

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 43 of 1982

BETWEEN : R E G I N A

Appellant

A N D : D A V I D W Y E

Respondent

Mr. S. C. Maharaj, Crown Counsel for the Appellant

Mr. I. Khan, Counsel for the Respondent

J U D G M E N T

This is an appeal by the D.P.P. against the decision of a magistrate who refrained from activating a suspended sentence and against the excessive leniency shown to the respondent in the circumstances.

The respondent David Wye had pleaded guilty to stealing \$195.85 from his employers Fiji Times Ltd. contrary to section 274(a)(i) of the Penal Code. He was fined \$1000.00 with 6 months imprisonment in default; the fine to be paid at \$30.00 per week and to a sentence of 18 months imprisonment suspended for 3 years. He was also prohibited under section 70 of the Liquor Act, Cap. 192 from drinking for 3 years.

The respondent is a reporter employed by the Fiji Times and he was earning \$4,500.00 per annum. As the facts reveal the crime was stupid and related to alcohol.

On 12/3/82 the respondent and another reporter employed by the Fiji Times were dancing and drinking in the evening at Lautoka. At 10.00 a.m. he went to the Manager's flat and borrowed \$7.00 from him. Having spent that they entered the Fiji Times' office using respondent's key; then they opened the box containing Fiji Sixes entires and removed a number of envelopes containing entries and money. The respondent had a key to the box having turloined the key nearly 2 weeks earlier for reasons best known to himself. The value of the entries was \$198.85. The respondent took them to the flat where the manager resides and where the respondent presumably was using a bedroom. About 5.30 a.m. the manager looked into respondent's room and saw the Fiji Six entries scattered on the floor. He notified the police. About

\$38.00 were recovered from the respondent who made restitution in regard to the balance.

The respondent has twenty eight previous convictions commencing on 8.4.71 which have been dealt with during his 18 appearances in Magistrates' courts at Suva, Sigatoka, Tavua and Lautoka. He was born on 6.12.57 and would on that basis be about 14 years old when his criminal activities commenced in 1971.

On 8.4.71 the Suva court sent him to Approved School on several charges of breaking and entering and stealing. He kept on escaping and indulging in similar crimes until caught. This continued until July 1973 when he was sentenced to 12 months' imprisonment for escaping. At that time he would have been 16 years of age.

In April 1974 he was bound over for assaulting a police officer and 3 months later was imprisoned for 9 months for offences connected with fire arms and attempt^{ed} housebreaking.

In 1976 he received 5 years' imprisonment on different counts of breaking and stealing. During this imprisonment he improved his education and after his release he obtained his present employment.

In August 1980 whilst in his present job he received 6 months' imprisonment suspended for 3 years for unlawful use of a motor vehicle at Suva. The facts of that case reveal that the car was very extensively damaged. It was this sentence which the learned magistrate decided not to activate.

I sympathise with the learned magistrate who had a difficult problem in the matter of sentence. After very careful thought and consideration of a probation officer's report and the Fiji Times' Manager's offer to re-instate the respondent he decided that the respondent should have one last chance.

No one is anxious to hurt a person who shows that he can make good. On the other hand one has to consider what chances he has had in the past of making good and which he has failed to take advantage of.

On 9.1.80 in spite of his appalling record the respondent was employed as a temporary civil servant in the Statistics Bureau. That position may have been given to him because he improved his educational standard considerably whilst he was in prison. The civil service job may have been useful in helping him to get his present job with the Fiji Times in March 1980. However, he went astray in Suva in purloining and smashing a car in August 1980. The Suva magistrate in that case appears to have given him a chance by imposing upon him a 6 months' suspended sentence. Courts^{are} discouraged from imposing suspended sentences on persons who have already served terms of imprisonment. The respondent had been to prison twice and on second occasion it was a long term.

Suspended sentences are not a soft option for magistrates. They are usually intended for persons who have never been to prison and who may reform ^{long as} ~~so~~ ^{as} the threat of it ^{is} ~~over~~ [^] over their heads. The person who has had one or two substantial terms of imprisonment and who on subsequent occasions commits further crimes cannot be said to have been deterred by the threat of imprisonment. Therefore a suspended sentence will not be likely to restrain him from committing further crimes as it may in the case of one who has not been imprisoned.

I will not quote from judgments on this very difficult aspect of sentencing. Crown Counsel, Mr. Maharaj, referred to Lautoka Criminal Appeals, 30/79, 50/77, 54/77, 86/76 and Suva Criminal Appeal 105/73.

1. Mosese Biraki and Regina, Lautoka Supreme Court Appeal 30 of 1979.
2. Regina and Vijay Singh alias Tigger s/o Jalim Singh, Raman s/o Sanyasi, Lautoka Supreme Court Appeal 50/1977.
3. Regina and Chet Ram s/o Budh Ram, Lautoka Supreme Court Appeal 54/1977.
4. Uraia Tukana and Regina, Appeal No. 105/1973.
5. D. A. Thomas - Principles of Sentencing.
6. Regina v. Katonaisa Tuivotua, Lautoka Supreme Court 88/1976.

I have noted carefully what Mr. I. Khan has had to say on behalf of the respondent but he did not stress section 30(d) of the Penal Code which enacts that the court shall activate the suspended sentence unless it would be unjust to do so having regard to all the circumstances which have arisen since it was passed including the facts of the subsequent crime. The use of the word unjust is most significant.

It appears that the circumstances prayed in aid of the respondent such as studying and improving his education arose prior to and not since imposition of the suspended sentence. Therefor on that basis it does not seem that it would be unjust to activate the suspended sentence, *i.e. w/in the limitations imposed by s. 30(d).*

What facts in the substantive charge of stealing from his employers can be called upon to demonstrate that it would be unjust to activate the suspended sentence? The crime was stupid in that the respondent left the evidence of it in the bedroom he was occupying. He was under the influence of alcohol and seems to have stolen the money to purchase more of it. A somewhat unpleasant feature is that the respondent had the key to the Fiji Sixes box and had had it for several days. He had taken it without the knowledge of the Manager. There could have been no honest motive which prompted the respondent to pocket that key and the resultant crime suggests what was in the respondent's mind when he took it several days earlier.

Although the commission of the crime was impromptu the concept had occurred some days before. The theft was mean in that it was money of people who implicitly trusted the Fiji Times to protect their money and their entries. It was a mean kind of theft.

I am afraid that I am unable to record any factor within the bounds of section 30(d) which would make it unjust to activate the suspended sentence. The whole section has obviously been carefully worded to ensure that suspended sentences shall not be imposed hap-hazardly and a convicted person must, under that section, be carefully warned about his future behaviour and must be told that he will not easily avoid activation of the sentence if he commits a further crime during the life of a suspended sentence.

The learned magistrate did not state that it would be unjust to activate the suspended sentence. The respondent is intelligent and reasonably educated. He must have known what to expect if he committed a further crime.

In my view the suspended sentence should have been activated and I Order that it shall be as from the date hereof.

With regard to the 18 months' term imposed for stealing from the Fiji Times I am of the view that it was somewhat severe in the circumstances. I reduce it to 12 months. Naturally it cannot be suspended and continue alongside an activated term. Therefore I Order that it be served forthwith.

The fine of \$1000.00 is set aside and any monies paid thereunder shall be remitted.

The result is that for the crime herein the respondent will serve 12 months which shall be consecutive to the 6 months' suspended imposed in Suva Magistrate's Cr. Case 2331/80 on 14/8/80; i.e. 18 months in all as from the date hereof.

LAUTOKA

26. August, 1982

J. T. Williams
(J. T. Williams)
Judge

