

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA

Appellate Jurisdiction

Criminal Appeal No. 79 of 1979

BETWEEN : R E G I N A Appellant

AND : 1. BIRDESH KUMAR s/o Shiu
Dayal
2. SUREND CHAND s/o Sukh Ram Respondents

Mr. Dyfed Williams, Counsel for the Appellant
Dr. Sahu Khan, Counsel for the 1st Respondent
Mr. Sahu Khan, Counsel for the 2nd Respondent

JUDGMENT

This is an appeal by the D.P.P. against suspended sentences imposed by a magistrate on BIRDESH KUMAR and SUREND CHAND on the ground that they are manifestly inadequate.

They were convicted of stealing \$1,434 from ANIL DASS TRIVENI on 15/2/79 and each received 15 months' imprisonment suspended for two years and ordered to pay \$718.00 compensation with 6 months in default.

The facts revealed that the complainant operates a service station and lives in Tavua. On 15/2/79 he and his wife went to the cinema by car in the boot of which the complainant had his takings amounting to \$1,434 in a tin box placed in a wooden box and locked in the luggage compartment of his car.

During the interval at 9.30 p.m. the complainant noticed the accuseds beside his car. When the film ended the complainant found his car boot open and the wooden box containing the money had gone. The police were notified and the

accuseds were located the same night and admitted the theft. Accused 2 took the police to a tree near Tavua Post Office where the box was recovered. The money was not recovered and to the day of the hearing it had not been recovered.

The accuseds said that they had opened the boot with a pair of scissors.

On 16/2/79, only a matter of hours after their arrest the accuseds appeared before a magistrate and were each represented by counsel. They pleaded not guilty and were remanded in custody until 28/2/79 when they were granted bail. There were appearances on 19/3/79 and 23/4/79 and the hearing date was fixed for 18/7/79. On the hearing date when witnesses had been summoned the accuseds changed their pleas to guilty and they admitted the facts which I have outlined.

It was pleaded on behalf of accused 1, in mitigation, that he was 19 years of age, and of good character and that his father would help to repay the money.

A similar plea was tendered on behalf of accused 2 who was said to be 18 years of age. He said he would repay.

It was suggested that the accuseds had shown remorse.

In passing sentence on 18/7/79 the learned magistrate said that although a large sum had been involved and the theft must have been carefully planned he considered that they should have one chance. In addition to the suspended sentence of 15 months imprisonment he ordered them to pay \$718.00 each by way of compensation with 6 months imprisonment in default.

Counsel for the respondents referred me to Criminal Appeal 43/74 (Lautoka) JOELI CAVULLATI who was 17½ years and convicted of 2 offences of robbery and 2 of shop-breaking for which he received 34 months' imprisonment. I set aside the sentences and substituted a period of probation. In so doing I placed great weight on his being a first offender and his youth. Also in his case he had been with older persons.

Joeli's case differs from the instant case which was clearly very carefully planned and executed.

The two respondents must have kept observation on the complainant for sometime and selected a day when the accumulated takings must have amounted to a large sum. They then had to take further note of the complainant's movements after seeing him put the money in the luggage compartment and trail him to the cinema.

Far from showing remorse when apprehended by the police they showed a determination to hang on to the proceeds of their well planned crime. Each one told the police that the other had the money. It had been removed from the wooden box when they were arrested an hour or two after the theft. It must have been readily available to hand over to the police if the accuseds felt any repentance but they did not do this.

When they appeared before the learned magistrate for the first time they showed no remorse or shame by pleading guilty. They showed no repentance by handing back the very large sum of \$1500 which they had stolen. During the several months spent awaiting trial they made no attempt to return the money but displayed a continuous criminal a disposition to hang on to it.

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Had they been apprehended several months later when the money could well have been squandered or spent in some irretrievable way one could not insist that they hand over that which they no longer had. But in the instant case these accuseds must have been able to hand all the stolen money back to the complainant when arrested. Had they done so a sentence of imprisonment, even suspended, is not likely to have been imposed. Instead their criminal intent continued right up to the moment of their conviction several months later.

That is an attitude which, in my view should be emphatically discouraged. Had it not been for that attitude I would not have been disposed to interfere with the learned magistrate's sentence.

I am not suggesting that the learned magistrate placed any emphasis on the offers of restitution - made after their conviction but I think that such offers should not be considered when assessing sentence. On receiving a lenient sentence a person may fail to keep his promise made before sentence that he would return the stolen money. However, there is nothing wrong in a magistrate making a compensation order with a term of imprisonment in lieu and making the substantive sentence somewhat lighter than it would be if there were no such order.

Although I am reluctant to send young first offenders to prison one cannot allow such feelings to prevail when during appearances in court and up to the time of conviction they are holding on to the substantial proceeds of their crime. It is an attitude which does not deserve leniency.

With respect to the learned magistrate I regard the sentences as being manifestly lenient.

It is unfortunate that the sentences should be altered after a lapse of about 6 months after they were imposed.

I do not propose to alter the compensation order. I gather that Hirdesh Kumar has paid the compensation and that the other accused has served his term for non-payment. The orders were simply part of the overall sentences.

ORDER

The suspended terms of 15 months will take effect as immediate terms of imprisonment forthwith.

LAUTOKA
22nd February, 1980

(Sgd) (J.T. WILLIAMS)

JUDGE