

Between:

TEVITA LESU

Appellant

and

REGINAM

Respondent

Mr. K. Bulewa for the Appellant

Mr. E. Tavai for the Respondent

REASONS FOR JUDGMENT

Appellant was on his own plea convicted on 28th January 1985 in the Suva Magistrate's Court on a charge of illegal sale of liquor contrary to section 277(1)(a) and (3) of the Penal Code and was sentenced to six months' imprisonment.

The appeal is against sentence on the ground that it was harsh and excessive because of the use made by the police of an agent provocateur to instigate and entrap appellant to commit the offence in question which would not otherwise have been committed.

It was contended that the circumstances under which appellant was instigated by the police to commit the offence in question was a strong factor in mitigation of the offence and should have excluded the imposition of a custodial sentence.

The short facts of this case show that on 23rd November 1984 appellant's premises were the subject of observation by the police and during which an agent was sent to buy beer from appellant. Five bottles were in fact

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bought at \$1.30 per bottle. After the purchase was made the police moved in and entered appellant's premises where a search was conducted. Fifty five bottles of beer were found in the refrigerator and were confiscated.

Appellant has two previous convictions for similar offences which occurred in August and October 1984. On both occasions he was fined.

There can be no question that generally where offences of this type are repeated for a third time as in the present case a prison sentence would seem inevitable.

However, there is an unusual twist disclosed by the facts of this case. It is clear the offence in question was only committed as a result of the use of an agent provocateur who was not himself charged as a party to the offence. Such a method of detecting crimes is not one that can meet with general approbation and may be in breach of the principle of open justice. Such a method of investigation is clearly unjust to the appellant for whom it is difficult to escape a strong feeling of sympathy.

The use of agents provocateur to induce men to commit crimes which they would not otherwise have committed has on several occasions been judicially disapproved, albeit such use of agents provocateur is no defence under the present state of our law to the commission of any particular crime. No doubt the use of agents provocateur is necessary and imperative in certain types of crimes, particularly those that seriously affect the public interest. There is clearly little pressing need for the use of an agent provocateur in offences relating to illegal sale of liquor. In the present case the premises of appellant had been placed under observation for only a short period before an agent was sent in to buy beer and thereby obtain evidence implicating appellant. If observation by the police had continued with

patience and professional dedication the end result might well have been the same without incurring more disapproval. In practice agents provocateur should be used as sparingly as possible and only in appropriate cases, if indeed there are such cases.

Appeal was allowed because of the unusual mitigating factor present in this case. The sentence of six months' imprisonment was set aside and substituted therefor was a sentence of eighteen days' imprisonment which appellant had already served to the date of hearing of his appeal and which enabled him to be released forthwith.

Appellant was however warned that in view of his previous convictions in this type of offence that he should expect little sympathy from this Court for any future similar infraction.

Chief Justice

Suva,

5th March, 1985.