

IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
CRIMINAL APPEAL NO. 26 OF 1981

Between:

BALWANT s/o Fauji

APPELLANT

- and -

R E G I N A M

RESPONDENT

Mr. H.K. Nagin for the Appellant.

Mr. A.M. Seru for the Respondent.

J U D G M E N T

The appellant was convicted by the Magistrate's Court Suva on the 17th February, 1981, of the offence of selling liquor without a licence and fined \$75 in default 3 months imprisonment. He was also ordered to pay \$75 costs in default 3 months imprisonment.

The appellant appeals against conviction and sentence on a number of grounds. He complains about the Magistrate misdirecting himself and certain comments made by the Magistrate and also the order that he pay \$75 costs.

So far as the conviction is concerned there was considerable evidence which the Magistrate accepted that established beyond reasonable doubt that the appellant sold beer that night to one Alota Saqabobo. His defence was that he had not himself given beer to Alota but his wife had. She gave evidence that she had given beer to a Fijian that night but did not know his name.

The Magistrate did not accept the evidence of P.W.1 Jone Masi Keri who testified he saw the appellant's wife hand over the beer to Alota.

Two policemen P.W.2 and P.W.3 whose evidence the Magistrate accepted were watching the premises that night and saw Alota go into the appellant's premises and come out with a parcel. The two officers who had a search warrant had to break into the premises because the appellant would not admit them. A large quantity of beer and some bottles of gin and rum were found on the premises - more than a normal person would keep in a private home.

P.W.3 took a cautioned statement from the appellant which was admitted into evidence without objection by the appellant's counsel, Mr. Nagin, although Mr. Nagin now contends, as he may have done at the trial, that the Magistrate erred in not properly directing himself in respect of the confession contained in the statement.

The Magistrate did not believe the Appellant as regards the manner in which he alleged the police obtained the statement.

There were a number of admissions in the statement by the appellant that he sold the beer to Alota Saqabobo. He went further and admitted he sold liquor to supplement his income.

There is no merit in the appeal against conviction and the appellant was properly convicted. The appeal against conviction is dismissed.

As to the appeal against sentence, I do not consider a fine of \$75 in default 3 months imprisonment is wrong in principle or excessive.

Mr. Nagin complains, and justifiably so in my view, as regards the order awarding costs of \$75 to the Crown in default 3 months imprisonment.

Section 156(1) of the Criminal Procedure Code authorises a Magistrate to order a person convicted before him to pay a public or private prosecutor such reasonable costs as the Magistrate may seem fit. Subsection 3 of the section provides that payment of costs by the accused shall be enforceable in the same manner as a fine.

The Magistrate had no authority to impose a term of imprisonment in default of payment of costs. Subsection (2) of section 30 of the Penal Code provides a scale of imprisonment for default in payment of a fine and makes no mention of payment of costs.

Section 31(1) of the Penal Code however, provides for distress where an accused is ordered to pay a fine or costs, etc. That is the method of enforcement that subsection 2 of Criminal Procedure Code 156 refers to.

Crown Counsel does not support the imposition of costs by the Magistrate.

Reading the recorded comments of the Magistrate it would appear that the Magistrate might have made the order because he considered the appellant had put the prosecution to unnecessary expense by the nature of his defence and his serious unjustified attack on the police. If that was so the order to pay costs takes on the nature of a further punishment. Whatever the Magistrate's reasons were costs given against an accused in a criminal or quasi criminal case are even rarer than costs being awarded against the Crown. The power is there to make such an order but it is one which should be rarely resorted to. There is some justification for awarding costs to a private prosecutor but I know of no Fiji case where in addition to sentencing an accused he is ordered to pay the Crown costs.

I allow the appeal against sentence to the extent that I revoke the order that the appellant pay \$75 costs

in default 3 months imprisonment.

I confirm the fine of \$75 in default 3 months imprisonment.

R. G. Kermode
(R.G. KERMODE)
ACTING CHIEF JUSTICE

SUVA, 4TH JUNE, 1981.