

VILIAME GATIVI

v.

THE STATE

[HIGH COURT, 1999 (Fatiaki J) 19 July]

Appellate Jurisdiction

Sentence- suspended sentence of imprisonment- relevance of minor offence of different character committed during operational period- Penal Code (Cap. 17) Section 30.

The Appellant committed two relatively minor offences during the operational period of a suspended sentence imposed on him for serious offences of a different category. The High Court allowed the appeal and stressed that before activating a suspended sentence the Court must consider whether it would be unjust to do so in view of all the circumstances including the facts of the subsequent offences, especially where those subsequent offences were of a minor and of a different character.

Case cited:

R. v. Moylan (1969) 53 Cr.App.R. 590

Appeal against sentence imposed in the Magistrates' Court.

Appellant in Person

Ms. A. Driu for the Respondent

Fatiaki J:

The appellant appeals against what he claims is the injustice of activating in full the suspended sentences of imprisonment imposed in respect of two earlier convictions entered against him in the Labasa Magistrates' Court in Criminal Case File Nos : 115 & 116 of 1999.

The relevant chronology is as follows :

- (1) On the 16th of February 1999 in Labasa Criminal Case No : 115 of 1999 the appellant was charged and convicted for an offence of House Breaking, Entering and Larceny for which he received a sentence of 6 months imprisonment suspended for 1 year ; (Criminal Appeal No : 32 of 1999) ;
- (2) On the same day and before the same magistrate in Labasa Criminal Case No : 116 of 1999 the appellant was charged and convicted for an offence of Larceny From Ship for which

A he received a sentence of 12 months imprisonment suspended for 2 years to be served concurrently with that imposed in (1) above (Criminal Appeal No : 33 of 1999) ;

B (3) On the 9th of March 1999 the appellant appeared before the Savusavu Magistrates' Court in Criminal File No : 96 of 1999 and pleaded guilty to a minor offence of Drunk and Disorderly (Count 1) and to a further offence of Resisting Arrest (Count 2). Upon his conviction the trial magistrate, on noting the above suspended sentences in the appellant's record of previous convictions, remanded the appellant to the Labasa Magistrates' Court for sentencing.

C On 16th March 1999 at the Labasa Magistrates' Court the appellant was sentenced on the Savusavu Criminal File No : 96 of 1999 as follows : on Count 1 to 3 months imprisonment and on Count 2 to 6 months imprisonment both sentences to be served concurrently.

D The Court then turned its attention to the appellant's suspended sentences and fully activated both sentences to be served consecutively to each other and to the concurrent sentences imposed in the Savusavu Criminal File making a grand total of $(6 + 12 + 6) = 24$ months imprisonment.

E At the hearing of this appeal the appellant sought to challenge his convictions in Savusavu Criminal File No : 96 of 1999 for Drunk and Disorderly and Resisting Arrest claiming that he was neither disorderly nor resisting arrest and, although admittedly drunk at the relevant time, he was merely trying to explain something to the police officers who had arrested him for no apparent reason.

F Section 309 of the Criminal Procedure Code however is clear in its terms in disallowing any appeal '... in the case of an accused person who has pleaded guilty and has been convicted on such plea by a magistrates' court, except as to the ... legality of the sentence'. The appeal against conviction must be and hereby rejected.

G As for the legality of the sentence however, Section 4 of the Minor Offences Act (Cap. 18) provides three distinct sentences for an offence of Drunk and Disorderly depending upon whether it is the offender's first (1 month imprisonment maximum), second (3 months imprisonment maximum) or third conviction (1 year's imprisonment maximum).

In the appellant's case and this is conceded by State Counsel, this was, despite his quite extensive record of previous convictions, his first conviction for Drunk and Disorderly under the Minor Offences Act and therefore was only liable to a maximum sentence of 1 months imprisonment.

The sentence of 3 months imprisonment imposed on the appellant was plainly

an unlawful sentence and is therefore quashed and in lieu thereof a sentence of 21 days imprisonment is imposed. The 6 months concurrent sentence on Count 2 however is plainly justified and remains unaltered. Had this been the only sentence the appellant had to serve then he would be entitled to be released from prison. Unfortunately it was not. A

I turn next to consider the appellant's main grievance which is the activation consecutively and in full of his earlier suspended sentences.

In this regard Section 30 of the Penal Code provides four alternative methods of dealing with a suspended sentence as follows : B

- (a) the court may order that the suspended sentence shall take effect with the original term unaltered; (activation in full) C
- (b) it may order that the sentence shall take effect with the substitution of a lesser term for the original term ; (activation with sentence reduced) D
- (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 ; (increasing the suspension period) or E
- (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.' F

Quite plainly in the appellant's case the trial magistrate exercised method (a) above but, in order to do so, it was necessary as a preliminary step, that the magistrate exclude method (d) i.e. the possibility that : '... it would be unjust to (activate the sentence in full) in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence ...' G

In this latter regard a cursory examination and comparison of the appellant's most recent offending and those for which he had earlier received the suspended sentences clearly shows that this most recent offending was for minor offences that occurred during the course of a single drunken scuffle with police officers and are in quite a different category and seriousness than those involving the suspended sentences. G

In R. v. Moylan (1969) 53 Cr.App.R. 590 Widgery L.J. in delivering the judgment

of the Court of Appeal (U.K.) and in considering an identically-worded provision as our Section 30 above said, at p.593 :

A 'We think it quite clear that a court may properly consider as unjust the activation of a suspended sentence where the new offence is a comparatively trivial offence and, particularly, where it is in a different category from that of the offence for which the suspended sentence was imposed. It is trite to say that every case depends on its own circumstances, and so it does. But there must be many instances in practice where a relatively minor offence committed in drink can under the terms of the section give rise to the activation of a heavy suspended sentence, and we recognise that it is proper for the court considering the matter to regard this as unjust in an appropriate case.'

C In light of the above I am reluctantly constrained to allow this appeal on the basis that the trial magistrate's exercise of his statutory discretion in activating the appellant's earlier suspended sentences in full was misguided, harsh and excessive.

D The orders activating the appellant's suspended sentences in Labasa Criminal File Nos : 115 & 116 of 1999 are accordingly quashed and the suspended sentences are re-instated.

E The effect of this order is that although the appellant is to be released immediately from prison he is warned that his suspended sentences imposed on 16th February 1999 will continue to hang over him for the next two years and should he choose to reoffend and be convicted in the next two years he may not be as lucky as he has been on this occasion.

(Appeal allowed, sentence varied.)

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