

STATE v SEORN THOMAS (HAA0029J of 2004S)

HIGH COURT — APPELLATE JURISDICTION

5 SHAMEEM J

23, 29 April 2004

10 **Criminal law — sentencing — driving or attempting to drive with excess alcohol in blood — reduction of sentence — driving without licence — driving in contravention of the third party policy risk — Community Work Act (No 9) 1994 s 3 — Dangerous Drugs Amendment Decree 1991 — Land Transport Act (No 35) 1998 ss 56(3), 114(56)(6)(a), 114(103)(1)(a) — Motor Vehicles (Third Party Insurance) Act (Cap 177) 1985 — Penal Code ss 29, 29(1).**

15 On 26 December 2003, Seorn Tomas (the Respondent), while drunk, drove a motor vehicle on Fletcher Road and was stopped by the police. A breath test showed that he had 61 micrograms of alcohol in 100 ml of breath. The police also found that he had no driving licence and no third party insurance cover.

20 The Respondent was sentenced as follows: (count 1): 6 months' imprisonment, suspended for 1 year for driving a motor vehicle while there was present in the blood a concentration of alcohol in excess of the prescribed limit; (count 2): 3 months' imprisonment for driving a motor vehicle without a driving licence; and (count 3): 6 months' imprisonment in respect of driving motor vehicle in contravention of the third party policy risk.

25 The Director of Public Prosecutions appealed against the sentences imposed on the following grounds: that the learned magistrate (a) erred in law for count 1 when he failed to invoke s 114(103)(1)(a) of the Land Transport Act (No 35) 1998 (the Act) which directed that the mandatory disqualification from driving be imposed as a penalty for the offence; (b) erred in law when he gave a 3-month imprisonment term suspended for 12 months for count 2, when the maximum imprisonment term was 30 days under s 114(56)(6)(a) of the Act; and (c) erred in law when imposing a suspended sentence for counts 1 and 2 when no power to suspend terms of imprisonment was conferred by the Act.

35 **Held** — (1) Section 103(1)(a) of the Act provided that “a person who drove or attempted to drive a motor vehicle or was in charge of a motor vehicle more than the prescribed concentration of alcohol is present in his blood commits an offence”. Section 114 provided that “penalties for breaches of offences are set out in the schedule to the Act”. The schedule provided that the maximum sentence for an offence under s 103(1)(a) on first offence was \$2000 fine or 2 years' imprisonment and mandatory disqualification from 3 months to 2 years. The case of *State v Satish Kumar* stated that “There is, therefore, under the Schedule of the Land Transport Act no discretion not to disqualify in respect of a section 103(1)(a) offence. The only discretion is as to the length of disqualification”. In that case, the court said, and in the case of *State v Vijendra Reddy*, the court considered the 6-month term of disqualification appropriate for driving with 40–50 micrograms of alcohol in the breath. In the Respondent's case, he had 60 micrograms which led to a longer term. A 9-month term of disqualification on count 1 was therefore appropriate.

45 (2) As to the second ground, the prescribed penalty on count 2 was a maximum of \$200 fine and 30 days' imprisonment on the first offence. The maximum sentence on count 3 under the Motor Vehicles (Third Party Insurance) Act (Cap 177) was a fine of \$400 or imprisonment for up to 1 year or both, and disqualification for 12 months in the absence of special reasons. Counsel for the Respondent did not object to the sentence of disqualification and agreed to the mandatory term of 12 months on count 3.

50 (3) On the third ground, state counsel submitted that there was no provision in the Act providing for the suspension of sentences. Thus, there was no period of imprisonment that

may be suspended. Counsel further argued however that the High Court had the inherent power to suspend sentences. While there was no provision in the Act providing for suspension of sentences, there was s 29 of the Penal Code which applied to all sentences of imprisonment. Thus, s 29(1) provided: “A court which passes a sentence of imprisonment for a term of not more than two years for an offence may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year nor more than 3 years from the date of the order, the offender commits in Fiji another offence punishable with imprisonment”. In the Respondent’s case therefore, the learned magistrate did not err in imposing suspended sentences. Clearly, a non-custodial option was to be preferred over a sentence of imprisonment. Likewise, a fine was not appropriate because the Respondent had no private means of sustaining for himself and any fine would be paid by his sister who was the only breadwinner in the family.

Appeal allowed.

Cases referred to

State v Satish Kumar [2002] FJHC 117; *State v Vijendra Reddy* [2002] FJHC 125, cited.

D. Toganivalu for the State

A. Herman for the Respondent

Shameem J. The Respondent was convicted, on his plea of guilty of the following offences on 19 January 2004:

Count one

Statement of Offence

Driving a motor vehicle whilst there is present in the blood a concentration of alcohol in excess of the prescribed limit: Contrary to section 103(1)(a) and 114 of the Land Transport Act No 35 of 1998.

Particulars of Offence

SEORN THOMAS on the 26th day of December, 2003 at Suva in the Central Division, drove a motor vehicle registration no CR 749 on Fletcher Road, Nabua whilst there was present in 100 millilitres of his blood a concentration of 112 milligrams of alcohol which was in excess of the prescribed limit.

Count two

Statement of Offence

Driving a motor vehicle without a driving licence: Contrary to section 56(3) and 114 of the Land Transport Act No 35 of 1998.

Particulars of Offence

SEORN THOMAS on the 26th day of December, 2003 at Suva in the Central Division, drove a private motor vehicle on Fletcher Road, Nabua without being the holder of a driving licence in respect of the said motor vehicle.

Count three

Statement of Offence

Driving motor vehicle in contravention of the third party policy risk: Contrary to section 4(1)(2) of the Motor Vehicles (Third Party Insurance) Act Cap 177 of 1985.

Particulars of Offence

SEORN THOMAS on the 26th day of December, 2003 at Suva in the Central Division, drove a motor vehicle on Fletcher Road, Nabua when there was not in force in relation to use of the said motor vehicle by the said SEORN THOMAS a policy of insurance in respect of a Third Party Policy Risk as complied under the provisions of this Act.

He was sentenced to 6 months' imprisonment suspended for 1 year on count 1, and 3 months' imprisonment suspended for 12 months on count 2. He was disqualified from driving for 6 months in respect of count 3.

The Director of Public Prosecutions appeals against those sentences on the following grounds:

- (a) That the learned magistrate erred in law for count 1 when he failed to invoke s 114(103)(1)(a) of the Land Transport Act No 35 of 1998 which directs that mandatory disqualification from driving be imposed as a penalty for this offence.
- (b) That the learned magistrate erred in law when he gave a 3-month imprisonment term suspended for 12 months for count 2, when the maximum imprisonment term is 30 days under s 114(56)(6)(a) of the Land Transport Act No 35 of 1998.
- (c) That the learned magistrate erred in law when imposing a suspended sentence for counts 1 and 2 when no power to suspend terms of imprisonment is conferred by the Land Transport Act No 35 of 1998.

Counsel for the Respondent at the hearing of this appeal conceded the grounds of appeal. However he asked me to set aside the sentences of imprisonment in the revisional jurisdiction of the High Court, and instead to impose a fine. State counsel agreed that a sentence of imprisonment was not appropriate for the Respondent in this case, and that other non-custodial options should be explored instead.

This case was called before the learned magistrate on 19 January 2004 and the Respondent pleaded guilty on all three counts. The facts were that on 26 December 2003, at 2.55 am the Respondent was driving a motor vehicle on Fletcher Road. He was drunk and he was stopped by police. A breath test showed that he had 61 micrograms of alcohol in 100 millilitres of breath. He had no driving licence and no third party insurance cover. The Respondent admitted these facts. He was a first offender and was 17 years old. He said he was unemployed and lived with his parents.

The learned magistrate sentenced him to a total of 9 months' imprisonment suspended for 12 months, and disqualified him from driving for 6 months on count 3.

Section 103(1)(a) of the Land Transport Act provides:

A person who—

- (a) drives or attempts to drive a motor vehicle or is in charge of a motor vehicle more than the prescribed concentration of alcohol is present in his blood; commits an offence.

Section 114 provides that penalties for breaches of offences are set out in the schedule to the Act. The schedule provides that the maximum sentence for an offence under s 103(1)(a) on first offence is \$2000 fine or 2 years' imprisonment and mandatory disqualification from 3 months to 2 years. As I said in *State v Satish Kumar* [2002] FJHC 117 — “There is, therefore, under the schedule of the Land Transport Act no discretion not to disqualify in respect of a s 103(1)(a) offence. The only discretion is as to length of disqualification”. In that case, and in the case of *State v Vijendra Reddy* [2002] FJHC 125, I considered a 6-month term of disqualification appropriate for driving with 40–50 micrograms of alcohol in the breath. In this case, the Respondent had 60 micrograms which should lead to a longer term. I therefore impose a 9-month term of disqualification on count 1.

The prescribed penalty on count 2 is a maximum of \$200 fine and 30 days' imprisonment on first offence. The maximum sentence on count 3 under the Motor Vehicles (Third Party Insurance) Act Cap 177 is a fine of \$400 or imprisonment for up to one year or both, and disqualification for 12 months in the
5 absence of special reasons.

Counsel for the Respondent has no objection to the sentence of disqualification and agrees to the mandatory term of 12 months on count 3.

State counsel submitted that the Land Transport Act makes no provision for the
10 suspension of sentences and that therefore no period of imprisonment may be suspended. Counsel for the Respondent agrees that no such provision exists but that the High Court has inherent powers to suspend sentences. In my view, neither position is correct.

Although the Land Transport Act makes no provision for the suspension of
15 sentences s 29 of the Penal Code applies to all sentences of imprisonment. Section 29(1) provides:

A court which passes a sentence of imprisonment for a term of not more than two
20 years for an offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year nor more than 3 years from the date of the order, the offender commits in Fiji another offence punishable with imprisonment ...

The sentence applies to all courts, which pass sentences of imprisonment. I
25 was not pointed to any provision in the Land Transport Act, which specifically prohibits the use of s 29 of the Penal Code. Such a prohibition was found for instance in the Dangerous Drugs Amendment Decree 1991 which provided that:

Provided that the provision of section 29 of the Penal Code and any other law shall
not apply to any sentence to be imposed under this Act.

30 In the absence of any such provision in the Land Transport Act, I consider that s 29 of the Penal Code does apply to sentences under the Act.

In this case therefore, the learned magistrate did not err in imposing suspended
sentences, especially when the Respondent is a 6th former, who will sit for his
35 6th Form examinations this year. Clearly a non-custodial option was to be preferred over a sentence of imprisonment. A fine is not appropriate because the Respondent has no private means and any fine would be paid, not by him but by his sister, the only breadwinner in the family.

In the circumstances I consider community work to be a viable option.

40 Section 3 of the Community Work Act (No 9 of 1994) allows a court to sentence an offender to community work for any offence punishable by imprisonment. The Respondent, a young first offender, is clearly a suitable person for community work under the supervision of a supervising officer, in this case a probation officer. It is a far more suitable sentence than the suspended sentence
45 which may not effectively bring home to the Respondent, responsibility for his behaviour.

On count 1 therefore, I impose on him 20 hours community service, on
count 2, 20 hours community service and on count 3, 20 hours community
50 service. The total sentence to be served in addition to disqualification, is 60 hours community service under the supervision of the probation officer, Suva. The kind of work he must do is a matter for the probation officer to decide.

Result: This appeal is allowed and the sentences imposed by the Magistrates Court are quashed. They are substituted with the following sentence:

Count 1: 20 hours community service and 9 months' disqualification.

Count 2: 20 hours community service.

5 Count 3: 20 hours community service and 12 months' disqualification.

All sentences are to be served consecutively. The probation officer Suva must provide a report to the chief registrar of the High Court as to service of the Community Work Order within 14 days of the completion of the sentence.

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Appeal allowed.

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