guilty to all seven counts and the prosecutor sought his remand pending trial. In the course of seeking bail the appellant is recorded to have said :

"... I am sorry for what I have done."

which prompted the trial magistrate quite improperly, to say :

"In that case you should change your plea."

after which, the appellant is recorded to have said :

"I am pleading guilty."

The charge was then put again to the appellant and this time he pleaded guilty to all seven counts.

The brief facts of the case are that the appellant had visited his uncle at Nakasi on 14th of December 1995 and whilst staying with him, the appellant stole the various items listed in Count 1 (including an N.B.F. Savings account passbook belonging to his uncle). Thereafter on 16th December 1995 using a forged withdrawal slip the appellant succeeded in obtaining $50 from an N.B.F. agency at Jays Supermarket at Nausori. Three days later a second attempt to withdraw $900 from the A.N.Z. Bank in Suva proved unsuccessful when the Manager became suspicious and questioned the appellant. The police were informed and the complainant's passbook and sandals were subsequently recovered.

Upon his conviction the trial magistrate sentenced the appellant to consecutive terms of 6 months imprisonment on each count making a total sentence of (6 x 7) = 42 months imprisonment.

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The appellant now appeals against the harshness of the sentence and asks the court to make his sentences concurrent. At the hearing of the appeal, the appellant urged the Court to consider the plight of his family and the fact that he now realises his mistake and has become a Christian since his imprisonment.

In sentencing the appellant the trial magistrate correctly observed (of the appellant):

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> "He has been in the practice of committing similar offences since 1991. It is only appropriate therefore that the Accused to be placed in prison for some time, perhaps he might learn how to discipline himself from the prison wall. The Accused is sentenced to 6 months imprisonment on each of the 7 counts. Sentences to run consecutively."

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I am satisfied however that in the sentence(s) he imposed, the trial magistrate ignored several sound principles of sentencing which are described in the following passage in Thomas Principles of Sentencing which states (with regard to a court's power to order concurrent or consecutive sentences):

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> "The exercise of these powers is subject to two general limiting principles. The first is that sentences imposed for what is essentially one incident or one transaction must be ordered to run concurrently; it is not permissible to inflate the effective sentence by adding consecutive sentences for what are essentially alternative or lesser charges. The second principle is that the aggregate of the sentences must bear some relationship to the gravity of the individual offences."

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(my underlining)

(see : In similar terms the observations of MacDuff C.J. in Krishna v. R. 8 F.L.R. 236 at 238)

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Furthermore, in considering whether offences are part of one incident or transaction the Court takes a broad view of the facts.

In this regard there can be little doubt in my mind having regard to the identity of the offences charged in Counts 2, 3 & 4 and Counts 5, 6 & 7 and their relative proximity in date, and involving the same criminal scheme, complainant and passbook, that the proper view would be to treat them all as being part of a continuous criminal transaction for which concurrent sentences ought to have been imposed.

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Then, at p.50 (ibid) the learned author states :

A "The third situation where the Court tends to consider consecutive sentences inappropriate is that where the offender is convicted of unlawfully possessing some item and an offence consisting of using or dealing with it."

For example in this case, one might consider the appellant's unlawful possession of the complainant's savings bank account passbook and his various attempts to unlawfully withdraw monies from it, as falling within that third situation where consecutive sentences would be considered inappropriate.

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Finally reference may be made to the totality principle which is succinctly described in the following extract, again from Thomas Principles of Sentencing (2nd edn.) at p.56, where the learned author states :

C "The effect of the totality principle is to require a sentencer who has passed a series of sentences ... to review the aggregate sentence and consider whether the aggregate is just and appropriate."

In similar vein Lawton L.J. said in Barton's case :

D "When these cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the behaviour and ask itself what is the appropriate sentence for all his offences."

E In this case the trial magistrate not only failed to differentiate in any way between the nature and seriousness of the various offences that were committed by the appellant, but he also over-looked the appellant's guilty pleas and was unduly influenced by his record of previous convictions. Indeed the sentence imposed appears to have been an exercise in pure arithmetics, without any consideration of relevant sentencing principles.

F True, as State Counsel submits, the offences had an element of meanness to them insofar as they involved a close relative of the appellant who had offered him shelter, but a cumulative sentence six months short of four years imprisonment is wholly disproportionate in my view to the totality of the appellant's criminal behaviour over 3 days with varying degrees of success, and involving less than $200.

G Accordingly the sentences are set aside and in substitution therefor, I impose the following :

Count 1 : 18 months imprisonment) 14th Dec. incident

Count 2 : 12 months imprisonment)
Count 3 : 4 months imprisonment) 16th Dec. incident
Count 4 : 8 months imprisonment)

Count 5 : 12 months imprisonment)
Count 6 : 4 months imprisonment) 19th Dec. incident
Count 7 : 8 months imprisonment)

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The sentences on Counts 2, 3, 4, 5, 6 and 7 are ordered to be served concurrently thereby making a total sentence of 12 months imprisonment for all the offences involving the stolen passbook, which is further ordered to be served consecutive to the sentence imposed on Count 1, making a reduced total sentence of (18 + 12) = 30 months imprisonment with effect from the 20th of December 1995.

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Subject to the above variation the appeal against sentence is dismissed.

*(Appeal partly allowed; sentence varied.)*

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