STATE v VILIAME CAVUBATI

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

28 November, 5 December 2002

[2002] FJHC 327

Criminal law — appeals — appeal by the State — whether sentence is wrong in principle.

Viliame Cavubati (Respondent) was charged with two offences. He was tried and convicted on count 1. He was acquitted on count 2. He was given a sentence of 1 year imprisonment, suspended for 2 years and fined $500. The State appealed against the sentence on the ground that it was wrong in principle and contrary to the established tariff for cases of act with intent to cause grievous harm.

Held — (1) The suspended sentence and fine was quite wrong in principle and manifestly lenient. The brutal and sustained violence inflicted on the victim which he suffered fractures and other injuries that required plastic surgery and overseas dental work, the fact that the attack was entirely unprovoked and the act of kicking a man who is down and already seriously injured, should have led inevitably to a custodial sentence.

(2) In the Respondent's case, a considerable reduction must be given because he has served much of his suspended term of imprisonment. He has also not re-offended and paid his fine. After a substantial reduction of the 12–month term which would have been appropriate taking into account his served sentence, a 6–month sentence would have been imposed.

(3) The facts of this case do not warrant the suspension of the term. Despite all the mitigating circumstances, a custodial sentence must be imposed.

Appeal allowed.

Cases referred to

Attorney-General v Sant Prakash 15 FLR 154; *DPP v Rajendra Shankar* Crim App No 66/1980; *Ivey* (1981) 3 Cr App R (S) 185; *Reg v Shaukat Ali* 22 FLR 87; *State v Dinesh Chand* Crim App No AAU0027/2000S; *Vilikesa Baleidruma* Crim App No 43/1976, cited.

R v Mah-Wing (1983) 5 Crim App Rep (S) 347; *R v Petersen* [1994] 2 NZLR 533, considered.

P. Bulamainaivalu for the State

B. Singh for the Respondent

Judgment

Shameem J. The Appellant was charged on the 3rd of April 2000, with the following offences:

First count

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: Contrary to Section 224(a) of the Penal Code, Cap 17.

Particulars of offence

Viliame Cavubati on the 12th day of December 1999 at Suva in the Central Division caused grievous harm to Manasa Baravilala, with intent to do him grievous harm.

Second count

Statement of Offence

DAMAGING PROPERTY: Contrary to Section 324 of the Penal Code, Cap 17.*Particulars of offence* Viliame Cavubati on the 12th day of December 1999 at Suva in the Central Division wilfully and unlawfully damaged the side glass window of the Government Handicraft Centre valued at $255, being the property of Fijian Property Trust Company Limited.

He was tried, and convicted on count 1. He was acquitted on count 2. Sentence was delivered on 20th July 2001. He was given a sentence of 1 year imprisonment, suspended for 2 years, and fined $500.

The State appeals against sentence, on the following grounds:

(a) that the learned resident magistrate erred in law and in fact in considering the civil suit against the Respondent by the complainant as a mitigating factor in sentencing, when the civil suit had been withdrawn by the complainant well before the date of sentencing. The Appellant will endeavour to support this ground by adducing further evidence.

(b) that the learned resident magistrate erred in law in refusing an adjournment to enable the Appellant to call Doctor Sunia Vudiniabola, who was abroad at the time, to adduce medical evidence that was material and very crucial to the Appellant's case. The Appellant will endeavour to support this ground by adducing further evidence.

(c) that the learned resident magistrate erred in law in imposing a suspended sentence, which sentence was lenient in all the circumstances of the case.

The hearing of this appeal was considerably delayed because of the inability of the State to serve the petition of appeal, and notice of hearing, on the Respondent. He lives in New Zealand. However, service was eventually effected, and the appeal heard on 28th November 2002.

State counsel submitted that the sentence was wrong in principle, and contrary to the established tariff for cases of Act with Intent to Cause Grievous Harm. He pointed to the injuries caused to the victim, and to the way in which the offence was committed and said that the facts justified a custodial sentence of about 12 months. No evidence was adduced to support ground (b), which was abandoned.

Counsel for the Respondent said that the Respondent was a first offender, that suspended sentences had been given for similar offences in the past, and that in any event it would be unjust to imprison the Respondent now when his suspended sentence had been all but served.

The facts

The court record shows that although the charges were filed in May 2000, the trial did not commence until 16th May 2001, because of the Respondent's (or his counsel's) non-attendance to court.

On the 16th of May Mr Manasa Baravilala, gave evidence that he and his wife were leaving the Wolf Hound bar, and were going to take his car out of the car park, when he was suddenly assaulted by the Respondent. He was punched on his left jaw. The car key broke in two and he was pushed by the Respondent against the show glass of the Suva Handicraft Shop in Ratu Sukuna House. The glass broke. The Respondent pulled the complainant out of the broken glass causing the glass to cut the complainant on the left side of his nose. The complainant

became semiconscious. The Respondent then dragged the complainant down the steps to the bottom of the car park and beat him around the head. He was stopped by a passerby, one Ilaitia Isoa. The complainant was taken to the CWM hospital where he was admitted for 4 days. He required plastic surgery to his nose, and had lost three teeth as well as his denture plate which was broken. He had bruised ribs and concussion, which caused him to have headaches for 5 or 6 months. He also suffered from blurred vision as a result of the assault and needed to have teeth implants to replace those he had lost in the assault.

Under cross-examination, the complainant said that he knew one Shirleen who was his ex-girlfriend but did not see her with the Respondent that night. He denied assaulting the Respondent and said he knew the Respondent because he played rugby for Fiji, and because the Respondent was a close relative.

Ilaitia Isoa, gave evidence that he heard a woman say "beat him, punch him, kill him" and saw the Respondent kicking and stomping on the complainant's head.

Dr Paula Nakabea a radiologist gave evidence of an X-ray of the complainant's head. It showed a depressed fracture of the frontal wall of the left cheek, blood in the nasal passages, swollen cheek and small depressed fracture of the right cheek. He said that the fractures were caused by reasonable force such as a punch, a cricket ball, or a traffic accident.

The Respondent gave evidence and said that the complainant had assaulted him, that he had acted in self-defence, and that the complainant had been assaulted by two other men one of whom was a bouncer. His evidence was substantially supported by that of Shirleen Liu, although her evidence about an assault by two men was different from the Respondent's.

In his judgment, the learned magistrate said he did not believe that the Respondent had acted in self-defence. He accepted the complainant's evidence, and accepted that the Respondent had assaulted the complainant with intent to cause him serious harm. At p 59 of the record, the learned magistrate said:

> *The complainant was dragged down the steps and punched and kicked while he was lying helplessly down. The injuries he received are multiple and serious and mostly in the region of the head. Taking all these factors into consideration I find that the accused did intend to cause grievous harm to the complainant.*

In sentencing the Respondent, the learned magistrate said as follows:

> *A civil claim for injuries sustained is pending in the court. A custodial sentence will result in loss of employment by the accused and would render any judgment for damages virtually worthless as the victim would not be able to recover the judgment sum. However the court also has to consider the public interest as well so that society has confidence in the court's sentence.*
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> *Normally in a case of this nature a custodial sentence is warranted. But considering all factors and particularly that the accused is a first offender I consider that a suspended sentence with a stiff fine would meet the ends of justice.*

The appeal

Both counsel agreed that the learned magistrate erred when he took into account the civil claim for damages. Indeed, the civil claim must be irrelevant to the criminal sentence, because the sentencing process is about identifying the proper punishment for a crime. It is not primarily about compensation. The civil claim is quite separate from criminal responsibility.

However, the real question in this appeal is whether the suspended sentence was right in principle. State counsel referred me to several English authorities which say that a custodial sentence must be imposed (despite good character) in cases of causing grievous harm with intent. In *Ivey* (1981) 3 Cr App R (S) 185, a sentence of 4 years' imprisonment was upheld by the English Court of Appeal for a man, who had no previous convictions, who got involved in a fight with a man in the course of which he stomped on his head causing severe injuries to the skull. The court held (per Griffiths LJ):

> *The degree of injury likely to be caused by kicking a man in the head when he is down is of a wholly different degree to that which is likely to be suffered in the course of a fist fight.*

The 4-year term was upheld.

In *Attorney-General's Reference No 33 of 1997* [1998] 1 Cr App R (S) 352, a community service order was imposed for causing grievous bodily harm with intent. The offender had got involved in a fight in the course of which the victim fell to the ground. The offender kicked him on the head as he lay on the ground unconscious, then later stomped on his head. The victim was admitted to hospital where he was unconscious for a day. The Court of Appeal said (per Bingham CJ) that the appropriate sentence should have been 3 years' imprisonment (or 2 years on a guilty plea) but that it would not substitute that sentence for the community service order because the community service order had already been served.

Earlier, in *Attorney-General's Reference No 59 of 1996*, an offender who punched a victim with whom he did an argument, then kicked him around the body and stomped on his head as he lay on the ground received a community service order and a supervision order. The Court of Appeal held that this sentence was unduly lenient saying that a non-custodial sentence was wholly inappropriate for this type of offence even for a first offender. A three-and-a-half year detention in a young person's institution was substituted.

The Fiji Court of Appeal has taken a similar view. In *State v Dinesh Chand* Crim App No AAU0027/2000S the offender was found guilty of assault with intent to cause grievous harm. He was given a suspended sentence. The State appealed against sentence. The appeal was heard after the operational period had expired. The court declined to order an immediate custodial sentence in the circumstances but held that although the offender was a first offender and there was some provocation, a suspended sentence was not appropriate. The following passage from *R v Petersen* (1994) 2 NZLR 533, was cited with approval:

> *The principal purpose of [the relevant section] was to encourage rehabilitation and to provide the Courts with an effective means of achieving that end by holding a prison sentence over an offender's head. It was available in cases of moderately serious offending but where it was thought there was a sufficient opportunity for reform, and the need to deter others was not paramount. The legislature had given it teeth by providing that the length of the sentence of imprisonment was fixed at the time the suspended sentence was imposed, that it was to correspond in length to the term that would have been imposed in the absence of power to suspend, and that the Court before whom the offender appeared on further conviction was to order the suspended sentence to take effect, unless of the opinion it would be unjust to do so. So, there was a presumption that upon further offending punishable by imprisonment the term previously fixed would have to be served (see p 537 line 4).*
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> *The Court's first duty was to consider what would be the appropriate immediate custodial sentence, pass that and then consider whether there were grounds for suspending it. The Court must not pass a longer custodial sentence than it would*

otherwise do because it was suspended. Equally, it would be wrong for the Court to decide on the shorter sentence than appropriate in order to take advantage of the suspended sentence regime (see p 538 line 47, p 539 line 5). R v Mah-Wing (1983) 5 Cr App Rep (S) 347 followed.

The final question to be determined was whether immediate imprisonment was required or whether a suspended sentence could be given. If, at the previous stages of the inquiry, the Court had applied the correct approach, all factors relevant to the sentence were likely to have been taken into account already; the sentencer must either give double weight to some factors, or search for new ones which would justify suspension although irrelevant to the other issues already considered. Like most sentencing, what was required here was an application of commonsense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation (see p 539 line 8, p 539 line 37).

The Court of Appeal then said that the facts of the case and the nature of the charge should almost always result in immediate imprisonment. A sentence of 6–9 months' imprisonment would have been more appropriate. However, it did not substitute such a sentence because of the length of time which had lapsed since the sentencing (18 months), because the offender had served his sentence, and because of the four-and-a-half years delay in bringing the offender to trial.

Counsel referred me to two local cases in which non-custodial sentences were imposed for convictions of act with intent to cause grievous harm. However in *Vilikesa Baleidruma* Crim App No 43 of 1976 no injury was caused by the swinging of a cane knife by the offender. In *DPP v Rajendra Shankar* Crim App No 66 of 1980, the offender had thrown a cane knife at his sister causing a 2 cm long cut which required six stitches. On an appeal against the suspended sentence imposed by the magistrate, the High Court held that because of the relationship between offender and victim and because the victim did not wish to report the matter to the police at all, the complaint being laid by her father, the suspended sentence was not manifestly lenient.

However in *Attorney-General v Sant Prakash* 15 FLR 154, the offender was convicted of doing an act intended to cause grievous harm. The act was a blow with a cane knife causing a deep wound to the victim who required hospitalisation for a month. The magistrate bound over the offender and ordered $20 to be paid to the victim as compensation. The Attorney-General appealed. The High Court held that the sentence was wrong in principle saying that the use of cane knives which were lethal weapons, must lead to a custodial sentence. A sentence of 12 months imprisonment was substituted for the binding over.

Similarly in *Reg v Shaukat Ali* 22 FLR 87, the offender had attacked the victim with a cane knife, causing serious injuries to his arm. He was charged with causing grievous harm, and was given a suspended sentence. The court held that assaults with cane knives had become common, and that they required immediate custodial and deterrent sentences. The suspended sentence was set aside, and a sentence of two-and-a-half years' imprisonment substituted.

Of course all these cases are distinguishable on the facts from the Respondent's. He did not simply swing a weapon at the victim, he did cause considerable injury to the victim, he did not use a cane knife or any weapon at all, and this was not a family dispute. Nevertheless, on the basis of these cases and those submitted to me by State counsel, several matters of principle emerge. One is that the offence of act with intent to cause grievous harm is a serious one which must almost always result in an immediate custodial sentence. Another is that, whilst good character is undoubtedly a mitigating factor, it should not

require the court to give a non-custodial sentence unless the facts of the case themselves are not serious. Lastly where the act complained of is an act involving the use of weapons, especially a knife, this should result in a substantial increase in the sentence.

I respectfully adopt these principles as being valid and relevant for the Fiji courts. Although the Court of Appeal in *Dinesh Chand* (above) said that a sentence of 6–9 months' imprisonment might have been appropriate in that case (which involved the use of a weapon) it is impossible to ascertain any local tariff for cases of act with intent to cause grievous harm without a study of more cases. However sentences appear to range from suspended sentences (where there was no or minimal injury and where the parties have resolved their differences) to two-and-a-half years' imprisonment (where there was serious injury, a brutal assault and the use of a weapon.) However, as I have said, as a general rule, non-custodial sentences are wrong in principle for the offence of act with intent to cause grievous harm. The reason for this principle is apparent. An intent to cause grievous harm is a component of the statutory definition of malice aforethought. If the victim dies, the offender will face a charge of murder. A comparison therefore with sentences passed for manslaughter, (which requires no such proof of intent) is unhelpful.

Turning therefore to the facts of this case, it is apparent that the suspended sentence and fine was quite wrong in principle, and manifestly lenient. The brutal and sustained violence inflicted on the victim, the fact that he suffered fractures and other injuries that required plastic surgery and overseas dental work, the fact that the attack was entirely unprovoked and the act of kicking a man who is down and already seriously injured, should have led inevitably to a custodial sentence. Although no weapon was used, a starting point of 2 years' imprisonment would have been appropriate. After adjustments for aggravating and mitigating circumstances including substantial reduction for good character, a sentence of 12 months' imprisonment would have been, in my view, the appropriate sentence in this case. There is nothing in the facts of the case, or the circumstances of the offender which warranted a suspension of that term. The Respondent, who is a rugby player for Fiji, displayed both callousness and cowardice in the way he attacked the victim, and then continued to kick him around the head when he was lying on the ground semi-conscious and unable to defend himself. A 12-month immediate custodial term, in my view ought to have been imposed after the trial.

However, now at the appeal, the circumstances have changed somewhat. First, the Respondent was sentenced on 20th July 2001. The offence was committed in December 1999. The suspended sentence was imposed on 20th July 2001 for a period of 2 years. That period expires in July 2003. The Respondent has already served all but 7 months of his sentence. He has paid his fine. What are the consequences of these factors on this appeal?

In *Dinesh Chand* (above) the Court of Appeal agreed that the suspended sentence was wrong in principle, but declined to substitute a custodial sentence on the ground that the period of suspension had expired, the fine had been paid and that there had been a four-and-a-half years delay before trial.

In *Attorney-General's Reference No 33 of 1997* (above), Lord Bingham considered the argument of "double jeopardy" in that the offender had already served 240 hours of community service. He said (at 355):

> *It would appear to us that in the ordinary way, and bearing in mind that it is an Attorney-General's reference involving an element of double jeopardy, the ordinary course would be to substitute a sentence of 12 to 15 months imprisonment. Our*

attention is, however drawn to the fact that the offender has, in fact, served the complete period of the community service order, and has apparently done so to the complete satisfaction of the authorities. That is not something which protects him against the substitution of a custodial sentence, as the Court has previously pointed out. But it is in our judgment something that should be reflected in any custodial sentence that we were minded to substitute. Accordingly it would follow that, unless the successful completion of this community service order were to be ignored, the appropriate sentence of custody to be substituted would fall somewhere below the level we have indicated … We bear in mind that the offender, if now sentenced to custody for what would be the appropriate term, would only be required to serve half that period, and we have to ask ourselves whether in all these circumstances the public interest would be served by sending the offender to prison for an effective period of some six months or less. With considerable hesitation, and some apprehension that our decision may be misunderstood and misapplied, we conclude that in all the circumstances it would not be appropriate to substitute a sentence of custody of this offender.

In the Respondent's case therefore, a considerable reduction must be given for the fact that he has served much of his suspended term of imprisonment (and has not reoffended thus far) and has paid his fine. I have further been told that he now lives in New Zealand with his family and has a responsible position in the Department of Social Welfare. In the circumstances after a substantial reduction of the 12-month term which would have been appropriate for this offender, (taking into account his served sentence) I arrive at a 6 month sentence.

As I have already said, the facts of this case do not warrant the suspension of the term. The violence, the pulling of the victim out of the broken glass window for further beating, the dragging down the steps, and the kicking and stomping on the head constitute such a serious assault, that despite all the mitigating circumstances, a custodial sentence must be imposed. The courts must send a message to the community that violence of this kind which was neither provoked nor short-lived, will not be tolerated.

Further, the Respondent, who I was told is a well-known rugby player, ought to have remembered that in Fiji, rugby players are considered to be role models particularly by the young and impressionable. I therefore do not consider that the fact that he is a well-known rugby player, to be a mitigating factor.

The suspended sentence is quashed and substituted with an immediate custodial term of 6 months. The $500 must be refunded to the Respondent forthwith.

Appeal allowed.