

**DIRECTOR OF PUBLIC PROSECUTIONS**

v.

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**LISI DUIKORO BURELEVU**

[HIGH COURT, 1997 (Pain J) 14 October]

Revisional Jurisdiction

B *Sentence- imprisonment- whether court has power to suspend upon conditions- Penal Code (Cap 17) Section 29.*

The Magistrates' Court imposed a sentence of imprisonment but suspended the sentence upon a number of conditions including repayment of the sum stolen by the offender's husband and the performance of community service by the offender.

C The High Court HELD: that there is no jurisdiction to impose conditions on the suspension of a sentence of imprisonment.

No case was cited.

Review by the High Court of a sentence imposed in the Magistrates' Court.

D *Ms R Olutimayin* for Director of Public Prosecutions  
Defendant in person

**Pain J:**

E This is a review of prosecution No.251/89 in the Magistrates' Court at Suva pursuant to Section 323 of the Criminal Procedure Code. It has been initiated by the Director of Public Prosecutions. This has been confirmed in Court by counsel from the Director's office.

On 8th February 1989 the defendant pleaded guilty to a charge of larceny by a servant. The case was then adjourned on 15 occasions for a variety of reasons.

F Finally, on 4th October 1989 the defendant was sentenced on the following terms:

"The Accused is sentenced to 2 years imprisonment suspended for 3 years on the following conditions:

1. That the Accused's husband who has agreed in writing to repay the amount totalling \$19,701.80 to compensate the Government for the loss at the monthly instalment of \$50 per month w.e.f. the end of October 1989 if instalments have not previously been deducted.
2. That should the Accused be employed in the future she will inform the Court accordingly for suitable

deduction be made from her wages or salary to assist her husband in the recovery of the loss.

3. That if the husband ceased to be employed for any reason the Court to be informed of that fact for a reappraisal of the situation. A
4. The instalments to be paid through the Court and from there to the Government. B
5. The Accused will do 100 hours of community work with the Salvation Army who will make their report to the Court at the end of that time or sooner if the Accused does not perform.” C

Subsequently, the case was called in the Magistrates' Court on 5th July 1991 and thereafter on a further 37 occasions between that date and 10th April 1995. This was primarily to monitor and enforce the payment of \$19,701.80 to reimburse the Government for the loss. C

It is clear that the order made on 4th October 1989 for reimbursement of \$19,701.80 has been treated and enforced over a long period as an order for payment of compensation under S.160(2) of the Criminal Procedure Code to a person who suffered loss as a result of the offence committed by the defendant. D

However, a close analysis of the order made by the learned Magistrate on 4th October 1989 shows that this is not so. It was expressly imposed as a condition of the suspended sentence of imprisonment in the same manner as the condition that the defendant undertake 100 hours community work. Moreover, a compensation order under S.160(2) of the Criminal Procedure Code could not be made against the defendant's husband. Only the person convicted of the offence can be ordered to pay compensation. Further, the order that a "suitable deduction" be made from the salary of the defendant if she should be "employed in the future" is too vague to be enforceable. Finally, if it could be construed as an order for payment of compensation pursuant to S.160(2) it was wrong in principle because the defendant did not have the means to pay. She was not working and payment by instalments, even if made by her husband at the rate of \$50 per month, would take an unconscionable period of 32 years 9 months to pay the sum \$19,701.80. E

In my view the order made on 4th October 1989 could not be construed or upheld as a valid order for payment of compensation pursuant to S.160(2). I repeat that it was expressed to be a condition of the suspended sentence. F

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DIRECTOR OF PUBLIC PROSECUTIONS  
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A In my view the order could not be enforced as a condition of the suspended prison sentence which it is expressed to be. Jurisdiction to impose a suspended sentence of imprisonment is given by S.29 of the Penal Code. This provides that when a Court imposes a sentence of imprisonment it may order that the sentence shall not take effect unless, during a specified period, the offender commits another offence punishable with imprisonment and the Court orders that the original sentence shall take effect. Section 29 contains no power for the original sentencing Court to impose any other conditions in relation to the suspension of the sentence of imprisonment.

B In this case, the learned Magistrate purported to impose conditions as to payment of compensation and undertaking community work upon the suspension of a prison sentence. He had no jurisdiction to do so. Those terms are ineffective and unenforceable. Moreover, if such terms could be imposed, they would only be valid for the period of the suspension of the prison sentence. That period expired on 4th October 1992.

C For the above reasons, I consider that the order of the learned Magistrate made on 4th October 1989 for payment of compensation of \$19,701.80 was invalid and unenforceable, either as a condition of the suspended prison sentence under S.29 of the Penal Code (as it purported to be) or as an order for compensation under S.160(2) of the Criminal Penal Code.

D By memorandum dated 16th September 1997 the Director of Public Prosecutions drew the Court's attention to S.325(5) of the Criminal Procedure Code. This provides that no proceeding for revision shall be entertained at the instance of a party who could have appealed the decision. The memorandum stated that the Director of Public Prosecutions could have appealed the decision of the learned Magistrate made on 4th October 1989 but failed to do so and is therefore precluded from initiating revision. Counsel at this hearing has confirmed these matters. However, it is submitted that the Court can nevertheless conduct a review on the basis that the matter has "otherwise come to its knowledge" under S.325(1).

E That is not what has happened. The record of the Magistrates Court was "called for" by the Director of Public Prosecutions and it is the Director of Public Prosecutions who has "reported" the matter to this Court. Both are specifically mentioned in S.325(1). Accordingly, sub-section (5) of S.325 applies and counsel concedes that the failure to appeal is a bar to revision at the instance of the Director of Public Prosecutions.

F In view of this, the fact that the original sentence has been completed as the period of suspension of the prison sentence has long expired and my finding that the condition for payment of compensation is unenforceable, it is inappropriate and unnecessary for the Court to make any orders. To do so might have the

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## HIGH COURT

unfortunate consequence of requiring the \$275 paid by the defendant to be refunded to her. That would be inequitable, particularly as the defendant has little prospect of paying the outstanding sum of over \$19,000 and any civil action may now be statute barred. I have made it clear in this decision that the order of the learned Magistrate for payment of compensation is unenforceable. That will not affect any rights the complainant has to take further civil action for recovery of the balance owing if that course is available. The invalid order of the learned Magistrate would not be a bar to that action.

In all the circumstances and for the reasons I have given, no orders are made on this revision.

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