

**HAROON KHAN**

v.

**THE STATE**

[HIGH COURT, 1998 (Fatiaki J) 26 January]

Appellate Jurisdiction

- B *Sentence – suspended sentence of imprisonment- whether a suspended sentence may be activated following expiration of the operational period – Criminal Procedure Code (Cap 17) sections 29 (1) and 30 (1).*

C The appellant committed a further offence during the operational period of a suspended sentence however he was not convicted of the further offence until the operational period had expired. The Magistrate activated the suspended sentence. On appeal the High Court HELD: notwithstanding the commission of a further offence during the operational period a suspended sentence can only be activated if a subsequent conviction is entered before the operational period expires.

- D Cases cited:

*Imanueli Tuni v. The State* Suva Cr. App. Nos. 103, 104 and 105 of 1989  
*The State v. Vilikesa Sigadromucala* Labasa Revision No. 10 of 1995

Appeal against sentence imposed in the Magistrates' Court.

- E *H. Robinson* for the Appellant  
*Ms. A. Dritu* for the Respondent

**Fatiaki J:**

F The appellant was convicted after trial in the Labasa Magistrates' Court for an offence of Office Breaking with Intent to Commit a Felony. On the 1st September 1997 the appellant was sentenced to 12 months imprisonment and on the same day 9 months of a 15 months suspended sentence was activated and ordered to be served consecutively, making a total of  $(12 + 9) = 21$  months imprisonment.

G The appellant now appeals against the order activating the suspended sentence on the following two grounds:

1. THAT the learned trial magistrate failed to consider mitigating factors relevant to sentencing; and
2. THAT the sentence is harsh in the circumstances."

In arguing the appeal, Mr. Robinson submitted that the activated sentence ought to have been ordered to be served concurrently instead of consecutively having regard to the appellant's age (45 years), his stable home environment

and the unlikelihood of him re-offending. Counsel conceded however that the magistrate's power to order that an activated sentence be served concurrently under Section 30(2) of the Penal Code (Cap. 17) was a discretionary one primarily for the activating court to determine.

A

During the course of the appeal however, it transpired that the activation of the suspended sentence might be unlawful and the assistance of both counsel was sought in that regard. It arose in the following manner.

The undisputed facts relating to the activated suspended sentence were as follows: On the 18th of October 1993 the appellant was convicted of an offence of Fraudulent Conversion in the Labasa Magistrates' Court and was sentenced to: "15 months imprisonment suspended for 3 years".

B

In terms of Section 29(1) of the Penal Code the operational period of the suspended sentence was for a period of 3 years from 18.10.93 and therefore, would ordinarily have expired or lapsed through effluxion of time on the 18.10.96 unless earlier activated by a Court order under Section 30(1) of the Penal Code.

C

The present offence with which the appellant was convicted was committed on the 31st of May 1994 and was clearly within the above-mentioned operational period of the suspended sentence. The trial magistrate was therefore obliged in terms of Section 30 "to consider (the appellant's) case and deal with him" in accordance with one of the four methods set out in the Section.

D

In Imanueli Tuni v. The State Suva Cr. App. Nos. 103, 104 and 105 of 1989 this Court in considering the powers of the Magistrates' Court to activate a suspended sentence said (at p.6) :

E

"It is clear that these three fairly comprehensive sections (Ss. 29, 30 and 31 of the Penal Code) provide a complete code to which reference must be made whenever a court is dealing with suspended sentences, whether it be a question of the existence of the power, the actual imposition or the subsequent activation."

F

Furthermore, and in setting aside the magistrate's activation in that case this Court said (at p.8) :

"Clearly then it is not the mere conviction of any offence during the operational period that is the determining factor but additionally the offence itself must satisfy two preconditions, namely, it must be an offence punishable with imprisonment AND it must have been committed during the operational period."

G

The conviction for the present offence and the activation of the suspended sentence however, only occurred on 11th of August 1997, which date is, equally clearly, outside the operational period of the suspended sentence.

A The question that arises from this latter fact is: whether the appellant's suspended sentence could be activated by a conviction entered outside the operational period for an offence committed within the operational period? or, does both the subsequent activation and the commission of the offence which gave rise to the activation, have to occur within the operational period?

B Learned counsel for the appellant forcefully argued in support of the latter proposition, whereas State Counsel equally forcefully, argued that the former proposition was the correct interpretation of the Section.

Section 30 of the Penal Code (Cap. 17) provides :

C “(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 :

D (a) the court may order that the suspended sentence shall take effect with the original term unaltered ;

(b) it may order that the sentence shall take effect with the substitution of a lesser term for the original term :

E (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 expiring not later than three years from the date of the variation; or

F (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

G opinion, the court shall state its reasons.

(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.

- (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."

A

Quite plainly, in this case the learned trial magistrate exercised method 1(b) in dealing with the appellant's suspended sentence. The crucial question however, framed in the words of the Section is : At the time of trial magistrate's activation of the appellant's suspended sentence had the sentence already "taken effect"?

B

In The State v. Vilikesa Sigadromucala Labasa Revision No. 10 of 1995 this Court in setting aside an order of the Labasa Magistrates' Court activating a suspended sentence outside the operational period upon a revision requested by the Resident Magistrate, Labasa, said (at p.2) :

C

"Section 30 of the Penal Code comprehensively sets out the powers of a Court activating a suspended sentence. Clearly in this case the suspended sentence (had) already taken effect in so far as the operational period of its suspension ...had elapsed since its imposition."

D

Having so ruled in the above Revision, there is nothing in State Counsel's submissions in this appeal that compels this Court to a different conclusion.

Needless to say if State Counsel's submission is correct then it would be the mere commission of an imprisonable offence during the operational period which would be the only relevant factor to consider before activating a suspended sentence however long after the operational period such activation might occur.

E

Section 30(1) however, makes it clear beyond any doubt that it is the subsequent conviction of the offender for an imprisonable offence and not its commission alone, that is the critical pre-requisite in the exercise of the Court's power to activate a suspended sentence, so that, in the absence of a conviction such as might occur under Section 44 of the Penal Code, activation of a suspended sentence would not be possible.

F

Furthermore, if State Counsel is correct in her interpretation and the date of the charge and the conviction for the subsequent offence is considered irrelevant, it is not difficult to imagine the grave injustice that could result from such a situation where, although the operational period of a suspended sentence is finite when first imposed, nevertheless, any re-offending for a qualifying offence during the operational period serves, theoretically, to suspend or extend the period ad infinitum or until such time as the prosecution chooses to lay a charge and the Court enters a conviction for such re-offending.

G

That could not have been the intention of the Legislature.

A Equally, it is not difficult to posit various scenarios where, through no fault of the prosecution, an offender on a suspended sentence may avoid being dealt with by the Court, but that eventuality, in my view, would be the lesser of the two evils and, in any event, would not prevent the offender being sentenced for his re-offending.

B Bearing in mind the penal nature of the Section under consideration and the absurdity inherent in empowering a court to extend under Section 30(1)(c), the operational period of a suspended sentence after it has expired, I am driven to the firm conclusion that a suspended sentence takes effect when, either the operational period expires or lapses through effluxion of time, or, when the suspended sentence is activated by a court empowered to do so, after a conviction for an imprisonable offence entered within the operational period, whichever occurs first, and not otherwise.

C For the above reasons, the appeal against the activation of the appellant's suspended sentence was allowed and the activated sentence of nine months imprisonment was set aside.

D *(Appeal allowed; sentence varied.)*