

IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 004 OF 2009

BETWEEN:

JAMES ASHWIN RAJ

Appellant

AND:

THE STATE

Respondent

Counsel: Appellant in Person
Ms. J. Cokanasiga for State

Date of Hearing: Thursday 9th April, 2009

Date of Judgment: Wednesday 27th May, 2009

JUDGMENT

[1] On 19 September 2007, the appellant appeared in the Nasinu Magistrates' Court on a charge of absconding or breaching bail conditions, contrary to sections 25(1)(b) and 26 of the Bail Act 2002.

[2] The particulars of the offence read:

JAMES ASHWIN RAJ s/o JOHN DIVEN RAJ, on the 28th day of August, 2007, at Nasinu in the Central Division, being an accused person released on bail by the Nasinu Magistrate Court to appear on the 7th September, 2007 absconded bail and failed to surrender to custody without a reasonable cause.

- [3] After waiving his right to counsel, the appellant pleaded guilty to the charge, and was remanded in custody for sentence.
- [4] On 24 September 2007, the appellant appeared in court and was granted bail to appear on 31 October 2007.
- [5] On 31 October 2007, the appellant appeared in court, but his case was further adjourned to 2 November 2007 for mention.
- [6] On 2 November 2007, the appellant failed to appear in court and a bench warrant was issued against him.
- [7] Eventually, the appellant was arrested and he appeared in court on 13 August 2008. The learned Magistrate further adjourned the sentence to 20 October 2008.
- [8] On 20 October 2008, the appellant failed to appear in court and a bench warrant was issued for the second time.
- [9] On 21 October 2008, the appellant was arrested. The learned Magistrate remanded him in custody for sentence on 22 October 2008.

- [10] On 22 October 2008, the appellant was sentenced to 11 months imprisonment.
- [11] In sentencing the appellant, the learned Magistrate noted that the maximum penalty for the offence of breaching bail is 12 months imprisonment. He used 9 months as a starting point and deducted 3 months for the guilty plea. The learned Magistrate then added 5 months for the aggravating factors he identified as follows:
- (i) By failing to attend Court on time, accused has wasted the Court's time.
 - (ii) While awaiting sentence, he allegedly was involved in 3 Robbery with Violence offence (see Nasinu Magistrate Court file No. 1606/07, 1594/07 and 1340/08). He appears not to have taken a progressive attitude to life.
- [12] The appellant appeals against sentence saying it is harsh and excessive.
- [13] The tariff for the offence of absconding or breaching bail range from a non-custodial sentence to 6 months imprisonment (***Raj v. State [2008] FJHC 74; HAA032.2008 (18 April 2008)***).
- [14] Counsel for the State properly concedes that the learned Magistrate erred in picking up a starting point outside the range.
- [15] As a matter of principle, starting point should be picked up from within the range. A term outside the range should only be picked up if exceptional or special circumstances are present.

[16] In this case, there were no exceptional or special circumstances present to justify a starting point of 9 months imprisonment. The appellant failed to appear in court in breach of his bail condition and he pleaded guilty at the first reasonable opportunity after he was charged. He had a previous conviction for a similar offence and some for unrelated offences.

[17] Instead of proceeding to sentence the appellant, the learned Magistrate delayed it by unnecessarily adjourning the case on numerous occasions. This was a simple case and should have been expeditiously dealt in accordance with the law as provided by section 206(2) of the Criminal Procedure Code. Section 206(2) provides:

"If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall, convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary."

[18] When the appellant pleaded guilty, there was no suggestion that his plea was equivocal. The facts admitted by the appellant disclosed the charged offence. The learned Magistrate gave no reasons for delaying the sentence. The delay was further aggravated when the appellant stopped attending court. The appellant was sentenced almost after a year from the date he first pleaded guilty. During this period, he spent 6 days in remand and the remaining days on bail. The learned Magistrate erred in not taking into account the time spent in remand while awaiting sentence.

- [19] While on bail, fresh allegations arose against the appellant. The learned Magistrate took the fresh charges as a matter of aggravation to increase the sentence in this case.
- [20] The approach was clearly wrong. Pending charges should not be used to justify an increase in sentence. Charges are merely allegations. They are not proof of guilt. The charges have to be proved and the burden of proof rests on the State. Unless and until the charges are proved beyond a reasonable doubt by the State, an accused person remains innocent and cannot be punished.
- [21] I hold the learned Magistrate erred in law by taking into account the pending charges against the appellant to increase his sentence. The State concedes this point but argues that this Court should not interfere with the sentence because the appellant committed the offence during an operational period of a suspended sentence he was serving for indecent conduct and which was imposed on 13 April 2007, and the learned Magistrate failed to activate that sentence.
- [22] While I find the State's argument persuasive, it would be wrong in principle for this Court not to intervene after finding that the court below had erred in sentence. Secondly, a suspended sentence is only activated after the offender is afforded an opportunity to show cause on oath (***Parmendra Prasad v State*** [1996] HAA 0007/96, ***Levi Nasaumalumu v State*** HAA 56/87). That opportunity had not been afforded to the appellant and it would be unjust to activate the sentence now given the long delay.

[23] Taking these matters into account, the appeal is allowed and the appellant's sentence is reduced to 6 months imprisonment.

Final Order:

[24] Appeal allowed.

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Daniel Goundar
JUDGE

At Suva
27 May 2009

Solicitors:

Office of the Director of Public Prosecutions, Suva for the State
Appellant – in person