

Lui v Police

10 Supreme Court, Nuku'alofa
Ward CJ
Criminal appeal No. 773/94

20 September 1994

Magistrates Courts - sentencing - prosecution opinion
Practice and procedure - duty of prosecutors - opinions
20 *Sentencing - prosecutor's opinion*

This was an appeal against a sentence of 8 months imprisonment on a charge of theft.

Held: allowing the appeal and reducing the term to 3 months:

1. A practice was growing in the Magistrates' Court for prosecutors to make comments beyond a plain statement of the facts of the offence.
2. The prosecutor's duty was to present the case to the Court as fairly and as accurately as possible, as a person assisting in the administration of justice, his statements being limited to matters of fact that he knows could have been proved by evidence and not to matters of opinion.
3. Some of the opinions expressed by the prosecutor had been repeated by the Magistrate when sentencing.

Case referred to : R v Banks (1916) 12 Cr. App. R. 74

Counsel for Appellant : Mr Elrington

40 Counsel for Respondent : Ms Weigall

Judgment

This is an appeal against a sentence of 8 months imprisonment imposed for theft. The appellant pleaded guilty before the Magistrate Court on the 9th of August of this year on one charge of theft of a boot lid from a car.

The accused had no previous convictions. He had, as I said, pleaded guilty before the Magistrate and, although the Magistrate specifically pointed out he had not tried to apologise, it is quite clear that he has since been to the victims, apologised and been forgiven by them.

There is no doubt about it that this was a blatant theft. He went to a friend's house and noting there was nobody there, picked up this item and took it away with him. At the same time, it was simply a theft and there was no breaking involved into the house. In such circumstances, prison could be an appropriate penalty.

However the case does give me a cause for concern about a matter on which I must comment.

In this case, as I have noticed is the practice more and more in the Magistrates' Court, the prosecutor made comments beyond a plain statement of the facts of the offence. The record shows that the prosecutor, having outlined the facts, added; "The prosecution is concerned with this crime, theft, because there no sign of it being reduced in this country. It is gaining in abundance. The rights of the people to their properties is in doubt these days because of these people who touch and take anything they want."

It should be stated quite clearly that the prosecutor's duty in any criminal proceedings is to present the case to the court as fairly and as accurately as possible. His role has been described in England as the role of a Minister of Justice, a person simply assisting in the administration of justice; *R v Banks* (1916) 12 Cr. App. R 74 at 76. Whatever his opinion of the case is, he should not state it in court and should limit his statements to matters of fact that he knows could have been proved by evidence had there been a contested case. If he is intending to suggest to the court that theft is increasing he should produce figures to support it. If he feels people have doubts as to the rights to their own property because of theft he should state the basis of that comment. And if he wished to suggest that, in this particular case, the accused was a person who touches and takes anything he wants, then he should have been able to justify that comment also.

Prosecutors would be well advised to read the Farquharson Committee Report set out in paragraphs 4 - 71 to 4 - 80 of the 1993 edition of Archbold. In Appendix B of the same work, the Code of Conduct description of the responsibilities of prosecuting counsel at paragraphs B 35 - 39 is equally worthy of study.

The unfortunate result of his opinions was that the Magistrate repeated some of them when sentencing. She should have based the sentence only on matters that were fact. To obtain those facts on a plea of guilty she, of course, has to rely on the statements of counsel. But such manifestly obvious opinions of the prosecutor should have been ignored. In future, magistrates should not allow such opinions to be given and, if given inadvertently, should ignore them.

Returning to the sentence which was passed, as I have said, I think that a sentence of imprisonment may be appropriate for an offence of theft. However, for an offence of this nature, the sentence of 8 months seems to me to be too severe a penalty. For a first offender, a sentence of 3 months imprisonment would have been an adequate penalty. He

has never been to prison before and clearly the effect of going to prison even for that length of time is going to be profound. He can also plead in support of his case that, having committed no offence until he is 27 years of age, this was an unusual form of behaviour for him; something out of character.

If having decided that imprisonment is the appropriate penalty, the court must move on to consider whether it would be appropriate to suspend it. I can do so if I feel the failure by the magistrate to suspend the sentence was wrong in principle. In all the circumstances of this case, I do not feel the sentence should be suspended.

100 The appeal is allowed. The sentence of 8 months imprisonment is quashed and a sentence of 3 months imprisonment is substituted.