

AIYAZ ALI v STATE

COURT OF APPEAL — CRIMINAL JURISDICTION

5 REDDY P, EICHELBAUM and GALLEN JJA

8, 17 May 2002

[2002] FJCA 34

10 **Criminal law — appeals — appeal against sentence and conviction — escaping from lawful custody and damaging property — sentence in absentia — plea in mitigation.**

Appellant sought an appeal against sentence and conviction on both counts of escaping from lawful custody and damaging property. He alleged that he was not present when
15 sentence was imposed and that he had no opportunity to enter a plea in mitigation.

Held — The sentences imposed were invalid since the Appellant was absent and had no opportunity to enter a plea in mitigation.

Appeal allowed.

No cases referred to.

20 Appellant in person

P Ridgway for the Respondent

Judgment

25 **Reddy P, Eichelbaum and Gallen JJA.** The Appellant who was then serving a prison sentence or sentences in respect of other offences was brought before the Chief Magistrate in Suva on 15 August 1997 where he faced two charges the first of escaping from lawful custody and the second of damaging property. The Appellant pleaded guilty to both charges. The record indicates that the charge
30 was read, explained and understood. The typed facts were tendered and read out to the court a copy was given to the Accused and the facts were admitted although the value of the damaged property was disputed. The previous convictions of the Appellant are shown as having been admitted. The record indicates that the Appellant sought time to prepare a plea in mitigation and the records contain a
35 note that the sentence then being served by the Appellant would not expire until the year 2006. The case was then adjourned to the 19th August for sentence and the Appellant being a serving prisoner a production order referred to.

The record for the 19th August indicates that there was no appearance by the Appellant. The prosecution sought an adjournment to enable the production order
40 to be served and from that it is apparent that it was not the fault of the Appellant he was not present. The case was then adjourned to the 12th of September for a plea in mitigation and sentence. An order was made that the production order was to be served.

On the 12th of September the accused was present but the record indicates the
45 prosecution did not have the file and sought an adjournment for 2 weeks. The court then adjourned the case to the 26th of September for sentence and ordered that the production order be endorsed.

The record indicates that on 26th of September 1997 the prosecution was
50 represented and the Accused was present but the record is silent as to what else may have occurred. There is an endorsement on the cover of the Magistrate's Court file which reads as follows:

Particulars for record purposes only. 26/9/97 accused sent (sic) to 12 months imprisonment on each count consecutive to each other and present terms.

This appears to be the only record of any sentence being imposed and does not refer to the circumstances of the imposition.

5 The Appellant who appeared before us maintains as he has maintained throughout that he was not present when the sentences were imposed and that he had no knowledge of them until nearly 2 years later when he was informed by the prison authorities that his sentence had been extended by the imposition of the criminal terms referred to on the Magistrate's Court file.

10 The Magistrate's Court record indicates that on the 1st of September 1999 an application from the Appellant for leave to appeal out of time was before the Chief Magistrate, the record states no good grounds were shown, that the appeal period had long expired and the application was denied.

15 An application for leave to appeal out of time by the Appellant came before the Hon Mr Justice Surman in the High Court on the 30 October 2001. The judge in the High Court was obviously concerned with the situation. He noted that there was no record that the sentences had been actually pronounced to the Appellant. He indicated that he had received no explanation as to why there was no endorsement on the court record that the sentences had been formally pronounced in open court. Against that background he allowed the appeal to be heard out of time.

25 The judge referred to the criminal record of the Appellant, and noted that his record indicated that on six previous occasions the Appellant had been convicted of escaping from lawful custody. In that context he considered that the sentence of 12 months imposed consecutively in September 1997 for an escape was unexceptionable but he reduced the sentence for damage to the property to 6 months to reflect the Appellant's plea of guilty. He stated that the two sentences as substituted were to run consecutively giving a total of 18 months imprisonment which was to run consecutively to the periods of imprisonment already being served for other unrelated offences.

30 The Appellant now appeals to this court. The Appellant was unrepresented before us. He stated that on the 26th September 1997 he was present in court when the case was called and that he then asked for further time to prepare a plea in mitigation. He asserted the case was stood down to enable him to do this. He claims that he was returned to the cells at the court and waited but was never brought back to court. He claims that he was returned to the prison and simply assumed that the sentencing had not proceeded. It was only when he learned from the prison authorities that his term had been extended by the sentences referred to that he realised what had happened and took the steps which led to this appeal coming before this court.

45 In his "application for appeal" he indicated that the appeal was against sentence and he set out a number of grounds in support. These were set out in some detail and placed the emphasis on the allegation that he had not been present when sentence was passed. It is also clear from the grounds upon which he relied that his concern throughout has been that he did not have any opportunity to put a plea in mitigation when the sentence was originally imposed and that he did not believe mitigating circumstances had been taken into account. In this court the Appellant relied upon further grounds which while repeating the concerns already expressed raised other grounds which relate not to sentence but to the conviction itself.

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It is now too late for us to consider any appeal against conviction which is not in any event before us. We proceed therefore to deal with the appeal against sentence.

5 Like the judge in the High Court we are concerned with the allegations that the Appellant was not present when sentence was imposed and that he had no opportunity to enter a plea in mitigation. This was a fundamental right and if these sentences were passed in the absence of the Appellant then they cannot stand.

10 Counsel for the State produced an affidavit from the police officer who was the prosecutor at that time. This affidavit is in accordance with the facts already referred to and contained on the record but does not assert that the Appellant was present when the sentences were imposed nor does it deal with the question of mitigation. Since this was the main part of the case on appeal before the judge in the High Court the omission of any assertion controverting the claims of the Appellant has to be regarded as significant. On the material before us therefore we proceed on the assumption that the sentence was imposed in the absence of the Appellant and that he did not have the opportunity which he sought to present a plea in mitigation. Under those circumstances the sentences cannot be regarded as valid and in our view can only be seen as a nullity.

20 We gave consideration to the possibility that the deficiencies were cured by the proceedings in the High Court. We do not consider this can be the case, a nullity is not cured by an appeal.

25 Accordingly we allow the appeal and quash the sentence imposed in both Magistrate's and High Courts. We direct that the case be remitted to the Magistrate's Court for the Appellant to be given an opportunity before a different Magistrate to make a plea in mitigation and for sentence then to be passed.

Appeal allowed.

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