WAISALE VAKARAUVANUA v STATE (HAA0051 of 2004)

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

18, 25 June 2004

Criminal law — appeals — simple larceny — negligible value of goods — variation of suspended sentence — recidivist — whether total sentence imposed harsh and excessive — Penal Code ss 259(1), 262(2).

On 5 June 2003, while serving suspended sentence, the Appellant stole two packets of chewing gum worth $20. He was charged and pleaded guilty to the offence of larceny and admitted 44 similar convictions. The Appellant asked the court for leniency and variation of the suspended sentence. The court held that the Appellant was given 25 suspended sentences, or binding over orders. The court further said that the Appellant disobeyed all the court orders made and committed again another offence 20 days after his conviction of larceny. The Appellant was sentenced to 9 months' imprisonment and the court activated the 9-month suspended sentence in full.

On appeal, the Appellant argued that the total sentence of 18 months' imprisonment was harsh and excessive considering the small value of the item stolen.

Held — (1) For a second conviction, it was appropriate to sentence the accused in excess of 9 months' imprisonment the length depending on the value of the things stolen or the circumstances of the stealing. However, for the Appellant, despite considering the insignificant worth of the item stolen, his previous convictions showed an inability to rehabilitate himself. Moreover, the only reason why suspended sentence may not be activated was the relative triviality of the subsequent offence and the activated sentence should normally run consecutive to the substantive service. Thus, the Appellant's stealing of the item with a small value was not trivial to his previous petty thefts committed. The sentence of 18 months' imprisonment was excessive given the nature of the total offending and the value of the item stolen. The activation of the sentence to be 3 months consecutive to the 9-month-term imposed.

Appeal allowed.

Cases referred to

Josevata Taucilagi v State [2002] FJHC 189; *R v Bocskei* (1970) 54 Cr App Rep 519; *R v Moylan* [1970] 1 QB 143; [1969] 3 All ER 783; *Ronald Vikash Singh v State* [2002] FJHC 118, cited.

Viliame Cavuilagi v State [2004] FJHC 92, considered.

Appellant in person

D. Prasad for the State

Shameem J. The Appellant was charged on one count of the following offence:

Statement of Offence

LARCENY: Contrary to Sections 259(1) and 262(2) of the Penal Code, Act 17.

Particulars of Offence

WAISALE VAKARAUVANUA on 5th day of June 2003 at Suva in the Central Division, stole 2 packets of Juicy fruits valued at $20.00 the property of MH Supermarket, Rodwell Road.

He pleaded guilty to the offence on 19 January 2004. The facts were that on 5 June 2003, he stole the two packets of chewing gum, hid them in his jacket and went past the cashier at Morris Hedstrom's without paying. The security guard

arrested him and took him to the police. These facts were admitted, the Appellant was convicted, and he admitted 44 similar convictions. He asked for leniency and expressed remorse. He had offended while serving a suspended sentence for larceny, imposed on 15 May 2003. He was asked to show cause why the 9-month term imposed, should not be activated.

The matter was then called on 30 January 2004. The Appellant was then represented by Mr Seru. Mr Seru told the court that the Appellant's employer was present and asked for leniency on the Appellant's behalf. Mr Seru asked "for variation of the suspended sentence".

The prosecution said that the Appellant had 46 previous convictions for the same offences, in respect of which he had received suspended sentences. They asked the court to activate the suspended sentence.

The court held that the Appellant had been given 25 suspended sentences, or binding over orders and that he had taken advantage of the leniency shown to him. He had disobeyed all the court orders made and had reoffended in this case only 20 days after he was convicted on 16 May 2003 also for larceny. He sentenced him to 9 months' imprisonment and activated the 9 months suspended sentence in full.

The Appellant now appeals the total sentence of 18 months' imprisonment. He says that it is harsh and excessive given the small value of the items stolen.

State counsel submitted that the Appellant appeared to be a habitual petty thief who was possibly suffering from a disorder which led him to such crime. He suggested that the sentence in total was not excessive but that I should consider recommending psychiatric examination as a variation of the sentence.

Dealing first with the sentence of 9 months imposed for the substantive offence. The tariff for a first conviction for simple larceny is 2 to 9 months' imprisonment (*Ronald Vikash Singh v State* [2002] FJHC 118, *Josevata Taucilagi v State* [2002] FJHC 189). On a second conviction, a sentence in excess of 9 months' imprisonment (the length being dependent on the value of the goods stolen and the circumstances of the stealing) is appropriate. Suspension should be considered for first offenders especially in cases of petty theft.

Despite the almost negligible value of the goods stolen in this case ($20 worth of chewing gum) the Appellant has committed the same offence on many occasions in the past, and shows an inability to rehabilitate himself. In *Viliame Cavuilagi v State* [2004] FJHC 92 Winter J said of an offender with 42 previous convictions for burglary and larceny offences:

> *Repetitive, recidivist offending must inevitably lead to longer sentences of imprisonment unless the offender can demonstrate special circumstances that motivate the court to sentence otherwise. This principle meets three of society's needs. Firstly it might act as a deterrent to the offender and others who fall into a pattern of semi-professional crime to support themselves. Second society is entitled to sideline or warehouse repeat offenders out of the community for longer periods of time so that at least during the term of incarceration they cannot wreck havoc on the lives of law abiding citizens. Third offenders deserve punishment that fits the circumstances of the crime.*

The 9-month sentence for a repeated offender was therefore correct in principle.

The activation of the suspended sentence was also correct in principle. The Appellant committed the offence within the operational period, and the offence was similar to the substantive offence. He was asked to make submissions about the activation of the sentence and counsel made those submissions for him. It

appears that he is employed and that his employer is supportive of him. The only reason why a suspended sentence might not be activated is the relative triviality of the subsequent offence (*R v Moylan* [1970] 1 QB 143; [1969] 3 All ER 783) and the activated sentence should normally run consecutive to the substantive sentence.

The stealing of $20 worth of chewing gum might be considered trivial in the case of a first offender. It is not trivial in this case, considering the Appellant's long list of petty thefts dating back to 1988. There was no reason for the non-activation of the sentence.

However I consider that the total imposed, of 18 months is excessive given the nature of the total offending. As was said in *R v Bocskei* (1970) 54 Cr App Rep 519, where a suspended sentence is ordered to run consecutively with a new sentence of imprisonment, the court should consider whether the aggregate sentence is just and appropriate. In this case I believe that it is too long given the value of the goods stolen in each case. As such I vary the activation of the sentence to 3 months and order that it run consecutive to the 9-month term imposed in the substantive case.

This appeal therefore succeeds to the extent that the activated term is reduced to 3 months' imprisonment. The Appellant must serve a total of 12 months' imprisonment. I further recommend that the Appellant be examined by the consultant psychiatrist of the St Giles Hospital to ascertain whether his propensity for stealing has psychological and treatable causes. I recommend that the Prisons Authority refer the Appellant for psychiatric examination for that purpose.

Appeal allowed.