

REGINA -v- DANIEL UPANG AND SIMISTER KIMISI

REGINA -v- CHERRY BULA

High Court of Solomon Islands

(Muria J.)

Criminal Cases No. 19 and 20 of 1991

Hearing: 18 October 1991

Judgment: 22 October 1991

F. Mwanasalua, DPP, for Appellant

A. Radclyffe for the Respondent

MURIA J: These appeals are brought by the DPP against the orders suspending the sentences imposed on the Respondents by the learned Principal Magistrate Central. The issues in the two appeals are the same and the Director of Public Prosecutions suggested that they should be heard together. The court agreed and the two appeals were heard together.

In both cases, the Respondents were each charged with the offences of Impossession of Firearms Without Licence and Impossession of Ammunitions without Licence contrary to section 5(11) as read with section 5(2)(a)(ii) of the Firearms and Ammunition Act (Cap.107). The learned Principal Magistrate convicted the Respondents and sentenced each of them as follows:

"On 24.6.91                      Daniel Upang                      Count 1:                      6 months imprisonment suspended for 1 year and fined \$200.00

Count 2:                      4 months imprisonment, concurrent and fined \$200.00.

Total fine of \$400 payable by 26.6.91, in default, 6 months imprisonment.

Simister Kimisi                      Count 1                      4 months imprisonment suspended for 1 year and fined \$150.00.

		Count 2	3 months imprisonment, concurrent and fined \$150.00.
			Total fine \$300.00, payable by 28-6-91, in default, 6 months.
On 1.7.91	Cherry Bula	Count 1	5 months imprisonment. Fined \$250.00
		Count 2	5 months imprisonment. Fined \$250.00
			Total fine \$500.00 payable by Friday, 4 p.m., in default 6 months."

At the commencement of his argument, the learned Director directed the court's attention to the fact that in Cherry Bula's case, the imprisonment sentences of five (5) months on each count were not specified whether those sentences were to run concurrently or consecutively to each other. In Solomon Islands, the position in law on sentences in cases of conviction of several offences at one trial is expressed in section 9 of the Criminal Procedure Code where it says:

*"9(1) When a person is convicted at one trial of two or more distinct offences the court may sentence him, for such offences, to the several punishments prescribed therefore which such court is competent to impose; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently."*

It is plain from section 9(1) that in Solomon Islands when a person is convicted of two or more distinct offences and the court sentences him to imprisonment for the offences the court is empowered to order the imprisonment sentences to commence one after the expiration of the other. In other words, it can order the prison sentences to run consecutively "unless the court directs that such punishment shall run concurrently".

The intention of section 9(1) must be that while empowering the court to pass imprisonment sentences to run consecutively where a person is convicted of several offences at one trial, the court is also given the power to direct sentences passed on those several offences to run concurrently. As such, the underlying duty thrown upon the court is to state clearly whether the sentences should run consecutively or concurrently. The Practice Direction (1962) 46 Cr. App. R. 119 and subsequent cases clearly support this view. It was stated in *R. -v- Anthony* [1962] Crim. L.R. 259 that sentences imposed in respect of each count and whether those sentences were to run concurrently or consecutively should be expressed with clarity.

In the present appeal, the two five (5) months suspended sentences on the Respondent, Bula were not expressed as to whether they were concurrent or consecutive. As such they must, the learned Director submitted, be taken to be concurrent. As it was pointed out in *R. -v-Corry* [1973] Crim. L.R. 381 that:

*"as the suspended sentences had not been expressed to be consecutive to each other when they were passed, they must be treated and ordered to take effect, as concurrent to each other."*

The same point was made clear in *Wilkinson* (1970) 54 Cr. App. R. 437 where two suspended sentences are imposed on the same occasion, the court should state whether as between themselves the sentences are to be concurrent or consecutive. The Court of Appeal said at p.439:

*"It follows, in our judgment, therefore, that when the learned Chairman in the present appeal imposed the two suspended sentences in November 1969 it was his duty, since he imposed them both on the same occasion, to say whether between themselves they should be concurrent or consecutive. Since he failed to do so, we think the only fair course in this case is to assume that they were made concurrent."*

In the present case the learned Principal Magistrate failed to state whether the five (5) months on each of the counts were concurrent or consecutive. However it is obvious therefore that the present two suspended sentences of five (5) months on each count imposed on Bula must be taken to be concurrent to each other.

The learned Director's appeals in both cases, as I have already mentioned, are both on the same ground, that is, that the learned Principal Magistrate erred in law in suspending the prison sentences imposed on the Respondents. Relying on section 43A of the Penal Code, the learned Director submitted that the learned Principal Magistrate was wrong to order the prison sentences to be suspended as the provisions of subsection (1) of section 43A do not apply where the offence committed involved the use or the illegal possession of a weapon.

Mr Radclyffe for the Respondents did not seek, and properly so, to oppose the appeals. In fact, if I may mention with respect, that it was Mr Radclyffe who, becoming aware of the error brought it to the attention of the learned Principal Magistrate.

In 1987, the Penal Code was amended by the Penal Code (Amendment) (No. 2) Act, 1987 which amends Part IV of the Code, on Punishments, by adding a new provision, section 43A, dealing with suspended sentences. Subsections (1), (2) and (3) of section 43A provide:

*"(1) Subject to the provisions of subsections (2) and (3), a court which passes a sentence of imprisonment on any offender for a term not more than two years for any offence, may order -*

*(a) that the sentence shall not take effect during a period specified in the order; or*

*(b) that after the offender has served part of the sentence in prison, the remainder of the sentence shall not take effect during a period specified in the order,*

*unless during the period specified in the order, the offender commits another offence punishable with imprisonment and a court thereafter orders under section 43B that the original sentence shall take effect:*

*Provided, that the period specified in the order shall not be less than one year or more than two years.*

*(2) The provisions of subsection (1) shall not apply where the offence involved the use or the illegal possession of a weapon.*

*(3) A court shall not deal with an offender by means of a suspended sentence unless the case appears to the court to be one in respect of which a sentence of imprisonment would have been appropriate in the absence of any power to suspend such a sentence by an order under subsection (1)".*

The Respondents were each convicted and sentenced for the offences of impossession of firearms without licence and impossession of ammunition without licence contrary to the Firearms and Ammunition Act, (Cap.107) which is the law in Solomon Islands that provides for the control of, among other things, the possession of firearms and ammunition. Section 5(2) of that Act creates the offences of impossession of firearms and ammunition without licences. When one turns to section 43A(1), it can be seen that the court has the power subject to subsections (2) and (3) to suspend a sentence of imprisonment imposed on any offender for a term not more than two years for any offence. However Parliament intended that a particular offence must be excluded when the court is exercising its powers under subsection (1). Subsection (2) was therefore enacted so that the court's power to suspend sentences does not apply "*where the offence involved the use or illegal possession of a weapon*".

In my judgement, therefore, the offences created by section 5(2) of the Firearms and Ammunition Act are the types of offences contemplated in section 43A (2) of the Penal Code which are the offences involving the use or illegal possession of a weapon and as such the sentences of imprisonment imposed for any of those such offences are excluded from the operation of section 43A(1) of the Penal Code. It follows, that the learned Principal Magistrate was wrong when he ordered the sentences of imprisonment on the Respondents to be suspended.

On the question as to the order this court should make in the event that this court finds that the learned Principal Magistrate was wrong in suspending the sentences, the learned Director submitted that there were two options available under section 292 of the Criminal Procedure Code (C.P.C.). Firstly he said, this court may either quash the order suspending the sentences and confirming the imprisonment sentences to run from the dates when they were passed by the Magistrate's Court, or secondly, to quash the order suspending the sentences and confirm the prison sentences to be served afresh. Mr Radclyffe submitted that this court should quash the order suspending the sentences.

The powers of this Court at the hearing of an appeal are set out in section 292 of the CPC which provide:

*"(1) At the hearing of an appeal the High Court shall hear the appellant or his advocate, if he appears, and the respondent or his advocate, if he appears, and the High Court may thereupon confirm, reverse or vary the decision of the Magistrate's Court, or may remit the matter with the opinion of the High Court thereon to the Magistrate's Court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrate's Court might have exercised:*

*Provided that the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

(2) *At the hearing of an appeal the High Court may -*

- (a) *if it thinks that a different sentence shall have been passed, quash the sentence passed by the Magistrate's Court and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed; or*
- (b) *if the appeal is against conviction alone and no sentence has been passed on the appellant by the Magistrate's Court by reason of the appellant's having been committed for sentence to the High Court by the Magistrate's Court in accordance with the provisions of section 207 prior to the presentation of an appeal, impose such sentence as it thinks fit."*

Under that provision this court has power to "confirm, reverse, or vary the decision of the Magistrate's Court or remit the matter .....to the Magistrate's Court or make such other order ..... as may seem just and may ..... exercise any power which the Magistrate's Court might have exercised .....". In the present cases, in Criminal Case No. 19/91, the Respondent Simister Kimisi would have served his prison sentences, allowing for one-third remission, had the learned Principal Magistrate not ordered the sentences to be suspended. As far as the other Respondent in that case, Daniel Upang, again allowing for one-third good behaviour remission, he would serve his sentences by 24th October, 1991 that is, in two days' time. In any case, Upang is now back in Papua New

Guinea. In Criminal Case No. 20/91, the Respondent Cherry bula whose prison sentences I have already held to be concurrent, would have completed serving his sentences, taking into account the one-third remission, on the day these appeals were heard, that is 18th October, 1991. In those circumstances it would not be fair and just to order the Respondents to start their sentences of imprisonment now.

I allow the appeals. The orders suspending the prison sentences be quashed but the prison sentences are confirmed to take effect from the respective dates they were imposed by the learned Principal Magistrate.

(G.J.B. Muria)

JUDGE