MITIELI ROKOLACADAMU v STATE

HIGH COURT — APPELLATE JURISDICTION

SINGH J

1 November 2002

[2002] FJHC 165

Criminal law — sentencing — application for appeal — conviction — principle of double jeopardy — Interpretation Act (Cap 7) ss 28(1)(k), 58, 59 — Finance Act ss 63, 67(1).

Mitieli Rokolacadamu (Appellant) was charged with the offence of Larceny by Servant. He was convicted on his plea of guilty and sentenced to 2 years' imprisonment. He appealed against both conviction and sentence. He submitted that since he had been surcharged under the Finance Act, it was a bar to conviction under the Penal Code under the principles of double jeopardy.

Held —

(1) A surcharge under the Finance Act (the Act) is a system of financially disciplining an officer who has breached the provisions of that Act or has in some way failed to act diligently in his office. The purpose behind the Act is to see good use of public funds or at least ensure they are not abused and to recover what is misused. It is not a penalty imposed after conviction by a court of competent jurisdiction. There is no question of double jeopardy in such case.

(2) The law clearly recognises the two separate elements namely punishment under the criminal law and payment of compensation or damages under the civil law. This recognition of the dichotomy can only be overridden by an express statutory provision. Unless the appellant can point to some such provision in the Finance Act or the Penal Code or the Criminal Procedure Code, he cannot succeed.

(3) The imposing of surcharge is not a criminal conviction; it is a form of financial discipline of a wayward officer by the minister. It is not a penalty imposed by a court of law.

(4) The staleness may be a mitigating factor where there is a long delay between the detection of offence and the institution of proceedings. Such delay has occurred in this case. Some consideration must be given for this.

(5) The learned magistrate in his sentencing remarks overlooked the surcharge from Appellant's wages. This court is able to extend some mercy and leniency in reducing the sentence. The appellant's sentence is reduced to a term of 15 months' imprisonment.

Appeal allowed in part.

Cases referred to

Emosi Banuve v State Criminal Appeal 59/1989; *Josefa Nemani v State* Criminal Appeal 0047/1997; *R v Hogan* [1960] 2 QB 513; *Shane Raymond Heatley v State* Criminal Appeal HA 0003/1995; *Vishwajit Prasad v State* Criminal Appeal 23/1993, cited.

R v Bryan Gwyn Green 1993 Criminal Law Review 46; *Serupepeli Cerevakawalu and Osea Baleasavu v State* Criminal Appeal 042/2001S, considered.

H. Robinson for the Appellant

Rabuku for the Respondent

Judgment

Singh J. The Appellant was charged with the offence of Larceny by a Servant contrary to s 274(b)(i) of the Penal Code, Cap 17. He was convicted on his plea of guilty and sentenced to 2 years' imprisonment. He is now appealing against both conviction and sentence.

Facts

The Appellant was a prison officer in charge of Labasa Prison from 1997 to 1999. One of his duties was collection of revenue under warrants. He issued receipts to those who paid. He did not bank the money. He used old bank lodgment forms and altered dates and figures on them which gave the impression that he had banked the money. This occurred over a period from 6th November 1997 to 6th August 1999. He managed to steal $5451.80 before he was finally caught on or about 14th or 15th October 1999 after an internal check. He was interdicted for 2 years. From February 2002, the Ministry of Finance began to deduct $30 per fortnight for account recovery and $30 per fortnight as fine.

Grounds of appeal

Mr Robinson submitted that since the Appellant had been surcharged under the Finance Act, it was a bar to conviction under the Penal Code under the principles of double jeopardy.

The starting point for consideration of the principles of double jeopardy are ss 58 and 59 of the Interpretation Act (Cap 7), which read:

Section 58 states:

> *The imposition of a penalty or fine by or under the authority of any written law shall not, in the absence of express provision to the contrary, relieve any person from liability to answer for damages to any person injured.*

Section 59 states:

> *Where an act or omission constitutes an offence under two or more written laws, the offender shall, unless a contrary intention appears, be liable to be prosecuted and punished under any of such laws, but shall not be liable to be punished twice for the same offence.*

Section 58 clearly recognises the two separate elements namely punishment under the criminal law and payment of compensation or damages under the civil law. This recognition of the dichotomy can only be overridden by an express statutory provision. Unless the Appellant can point to some such provision in the Finance Act or the Penal Code or the Criminal Procedure Code, he cannot succeed.

Section 59 on the other hand refers to *"offence", "offender", "prosecuted and punished"*. The use of these words entails a prosecution for a criminal offence, which would of course be by a court of competent jurisdiction.

Section 28(1)(k) of the Constitution also gives expression to the principles similar to s 59 of the Interpretation Act.

Section 28(1)(k) states:

> *(1) Every person charged with an offence has the right:*
>
> …

(k) Not to be tried again for an offence of which he or she has previously been convicted or acquitted.

It was not in dispute that the Appellant was surcharged; only the total amount recovered is not known. The surcharge was done before the Appellant was convicted and sentenced. The fact of surcharge was made known to the learned magistrate in the course of mitigation.

Section 63 of the Finance Act empowers the Minister of Finance to surcharge an officer in certain circumstances. The amount of surcharge shall be the value of loss suffered by the government. Section 67(1) states that "*the amount of any surcharge made under Section 63 shall be recoverable or a debt due to the Government from the person against whom the surcharge has been made*". The keyword in s 63 is *debt*. Surcharge is not a penalty or a fine. It can be recovered by way of civil proceedings or without civil proceedings by deduction from wages or salary. Conviction is not a prerequisite for recovery of such debt even though a conviction may be relevant to show liability in civil proceedings.

The imposing of surcharge is not a criminal conviction; it is a form of financial discipline of a wayward officer by the Minister. It is not a penalty imposed by a court of law.

In *R v Hogan* [1960] 2 QB 513 (decision of Court of Criminal Appeal of England) the appellants had escaped from prison. They were recaptured. They were disciplined under the prison rules by visiting committee of justices. Certain privileges were forfeited from the appellants. They were later charged and convicted among other offences for escape by force and sentenced to 2 years' imprisonment. It was held that the principle that a person who had been convicted of an offence could not subsequently be charged with the same offence in an aggravated form in relation to the same facts was confined to conviction by courts of competent jurisdiction. The visiting justices had dealt with escapes as a matter of internal discipline. There was nothing that prevented the accused from being charged with the common law offences of escape. Forfeiture of privileges was a matter for consideration in sentencing only.

In *Serupepeli Cerevakawalu and Osea Baleasavu v State* Criminal Appeal 042 of 2001S, Shameem J declined to set aside 12 months' sentence imposed on certain appellants after conviction for offence of wrongful confinement and criminal intimidation. The appellants had earlier been dealt with by Controller of Prisons under the Prisons Act. Their remission had been forfeited and certain other privileges forfeited as well. The basis of the reasoning was that prison rules are in place for maintenance of orders inside prison. They do not create criminal offences but only disciplinary offences. Shameem J held that the word "*convicted*" in s 28(1)(k) meant convicted by a court of competent jurisdiction and it could not be extended to a penalty "*imposed by a domestic or internal tribunal*".

In *R v Bryan Gwyn Green* 1993 Criminal Law Review 46 the issue was whether a person who had been dealt with for contempt in civil proceedings for breaching a non-molestation order could later be charged with offence of assault arising from the same facts in criminal proceedings. It was held such criminal proceedings could be laid, on the grounds that "*the Family Division when exercising its jurisdiction in contempt proceedings relied upon a jurisdiction which was quite separate from any criminal proceedings which might be brought in criminal courts. It was an inherent power which derived from its jurisdiction to enforce its orders. It was important to bear in mind that contempt proceedings should be dealt with swiftly and decisively. There was no doubt that the contempt*

jurisdiction of the court was quite separate from the criminal jurisdiction of any other court notwithstanding that it might arise out of the same set of factual circumstances".

There is no question of double jeopardy in such cases.

From the above authorities it appears that one has to look at the nature of earlier proceedings, legislation under which they were taken, purpose of such legislation, type of penalty imposed and the nature of the body imposing such a sentence to consider the issue of double jeopardy.

A surcharge under the Finance Act is a system of financially disciplining an officer who has breached the provisions of that Act or has in some way failed to act diligently in his office. The purpose behind Finance Act is to see good use of public funds or at least ensure they are not abused and to recover what is misused. It is not a penalty imposed after conviction by a court of competent jurisdiction. Accordingly this ground of appeal fails.

Severity of sentence

The Appellant was sentenced to imprisonment for 2 years. In his sentencing remarks the learned Magistrate looked at the position of trust and responsibility enjoyed by the appellant. He also looked at the fact that the theft was carried out systematically over a period of time.

The mitigating factors in the case were a plea of guilty, the Appellant was a first offender and surcharge had commenced. He also lost employment as a result of conviction.

However there were certain aggravating features to the case as well. There was a breach of trust by senior prison officer. The Appellant's activity spanned over a period of 21 months. He used a fairly sophisticated method to defraud the State.

The principles of sentencing in cases of Larceny by a Servant are discussed by Pain J in *Shane Raymond Heatley v State* Criminal Appeal HA 0003 of 1995. It suggests that a custodial sentence is the norm in such cases and the only issue being the length of sentence.

In *Vishwajit Prasad v State* Criminal Appeal 23 of 1993 a total of $78,000 was defrauded by an employee. Of this $38,000 had been repaid leaving a balance of $40,000. The Court of Appeal considered that a sentence of 4 years was excessive and reduced it to 2-and-a-half years.

In *Emosi Banuve v State* Criminal Appeal 59 of 1989 a sentence of 3 years imposed by the Magistrate's Court was reduced to 18 months. The amount involved was $4839.

The present case is close to *Emosi Banuve* in respect of amount stolen. However, one factor, which caused this court some concern, is the delay by the authorities in bringing the matter before the court. The offence was detected in October 1999 but the charge was filed on 6th August 2001 about 22 months later leaving the matter hanging over the appellant's head. Fatiaki J (now Chief Justice) in *Josefa Nemani v State* Criminal Appeal 0047 of 1997 at Labasa considered that staleness may be a mitigating factor where there is a long delay between the detection of offence and the institution of proceedings. Such delay has occurred in this case. Some consideration must be given for this.

The learned magistrate in his sentencing remarks overlooked the surcharge from Appellant's wages. Hence without in any way criticizing the sentence imposed by the learned magistrate, this court is able to extend some mercy and leniency in reducing the sentence. The Appellant's sentence is reduced to a term of 15 months' imprisonment.

Appeal allowed in part.