SENITIKI NAQA and 4 Ors v STATE

HIGH COURT — APPELLATE JURISDICTION

5 WINTER J

26 July, 4 August 2004

Criminal law — sentencing — forcible entry — wrongful confinement — unlawful possession of arms and ammunition — unlawful assembly — damaging property — unlawful use of motor vehicle — whether cancellation of suspended sentence of imprisonment and imposition of immediate jail term commenced from original sentencing date — whether there was double jeopardy — Arms and Ammunition Act (Cap 188) ss 2(a)(ii), 4(1) — Criminal Procedure Code ss 335, 336 — Penal Code (Cap 17) ss 86, 87, 99, 256, 292, 324

On 6 July 2000, the Appellants through force entered the Monasavu Dam guarded by 18 soldiers. They added drugs to the yaqona and served the yaqona to the soldiers which incapacitated them. The Appellants then seized their weapons and locked them up in the barracks for 24 days. On a different occasion, Senitiki Naqa (A1), Serupepeli Tuinakauvadra (A2) and Inoke Nairoiroi (A3) took over a telecom vehicle that was sent to Monasavu to check the transmitting station.

The Appellants were convicted of the following charges: (a) count 1: forcible entry for A1–A3 and Peni Buka (A4); (b) count 2: wrongful confinement for A1–A4 and Sailosi Latikau (A5); (c) count 3: unlawful possession of arms and ammunition for A1–A5; (d) count 4: unlawful assembly for A1–A5, Viiliame Molikula (A6) and Viliame Nawaqaliqali (A7); (e) count 6: damaging property for A1–A3; and (f) count 7: unlawful use of motor vehicle for A1–A3.

After several adjournments, A2, A6 and A7 changed their pleas on 19 June 2002. On 1 October 2002, A6 and A7 were each bound over to keep the peace for 12 months in the sum of $150 each and A2 was sentenced as follows: (a) count 1: 6 months' imprisonment; (b) count 2: 6 months' imprisonment; (c) count 3: 18 months' imprisonment; (d) count 4: 6 months' imprisonment; (e) count 5: 12 months' imprisonment; count 6: 3 months' imprisonment. The learned magistrate held that all the sentences were concurrent to each other covering a total of 18 months in prison. However, the learned magistrate further held that since the accused was arrested and assaulted by the security forces at the time of arrest and suffered injuries, the total 18 months' prison sentence for 3 years was suspended.

On 2 October 2002, all the remaining accused persons changed their pleas and the learned magistrate held that their pleas were similar to that advanced by A2. The court noted that all the accused were first offenders; their guilty pleas saved the court's time; they appeared to have suffered assaults. Thus, the remaining accused were sentenced as follows: (a) count 1: 6 months' imprisonment; (b) count 2; 6 months' imprisonment; (c) count 3: 18 months' imprisonment; (d) count 4: 6 months' imprisonment; (e) count 5: A1 and A3 for 12 months' imprisonment each; and (f) count 6: A1 and A3 for 12 months' imprisonment each.

Subsequently, the case was remitted to the learned magistrate to amend the sentence to the effect that there was no suspension. On 18 July 2003, A1–A5 was given immediate custodial sentences. For various reasons not attributable to the Appellants, the announcement of the sentence was made only on 26 March 2004.

The Appellants appealed and argued that the learned magistrate should have backdated the commencement of the sentence of imprisonment to the original sentencing date.

Held — (1) It was clear that under s 335 of the Criminal Procedure Code a case may be sent back for amendment or reinstatement and judgment delivered subsequent to the amendment or reinstatement. Further, s 336 provides that "… the Court which the High Court certifies its judgment or order shall thereupon make such orders in conformity to the

judgment or order of the High Court and shall take such steps as may be necessary to comply with or enforce such judgment or order". Thus, the cancellation of a suspended sentence of imprisonment and the imposition of sentence commences with the announcement of the corrected judgment.

Appeal allowed.

Cases referred to

State v Manoj Kumar [2003] FJHC 71, approved.

Attorney-General's Reference No 33 of 1997 [1998] 1 Cr App 352, considered.

R v Arkle [1972] 567 Cr App 722; *State v Dinesh Chand* [2002] FJCA 50, cited.

Valenitabua for the Appellants

K. Bavou for the Respondent

Winter J.

Introduction

The Appellants by a curial process that will shortly be detailed in full received a sentence of 18 months' imprisonment in the Suva Magistrates Court on 26 March 2004. They have appealed that sentence.

The appeal raises three novel points of sentencing law. The most important of which relates to the appropriate discount to be given to an appellant originally sentenced to a community-based sentence, who serves a majority of that sentence and then is faced with a successful state appeal ordering immediate imprisonment.

The background to this matter has been earlier described in a related case stated decision of my sister Shameem J (Criminal Appeal 023 of 2003S). It is repeated here.

Background

The Respondents were convicted and sentenced on the following charges:

FIRST COUNT

Statement of Offence

FORCIBLE ENTRY: Contrary to Section 99 of the Penal Code, Cap 17.

Particulars of Offence

SENITIKI NAQA, SERUPEPELI TUINAKAUVADRA, INOKE NAIROIROI and PENI BUKA on the 4th day of July, 2000 at Monasavu, Tavua in the Western Division, in order to take possession thereof, made a forcible entry in a violent manner upon the Monasavu Dam of the Fiji Electricity Authority, covering the whole Monasavu Dam area which was in occupation of the said Fiji Electricity Authority.

SECOND COUNT

Statement of Offence

WRONGFUL CONFINEMENT: Contrary to Section 256 of the Penal Code, Cap 17.

Particulars of Offence

SENITIKI NAQA, SERUPEPELI TUINAKAUVADRA, INOKE NAIROIROI, PENI BUKA and SAILOSI LATIKAU, between the 4th day of July 2000 and 31st day of July 2000, at Monasavu, Tavua in the Western Division, wrongfully confined any officers namely Warrant Officer Seuta, Corporal Leweni, Corporal Yacarogovinaka, Corporal Panda Ram, Private Tanuku, Private Bainikoro, Private J, Dovi, Private Muduvakarua, Private Tavaga, Private Saga, Private Sausauwalu, Private Dreuvakabalawa, Private Raoma, Private Raicebe, Private Saukitoga, Private Dan, Private Grace, Private Lalaqila, Lt Tanuku and Sergeant Tawakevou.

THIRD COUNT

Statement of Offence

UNLAWFUL POSSESSION OF ARMS AND AMMUNITION: Contrary to Section 4(1) and 2(a)(ii) of the Arms and Ammunition Act, Cap 188.

Particulars of Offence

SENITIKI NAQA, SERUPEPELI TUINAKAUVADRA, INOKE NAIROIROI, PENI BUKA and SAILOSI LATIKAU between the 4th day of July 2000, and the 31st day of July 2000, at Monasavu, Tavua in the Western Division, were found in possession of M16 and K2 rifles and assorted ammunition without licence authorizing the said Senitiki Naqa, Serupepeli Tuinakauvadra, Inoke Nairoiroi and Sailosi Latikau to possess the said arms and ammunition.

FOURTH COUNT

Statement of Offence

UNLAWFUL ASSEMBLY: Contrary to Sections 86 and 87 of the Penal Code, Cap 17.

Particulars of Offence

SENITIKI NAQA, SERUPEPELI TUINAKAUVADRA, INOKE NAIROIROI, PENI BUKA, SAILOSI LATIKAU, VIILIAME MOLIKULA and VILIAME NAWAQALIQALI between the 4th day of July 2000 and the 31st day of July 2000, at Monasavu, Tavua in the Western Division, assembled with intent to commit an offence or being assembled to with intent to carry out some common purpose, conducted themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit the breach of the peace or will by such assembly needlessly and without any reasonably occasion provoke other person to commit a breach of the peace.

FIFTH COUNT

Statement of Offence

DAMAGING PROPERTY: Contrary to Section 324 of the Penal Code, Cap 17.

Particulars of Offence

SENITIKI NAQA, SERUPEPELI TUINAKAUVADRA and INOKE NAIROIROI between the 1st day of July 2000 and the 31st day of July 2000 at Monasavu, Tavua in the Western Division, wilfully and unlawfully damaged the Gate Shaft of the Monasavu Hydro Dam valued at $10,000.00, the property of the Fiji Electricity Authority.

SIXTH COUNT

Statement of Offence

UNLAWFUL USE OF MOTOR VEHICLE: Contrary to Section 292 of the Penal Code, Cap 17.

Particulars of Offence

SENITIKI NAQA, SERUPEPELI TUINAKAUVADRA and INOKE NAIROIROI between the 1st day of July 2000 and the 31st day of July 2000 at Monasavu, Tavua in the Western Division, unlawfully and without colour of right, but not so as to be guilty of stealing, drove a van registration number CQ 524 the property of Telecom Fiji Limited.

Thereafter, after prosecution evidence was disclosed to the defence the matter was set for hearing to 3 May 2001. On that date the prosecution said they had not served witness summons and the case was adjourned to 5 September 2001 for mention. After several further adjournments, the second (A2), sixth (A6) and seventh (A7) accused changed their pleas on the 19 June 2002. A6 and A7 were each bound over to keep the peace for 12 months in the sum of $150 each. A2 was sentenced as follows:

Count 1 — 6 months' imprisonment
Count 2 — 6 months' imprisonment
Count 3 — 18 months' imprisonment
Count 4 — 6 months' imprisonment
Count 5 — 12 months' imprisonment

Count 6 — 3 months' imprisonment

The learned magistrate then said:

> All the above sentences are concurrent to each other that is total of 18 months in prison. Given what Defence counsel said that the accused was arrested and assaulted by the Security Forces at the time of arrest, and as a result, suffered injuries, I will suspend the total 18 months prison sentence for 3 years.

The sentence was delivered on 1 October 2002. Thereafter on the 2 October 2002, all the remaining accused persons changed their pleas and the learned magistrate stated as follows:

> I note that the written plea in mitigation is somewhat similar to that advanced, on behalf of Accused No 2. I also note the fact that all the accused are 1st offenders. I also take note of their guilty pleas which has saved the Court's time. The accused as a result of their wrong doing, appeared to have suffered assaults etc by the Security Forces at the time of their arrest and detention. In Accused No 1's case he appeared to have suffered serious injuries which affect him as of today. I repeat my sentencing comments that I made when sentencing Accused No 2 yesterday. I will sentence the accused in the following way:
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> Count No 1 — each accused gets 6 months' prison.
> Count No 2 — each accused gets 6 months' prison.
> Count No 3 — each accused gets 18 months' prison.
> Count No 4 — each accused gets 6 months' prison.
> Count No 5 — Accused 1 and 3 get 12 months' prison each.
> Count No 6 — Accused No 1 and 3 get 12 months' prison each.

The above sentences are concurrent to each other that is a total sentence of 18 months each. Since the accused have suffered injuries at the time of arrest and detention, the above sentences are suspended for 3 years.

The Director of Public Prosecutions then applied to have a case stated in respect of these sentences.

The facts

The summary of facts submitted to the court was sparse and went only a little further than the particulars of offence on all counts. On 6 July 2000 at about 1.40 am, the accused with others entered the Monasavu Dam by force. The dam was at that time being guarded by 18 soldiers from the Fiji Military Forces. They then served yaqona to these soldiers. They had first added drugs to the yaqona which incapacitated them. They then seized their weapons and locked them up in their barracks, where they remained until 31 July 2000. The accused were then seen between 4 and 31 July in possession of the rifles and ammunition which they had taken from the soldiers. Between those dates, the accused with others unlawfully assembled at the Monasavu Dam in order to maintain the unlawful confinement of the 18 soldiers. The soldiers were in fear because they could see that the accused were inexperienced in the use of firearms. On 6 July the first, second and third accused then shut down the gate shaft of the Monasavu Dam, damaging it. The gate shaft was valued at $10,000. Finally, the first, second and third accused with others forcefully took over a telecom vehicle from a telecommunications technician, who had been sent to Monasavu to check the transmitting station. They and others then used the vehicle for their own purposes until 31 July. The vehicle was later recovered. These facts were admitted by all the accused. In mitigation, counsel said that the accused committed these offences because they were frustrated about the failure of the authorities to pay the Monasavu landowners compensation for the use of their land for the

Monasavu Hydroelectric Scheme. He further said that the accused had been arrested by members of the Fiji Military Forces, that they had been assaulted over several days and kept in custody for 9 days. He said that the accused had suffered physically, psychologically and financially as a result of this case.

At the conclusion of the case stated her Honour was left with no choice but to refer the matter back to the learned magistrate.

At p 31:

> However, I order that this case be remitted to the learned Magistrate to amend his sentencing remarks to the effect that there is no suspension. Instead each accused namely, Senitiki Naqa, Serupepeli Tuinakauvadra, Inoke Nairoiroi, Peni Buka and Sailosi Latikau must be given immediate custodial sentences.

I note that her Honour's decision was given on 18 July 2003. For various reasons, not attributable to the Appellants, the conviction by the learned magistrate was not announced until 26 March 2004. This resulted in the Appellants receiving an immediate custodial sentence. They have been in jail since that date. They appealed.

The appeal

In summary the grounds of appeal were originally:

(a) That the learned magistrate erred in law in sentencing the Appellants for 18 months' imprisonment with effect from 26 March 2004.

(b) That the learned magistrate erred in law in not backdating the said 18 months' imprisonment, without suspension, to the first and second days of October 2002 as the case may be.

(c) That the Appellants have been subjected to double jeopardy.

On this basis the appeal came before me and was part-heard on 17 June 2004 at this time the Appellants' energies were focused on pursuing an argument that the learned magistrate should have somehow backdated the commencement of the sentence of imprisonment to the original sentencing date. This having the practical effect of providing for an immediate release of the Appellants as their term of imprisonment would have expired by 26 March 2004.

I indicated to counsel that I completely rejected that argument. My reasoning was that s 335 of the Criminal Procedure Code makes it clear that:

> The High Court shall have power, if its thinks fit (a) to cause the case to be sent back for amendment or reinstatement and judgment shall be delivered after it has been so amended or reinstated.

Further, s 336 provides:

> … the Court which the High Court certifies its judgment or order shall thereupon make such orders are in conformity to the judgment or order of the High Court and shall take such steps as may be necessary to comply with or enforce such judgment or order.

In my view when read in combination those sections can only mean that on a case stated the cancellation of a suspended sentence of imprisonment and the imposition of an immediate jail term commences with the announcement of the corrected judgment by the magistrate in the lower court.

I am fortified in that view by the application of general suspended sentencing principle. In the usual course of proceedings a person who commits an additional offence during the period of suspension will normally serve the suspended sentence immediately and on top of that receive any other penalty the court may choose to impose for the offence occurring within the suspension period.

The practical application of the cancellation of suspension was noted in *State v Manoj Kumar* [2003] FJHC 71. My sister Shameem J was there dealing with the state's appeal against the suspension of an immediate term of imprisonment. The appeal was granted. Her Honour on the last page said:

> The suspended sentence was therefore wrong in principle and manifestly lenient. The appeal is allowed. The respondent is sentenced to 3 years imprisonment to commence today.

I agree with that demonstration of principle.

This indication of my preliminary view during the course of the part-hearing on 17 June did not however dispose of the matter. I was concerned that another sentencing principle had been overlooked. I accordingly drew counsel's attention to the Fiji Court of Appeal decision in the *State v Dinesh Chand* [2002] FJCA 50 in particular the reference contained in that decision to the English House of Lords observations contained in *Attorney-General's Reference No 33 of 1997* [1998] 1 Cr App 352 (*Attorney-General's Reference*).

The decision related to circumstances where an accused originally sentenced to community service was after a successful state appeal to commence an immediate term of imprisonment.

Lord Bingham, when commenting on counsel's argument about double jeopardy, noted that in circumstances where an offender had already served 240 hours of community service then some allowance has to be made in the corrected sentence for the fact that the prisoner had completed a portion of the penalty originally imposed.

> 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.

Counsel then sought leave to take an adjournment of the appeal part-heard to allow them sufficient time to reconsider the matter. I invited their comment particularly on:

(1) The jurisdiction of this court on a sentencing appeal from the magistrate's decision of 26 March 2004.

(2) The applicability of the Attorney-General's Reference No 33 of 1997 reported in [1998] 1 Cr App 352.

The matter was resumed on 26 July 2004 for argument.

Decision

When the matter resumed before me for hearing it was common ground between the Appellant and the Respondent that there could be a "full" sentencing appeal from the magistrate's corrected judgment delivered on 26 March 2004. I agree with that argument. It makes sense that an aggrieved prisoner should have a right to appeal the duration or nature of penalty on a corrected sentence. [S 308(1) CPC].

As for the second matter they addressed me on there was a large measure of disagreement.

The Appellant argued that the magistrate failed to take into account the Appellants good service of the period of suspension down to the date of his corrected judgement of 26 March 2004.

The State argued primarily that as the imposition of the suspension of imprisonment was a nullity (after the case stated decision) there was in effect nothing for the learned magistrate to take into account as a credit against the duration of the imprisonment.

In support of that argument counsel referred me to an English Criminal Appeal decision *R v Arkle* [1972] 567 Cr App 722 (*Arkle*).

The House of Lords was there considering *Arkle's* argument that on subsequent offending the court could not reactivate an invalidly suspended 27-month term of imprisonment. The suspension was invalid as there was no power in the court to suspend a sentence exceeding a total of 2 years' imprisonment. The counsel submitted that as my sister Shameem J declared in her case stated judgment that the suspension was invalid, that it had always been invalid. Therefore counsel said there was no credit to be given to the Appellants for the fact that they had well-served over half of an invalid suspended period.

I reject that argument. I prefer the principles expressed by the House of Lords in *Attorney-General's Reference*. In addition I note, however, that *Arkle* supports this position. At p 725 their Lordships pose the question, how is this tangle to be resolved?

Their Lordships were concerned that quite clearly the lower court originally imposing the invalid suspension had never intended that *Arkle* should serve an immediate sentence of 27 months' imprisonment. The House granted leave to appeal that sentence out of time in order to adjust the duration of an immediate sentence of imprisonment to something which would be fair in the circumstances of the case. Accordingly they set aside the sentence of 27 months' imprisonment and substituted a sentence of 6 months consecutively served but properly suspended.

I find myself in a similar position here of having to resolve the particular tangle these Appellants find themselves in. Having decided that they have a full sentencing appeal right following the learned magistrate's amended sentence of 26 March 2004 I now must consider what adjustment should be made to reflect the fact that the Appellants had substantially served their suspended sentence. Further, adjustment must be made to reflect my view that it was never contemplated by the sentencing magistrate on 1 and 2 October 2002 that he would impose an immediate term of 18 months' imprisonment.

In my mind this offending required a short sharp sentence of immediate imprisonment to punish these first offenders and send a clear message of deterrence to others who would seek to take the law into their own hands. In practical terms a sentence of 12 months' imprisonment even on the arms charges might have been reasonable. This sentence would be constructed by respecting

the original sentencing remarks (1 and 2 October 2002) and observing the maximum duration of penalty of 18 months. However, against that penalty the suspension was not to be an option. There needs to be a further discount to recognise the mitigating features and in particular the fact that these first offenders co-operated and pleaded guilty at the earliest opportunity and had themselves been subjected to rough justice after their recapture by the army.

In addition an allowance needs to be made for the service of over half of the suspended sentence of imprisonment at the time of the sentencing on 26 March 2004. Accordingly, an immediate sentence of 6 months' imprisonment should be the effective result.

Conclusion

The corrected sentence imposed on 26 March 2004 is quashed and replaced with the following:

Count No 1 — 6 months' imprisonment
Count No 2 — 6 months' imprisonment
Count No 3 — 6 months' imprisonment
Count No 4 — 6 months' imprisonment
Count No 5 — 6 months' imprisonment
Count No 6 — 6 months' imprisonment

All sentences to be concurrent. For the purposes of calculating a release date I choose not to recognise the additional one day served by the second Appellant Serupepeli Tuinakauvadra. This sentence on all accused to take effect from 26 March 2004.

Appeal allowed.