THE DIRECTOR OF PUBLIC PROSECUTIONS

v.

SAVIRIANO RADOVU

[HIGH COURT, 1996 (Fatiaki J) 22 May]

Appellate Jurisdiction

Sentence- imprisonment- indecent conduct with a young person- whether suspended sentence appropriate- Penal Code (Cap 17) Section 29.

The prosecutor appealed against a suspended sentence of 9 months imprisonment imposed on a first offender who pleaded guilty to indecently assaulting a young girl. The High Court examined and explained the relevant provisions of the Penal Code. It described offences of indecency involving young persons as prima facie unsuitable for suspended sentences. The appeal was allowed and an immediate sentence of imprisonment substituted.

Case cited:

D.P.P. v. Jolame Pita 20 F.L.R. 5

Prosecutor's appeal against sentence imposed in the Magistrates' Court.

Ms. L. Laveti for Appellant
Respondent in Person

Fatiaki J:

This is an appeal by the Director of Public Prosecutions against the leniency of a sentence imposed upon the respondent by the Labasa Magistrates' Court after he pleaded guilty to an offence of indecent assault.

The brief facts which were presented to the learned trial magistrate were that :

> "On the day in question around 4.30 p.m. the complainant, 8 years old, went to pick mangoes at the back of Virend Prasad's shop. The accused started fiddling the complainant's breasts."

Upon the respondent's conviction the learned trial magistrate sentenced him to 9 months imprisonment suspended for 18 months and fined him $30.00 in default 30 days.

It is common ground that the respondent was a first offender at the time of the offence nevertheless learned State Counsel in urging the manifest leniency of the sentence, highlighted the age disparity between the complainant (a child of 8 years) and the respondent (a man of 42 years). Reference was also made to the fact that the victim and the respondent were strangers.

Counsel also asserted without any supporting evidence or statistics, that the offence was prevalent. When asked about the actus reus of the offence, Counsel stated that fiddling amounted to a lingering touch.

The respondent for his part in opposing the appeal stated at the hearing of the appeal (without contradiction):

> "The girl called me to her and I went to her. I touched victim's breast. She was wearing a dress at the time. I don't know or understand why I did that."

At the outset I cannot agree that the fact that the complainant and the respondent were strangers is necessarily an aggravating circumstance. In an offence such as this, involving a young child, the fact that the victim and the accused are related is a clear aggravating factor.

It is also noteworthy that the incident occurred on 9th October 1995 and although the complaint was laid on the same day and the respondent was also interviewed, no charges were laid until 21.12.95 (almost 2 1/2 months later). A medical report (not produced) of the victim also disclosed nothing more serious occurred between the complainant and the respondent than was outlined in the facts.

Indeed not only does there appear to have been an unexplained reluctance on the part of the prosecuting authorities to lay charges but also the learned trial magistrate was not assisted by either a medical report or a birth certificate, nor was he told how long the incident lasted or what was involved in the respondent's act of fiddling ? For instance, does the expression include squeezing, fondling and pinching? or was it more like tickling ? or a lingering touch as State Counsel quaintly describes it.

Be that as it may there can be little doubt in anyone's mind that the respondent indecently assaulted the complainant by fiddling with her breasts, although, it is not entirely clear whether a child of such tender years would be sufficiently physically mature as to have developed breasts.

Equally there is little doubt in my mind that having regard to the nature of the indecent assault, this case must be considered as falling in the least serious category of such cases.

On that basis can it be said that the learned trial magistrate's sentence was manifestly lenient? I cannot agree, bearing in mind that a suspended sentence of imprisonment although not taking effect immediately, is none-the-less a custodial sentence (see: Section 29(5) of the Penal Code). Then can it be said that the learned trial magistate erred in suspending the sentence of imprisonment ?

In seeking the answer to this question I have borne in mind the learned Chief Justice's Circular Memorandum No. 1 of 1991 entitled : "Use of suspended sentences" in which he deprecated the indiscriminate and unwarranted use of

suspended sentences of imprisonment and laid down the following guidelines when he said :

> "This is a power that should be used with utmost care and only in suitable cases as envisaged by the law.
>
> Except in exceptional circumstances, the power is certainly not intended to be used in cases such as the following :
>
> 1. Perpetration of violence upon a person or persons resulting in serious bodily injuries ;
> 2. Abduction for criminal purposes ;
> 3. Grave sexual offences ;
> 4. Causing substantial or serious damage to other people's property ;
> 5. Frauds involving large sums of money ;
> 6. Aggravated robbery ;
> 7. Causing death by dangerous or reckless driving where alcohol is a substantial factor or where the circumstances of driving disclosed a wanton disregard for human lives; and
> 8. Any other case where the degree of criminality borders on evilness."

I have also considered the decision of Grant Acting C.J. (as he then was) in D.P.P. v. Jolame Pita 20 F.L.R. 5 where he said at p.7:

> "Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence ..."

In this case the learned trial magistrate was plainly of the view that a sentence of imprisonment was warranted. Furthermore he would have been aware that he was dealing with a first offender of mature years who had pleaded guilty to a moderately serious sexual offence in which no appreciable degree of violence was used and where no injuries were caused to the victim.

Having regard to those special circumstances was the learned trial magistrate justified in suspending the sentence ? I have come to the firm conclusion that he

was not justified in suspending the sentence of imprisonment although the sentence does strictly come within the statutory limits set out in Section 29(1) of the Penal Code (Cap.17) in so far as it is "... a sentence of imprisonment for a term of not more than two years for an offence, ..."

I have reached this conclusion because, Section 29 ought, in my view, to be read as a composite whole rather than as if its various subsections were separate unrelated enactments. In this way, sentences covered by subsection (3) i.e. "... imprisonment for a term of not more than 6 months", would also be impliedly included in subsection (1) which expressly refers to : "... a sentence of imprisonment for a term of not more than two years" i.e. the larger incorporates the lesser.

In my view the legislature has generally limited the way in which the statutory discretion of a Court to suspend a sentence of imprisonment under subsection (1) ought to be exercised, by expressly excluding from the exercise of the discretion:

> "(3) ... a sentence of imprisonment for a term of not more than six months in respect of one offence ... where -
>
> (a) The act or any of the acts constituting the offence consisted of an assault on or threat of violence to another person or of having or possessing a firearm, an imitation firearm, an explosive or an offensive weapon or <u>of indecent conduct with or towards a person under the age of sixteen years</u> ;"
>
> (my underlining)

Needless to say the offence with which the respondent was charged and convicted in this case falls fairly and squarely within the category of excluded 'act(s)' contemplated by subsection 3 para (a) above, and therefore, had the present sentence been within the statutory maximum length of imprisonment, namely 6 months, the learned trial magistrate would not have been empowered to suspend the sentence.

I cannot accept that in expressly excluding such 'act(s)' from the operation of subsection (1) of Section 29, the legislature was concerned only with the length of the sentence imposed and not with the nature or type of offence committed. Quite plainly it was.

If this were not so, one would have the rather extraordinary situation where serious offending such as Attempted Armed Robbery, where a prison sentence under 2 years was imposed could technically be suspended, whereas a misdemeanour of Being In Possession of an Offensive Weapon in a Public Place could not be suspended if the trial magistrate imposed a sentence of less than 6 months imprisonment !

What is more there would have been no need for a separate subsection (3) of

Section 29. The same result could have just as easily been achieved by further fixing a minimum sentence in subsection (1) so as only to permit the suspension of sentences of imprisonment between 6 months and 2 years.

A

In my considered opinion the legislature could not have intended the exclusions set out in subsection (3) paragraphs (a) to (c) to be so easily ignored or circumvented merely by a Court imposing a sentence in excess of the subsection's maximum i.e. 6 months imprisonment, and at the same time retaining its discretion to suspend, by ensuring that the sentence imposed is within the maximum envisaged by subsection (1) regardless of the offence committed and however little above 6 months the sentence imposed might be.

B

In my view paragraphs (a) to (c) of subsection 3 of Section 29 provide an over-riding statutory fetter or limitation within which a Court is empowered to exercise its discretion to suspend a sentence of imprisonment under subsection (1).

C

More particularly for present purposes, offences which fall within any of the three broad categories enumerated in paragraph (a) above, namely, (i) offences involving personal violence ; (ii) offences involving the possession or use of firearms, explosives or offensive weapons ; and (iii) offences of indecency involving young persons, must be considered prima facie unsuitable to be dealt with by way of a suspended sentence of imprisonment.

D

I am fortified by a consideration of paragraph (c) which sets out a well-known principle of sentencing practice which recognises that it is inappropriate to impose a suspended prison sentence concurrently or consecutively with an immediately effective sentence of imprisonment (see: Sapiano 52 Cr. App. R. 674 ; Flanders ibid at 676 and Butters 55 Cr. App. R. 515). Needless to say this statutory exception holds true whatever the length of the suspended sentence might be and cannot be ignored merely because the term of imprisonment imposed exceeds 6 months.

E

Finally I make the observation that Section 39 of the Criminal Justice Act 1967 (U.K.) which for all intents is in identical terms to and the precedent for Section 29 of our Penal Code, quite clearly omits the "not" in line 2 of subsection 3 immediately before the words : "... make an order under the provisions of subsection (1) ...". The question that then arises is, did our legislature consciously and intentionally write in the "not" in subsection (3) so as to change the mandatory form of the U.K. subsection into our existing negative format ? and if so, what was its intention in doing so ? Whatever the reason, our subsection 3 is an anomaly and needs to be urgently re-drafted.

F

G

The appeal is allowed. The sentences are set aside and in substitution therefor an immediate custodial sentence of 9 months imprisonment is imposed with effect from the 8th of January 1996.

(Appeal allowed; sentence varied.)