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MOSESE BIRAKI

v.

REGINAM

B

[SUPREME COURT, (Williams, J.) 8 June 1979]

Appellate Jurisdiction

Appellant—*In Person*

C

D. Williams for Respondent.*Criminal Law—Principles regarding suspended sentence*

D

Appellant had been convicted of Shop Breaking and Larceny. He had been given a suspended sentence which the appellate Judge found was too lenient. The Court citing authority, made the following observations about suspending sentences—

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1. Magistrates should not impose suspended sentences on those who have already served terms of imprisonment.
2. The purpose of a suspended sentence is to avoid sending to prison an offender who has not yet been to prison, although on the face of it his crime merits imprisonment.
3. It is well established on English authorities that generally speaking a suspended sentence should be activated, otherwise the public will regard them as of no more consequence than an unconditional discharge.
4. That the subsequent offence is of a completely apparent kind from the suspended sentence is not a good reason for not activating the suspended sentence.
5. An activated sentence should usually be consecutive to any current sentence.

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Cases Referred to:

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- R. v. Katonaisa Tuivotua* Cr. App. 86/76.
R. v. Vijay Singh & Raman Cr. App. 50/77.
R. v. Chet Ram, Cr. App. 100/77
R. v. Abdul Shorab, Cr. App. 115, 117, 118, 119/77.

H

WILLIAMS J.:

Judgment

The appellant was convicted on his own plea of guilty for shop-breaking and larceny.

The crime was committed on 27.3.79 and the property stolen was quite considerable including 2,300 cigarettes, 2 cartons of corned beef, 1 carton of corned mutton, ghee and sugar, worth \$673. It seems that the accused was arrested on 29.3.79 and appeared in court on 30.3.79. In the two days between the theft and his arrest the accused had disposed of all the property except 490 cigarettes and carton of corned beef.

Ten previous convictions were admitted by the accused and the learned magistrate sentenced him to two years' imprisonment. The accused has appealed against that sentence. His record commencing on 7.1.74 includes five convictions for larceny, shop-breaking and larceny larceny from a dwelling house and two for assault occasioning actual bodily harm.

In the circumstances I regarded the sentence imposed on the accused as being emphatically on the lenient side and I would have dismissed this appeal summarily were it not for the accused's last conviction. It was for assault occasioning actual bodily harm and it must have been fairly serious assault because the accused was sentenced to 14 months imprisonment on 26.8.77. However, the sentence was suspended for 2 years. The magistrate who dealt with the instant case of shop-breaking did not activate the suspended sentence. Moreover, the magistrate who imposed the suspended sentence had done so regardless of the accused's previous convictions and terms of imprisonment.

The Supreme Court has frequently stated that magistrates should not impose suspended sentences on persons who have already served terms of imprisonment. The purpose of a suspended sentence was indicated at the end of the judgment of Cr. App. 86/76, *R v. Katonaisa Tuivotua* which dealt with a case in which an accused with a poor record was placed on probation for five offences of shop-breaking and house-breaking. During his period of probation he was convicted of robbery and was sentenced to 6 months imprisonment suspended for 2 years and the offences for which he had been put on probation were ignored. The Supreme Court judgment in that case points out that a suspended sentence is a mode frequently adopted for dealing with a person who is not suitable for probation but who merits a chance under the stricture of a known sentence if he fails to keep out of trouble. The suspended sentence of 6 months was varied to one of 9 months immediate imprisonment.

It has been said many times by the Fiji Supreme Court, following the practice established by the Court of Appeal in England, that an offender who has already served a prison term should not be the recipient of a suspended sentence. The purpose of a suspended sentence is to avoid sending to prison an offender who has yet been to prison, although on the face of it his crime merits imprisonment. For that reason the magistrate assesses the gravity of the offence, imposes the appropriate sentence and then considers whether or not it should be suspended.

Turning now to the magistrate's decision not to activate the suspended sentence of 14 months which had been imposed on this appellant. The learned magistrate said that because the offence of assault occasioning bodily harm for which it was imposed happened a substantial period of time ago and because that offence was of a different kind from the present offence of shop-breaking and stealing, he would

- A not activate the suspended sentence. The suspended sentence was imposed on 26.8.77, the shopbreaking occurred on 27.3.79 i.e. 19 months later. The period of suspension was 24 months and I would say, with respect to the learned Magistrate's views that the breaking offence was committed well within the 24 month period of suspension. S.28A of the Penal Code enables a court to suspend sentence for 3 years and if an offence were committed after 2 years and 3 months I would not be likely to regard that as a substantial lapse of time. On the other hand if the period of suspension had been 20 months I may have been inclined to agree with the learned magistrate that the period was virtually expired. However, even if there were only a month to run, I would probably activate the sentence if it were one which had been erroneously imposed instead of an immediate term as in this case.
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- C The magistrate's other reason, namely that it was an offence of a different kind is also erroneous. I would respectfully draw his attention to *R v. Vijay Singh & Raman (s/o Sanyasi)*, Cr. App. 50/77 in which the D.P.P. had appealed against the imposition of 18 months imprisonment for 2 years as being manifestly lenient in the circumstances of that case.

- D There can be little point in my reiterating all that was stated in that judgment. Suffice it to say that it is well established on the English authorities that generally speaking a suspended sentence should be activated otherwise the public will come to regard them as of no more consequence than an unconditional discharge. The fact that the subsequent offence is of a completely different kind from the "suspended offence" is not a good reason for not activating the suspended sentence. In numerous cases the English Court of Appeal has stated that sentences should have been activated in spite of the different nature of the offence. However, if the subsequent offence is very trivial and quite different from the "suspended offence" a court will be justified in not activating the suspended sentence. (See *R. v. Chet Ram Cr. App. 100/77* and *R. v. Abdul Shorab Cr Apps 115-119/77*.)
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- F The accused agreed that he had been convicted for assault occasioning actual bodily harm and had received 14 months suspended. He stated that he committed that offence when he had been drinking. The accused received notice whilst in prison that he would be required to show cause why the suspended sentence should not be activated. When called upon he asked for leniency. In my view he had received leniency at the time of sentence was suspended. The learned magistrate should have activated the sentence and I propose to do so rather than shuttle the accused between Courts. The authorities I have quoted have pointed out that an activated sentence should usually be consecutive to any current sentence.

- G The accused's appeal against sentence of 2 years for the shop-breaking is dismissed and the suspended sentence of 14 months imposed on 16.8.77 for assault occasioning actual bodily harm is fully activated and will be served consecutively to the aforesaid 2 years. The total will be 3 years and 2 months imprisonment.

- H It is pointed out that the learned magistrate should record in the file containing the record of the assault charge that the sentence has been activated so as to avoid the possibility of any errors arising.

Appeal dismissed. Suspended service activated.