IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL N0.AAU0033 OF 2005S
(High Court Cr. Appeal N0.HAA0018 of 2005)

BETWEEN:

MACIU KOROICAKAU

APPELLANT

AND:

THE STATE

RESPONDENT

Coram: Ward P
Henry JA
McPherson JA

Hearing: Wednesday, 13 July 2005

Counsel: Appellant in person
D Goundar for respondent

Date of Judgment: Friday, 15 July 2005

JUDGMENT OF THE COURT

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[1] On 7 July 2004, the appellant pleaded guilty in the Magistrates' Court to two charges of robbery with violence, one charge of unlawful use of a motor vehicle and two charges of minor traffic infringements. They all arose from the same overall incident. The magistrate sentenced the appellant to seven years and five years on the two robbery charges and discharged him on the remaining three charges. He ordered that the two sentences of imprisonment should be served concurrently with each other. The appellant was already serving another sentence of imprisonment ordered on 17 May 2004 and the magistrate ordered that the total sentence of seven years should also be concurrent with the existing sentence.

[2] The appellant appealed to the High Court against sentence on the grounds that it was harsh and excessive and that, when the magistrate ordered the sentence to be served concurrently with the term he was then serving, he should have backdated it so it commenced at the same time as the earlier sentence.

[3] Shameem J dismissed the appeal. On the issue of the starting date of the sentence, she explained:

> "The learned Magistrate ordered the sentences to be served concurrently with each other. He did not err. Consecutive sentences would have offended the totality principle, and all the charges arose out of what was one criminal enterprise. Further, he did not err when he ordered the sentence to be served concurrently with the existing term of imprisonment. Although the appellant submits that in effect his total term was lengthened by the order, and that the 7 year term should have been backdated to the date of the imposition of his original term of imprisonment, this was not possible in law. A concurrent term of imprisonment can only run from the date it is imposed."

[4] The appellant appeared before a single judge in chambers seeking to proceed on a number of grounds. He ruled that there was no right of appeal on the others but allowed the appeal to go ahead on this ground as the appellant was suggesting the sentence had been passed in consequence of an error of law.

[5] At the hearing before this Court, the appellant advised that he had read the written submissions of the respondent and understood now that there is no power to ante-date a sentence. It is clear that is a correct statement of the law. It was so held by Grant CJ in *DPP v Rasea* in 1975 (Reported in[1978] 24FLR 91) in which he pointed out:

> "A Magistrates Court has no power to backdate a sentence of imprisonment or to order it to run from any date earlier than the date on which the sentence is imposed."

That is still the law and has been confirmed many times since.

[6] However, the appellant's written submissions appear largely to be challenging the interpretation of regulation 139 of the Prisons Regulations. This is an issue which has been raised previously by other appellants in their submissions particularly in relation to suggested miscalculations of remission by the prison authorities. We consider it may be helpful if we clarify the point.

[7] The power to impose a sentence of imprisonment is given by section 28 of the Penal Code. The power to order concurrent sentences is found in subsection (4):

> "(4) Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence of imprisonment which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be served concurrently with the former sentence or any part thereof ..."

Regulation 139 of the Prisons Regulations deals with the calculation of sentences for remission:

> "139.- (1) Where one term of imprisonment is consecutive to another term such terms shall be treated as one term for the purposes of remission.
> (2) Where one sentence is partly concurrent with, but overlaps an earlier sentence, the later sentence shall be added to the period of the earlier sentence actually served when the later commenced and remission shall be calculated on the total period.
> (3) Where a court orders a fresh sentence "to commence at the expiration of the sentence the prisoner is now serving" or other words to the like effect, the order of the court shall be interpreted literally.
> (4) Where a prisoner is sentenced to two or more terms on different counts, such sentences shall be consecutive unless the court shall otherwise order.

> (5) Where a convicted criminal prisoner is sentenced to several terms of imprisonment on several warrants as the same time, or is sentenced to a further term or terms of imprisonment before the expiration of his original sentence, his several sentences on all the warrants shall be consecutive unless otherwise ordered by the court and the aggregate term shall run from the date of the first warrant."

[8] Although the use of the phrase "partly concurrent" in sub-regulation (2) is unfortunate, we consider the meaning is clear. It covers all cases where the order of the court is that a later sentence shall be served concurrently with a sentence that the prisoner is already serving. Inevitably the earlier sentence will have been partly served and so the later sentence will effectively only be partly concurrent with it.

[9] In the present case, the prison authorities had to add the seven year sentence to the portion of the previous (17 May 2004) sentence which had already been served by 7 July 2004 when the seven year sentence was passed. That means adding the seven weeks already served to the seven years subsequently ordered giving a total sentence of seven years and seven weeks. That total sentence runs from the date the first sentence was passed, namely 17 May 2004.

[10] Any remission due should then be calculated on a sentence of seven years and seven weeks and deducted accordingly.

[11] The appellant filed lengthy written submissions largely based on the meaning of concurrence in geometry as meeting or tending to meet at the same point. Using that definition, he suggests that the use of the word 'concurrent' in relation to separate sentences must mean the two periods of imprisonment will meet at the same starting point. Ingenious though his argument is, it does not affect the case. The procedure for calculating remission is covered solely by the terms of the regulation read with earlier authority that there is no power to ante-date a sentence.

The appeal against sentence is dismissed.

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Ward P

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Henry JA

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McPherson JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent