Fiji Law Reports

Delai, In re [2000] FJLawRp 27; [2000] 2 FLR 15 (14 April 2000)

[2000] 2 FLR 15

IN THE HIGH COURT OF FIJI ISLANDS

In Re ERONI DELAI

High Court Miscellaneous Jurisdiction
Scott, J
14 April 2000
HBM 15/00

Personal liberty - Habeas corpus ad subjiciendum - whether prison sentence in default of fines excessive - appropriate value for fines discussed- whether applicant wilfully refused to pay fines - Criminal Procedure Code (Cap 21) ss80(1) and (2), 88(4), 199, 205, 323, Penal Code (Cap 17) s35(1)(a), Constitution 1997 s23(1) and (2)

The applicant, a mini van driver had served 6 months of a total default period of 4465 days or 12.23 years for failure to pay fines ranging from $25 to $60 and totalling $5,754.00 for 93 traffic offences mostly involving failure to stop using a private vehicle as a taxi. The applicant never attended court. In some cases he pleaded guilty in writing, in others, he was found guilty after formal proof. The Court never enquired into the applicant's means to pay fine before imposing fines. The applicant was released immediately by order of court.

Held - (1) Failure to pay a small or modest fine or failure to apply for extension of time will be taken as evidence of refusal to pay.

(2) Constitution section 23 does not require further detailed examination of means when Criminal Procedure Code sections 88 and 199 are properly applied, but larger fines imposed for more serious offences will require examination as to means before fine is imposed.

(3) Constitution section 23 is not a licence for persistent offenders of very limited means to escape sanction of imprisonment, but offenders will be given more time to pay upon request being made to a court.

Applicant released immediately from prison.

Cases referred to in judgment
Ref ***Haroon Khan v State*** (1994) 40 FLR 182
Ref ***Sundarjee Bros Limited v Coulter*** (1987) 33 FLR 83

[Note: appl in ***Esala Rasea, Re*** *[2000] HBM 042/00 28 July 2000;* ***Sikeli Kalisito, Re*** *[2000] HBM 045/00 28 July 2000;* ***Savenaca Komai*** *HBM 40/.2000;* ***Sosiceni Vuluma v State*** *[2000] Revisional Action HAJ001/00L 17 November, 2000; foll in* ***Apenisa Erevatu and Meli Nalulu v State*** *[2001] in HAJ0002 and HAJ0003/01L Judgment of 20th February, 2001;* ***Mateo Bale & Naisa Cakacaka v***

State *[2001] HAR 001/01 22nd June 2001]*

William Clarke for applicant
Sunil Kumar for the State
Dr Shaista Shameem with Vuki Qionibaravi for the Fiji Human Rights Commission

14 April 2000.

JUDGMENT

Scott, J.

The Applicant was produced before the Court by the Commissioner of Prisons on 11 April after a writ of habeas corpus ad subjiciendum had been issued pursuant to leave granted on 15 March. On 10 April 1 ordered the Applicant's immediate release from prison and now give my reasons.

The Applicant is a mini van driver who during 1997 and 1998 committed 93 traffic offences, mostly incorrect stopping or using a private vehicle as a taxi.

On each occasion he was served with a Notice to Attend Court (NAC) under the provisions of section 80 of the Criminal Procedure Code (Cap. 21 - the CPC) but according to paragraph 5 of his supporting affidavit, on no occasion did he actually attend Court as required by the Notice.

A NAC is, by virtue of Section 80(2) of the CPC equivalent to a summons. Section 80(1) of the CPC empowers a Resident Magistrate to deal with the offence to which the summons (or NAC) relates in the absence o f the accused so long as the offence is only punishable either by a fine or by a fine and imprisonment not exceeding 3 months and providing that the accused pleads guilty or is legally represented.

A Resident Magistrate can also deal with the matter under Section 199 of the CPC which permits a hearing to take place in the absence of an accused where the accused is charged with an offence punishable by a fine not exceeding $100 or imprisonment for a term not exceeding G months. This procedure is colloquially referred to as "formal proof". Unlike the Section 88 procedure some evidence has to be adduced before a conviction can be entered.

According to the Applicant's files held in the Suva Magistrates' Court the Applicant's convictions in most cases were entered after the offences had been formally proved but on some occasions he pleaded guilty in writing.

Section 88 (4) allows a Resident Magistrates to impose a fine on an offender convicted in his absence under Section 88(2). Section 35(1)(a) of the Penal Code (Cap. 17) requires that any fine "shall not be excessive". A fine will be excessive and wrong in principle where the accused does not have the means to pay it (see ***Haroon Khan v. The State*** 40 FLR 182). The Penal Code also allows a default period of imprisonment to be imposed "for such term as in the opinion of the Court will satisfy the justice of the case" not exceeding the scale set out in Section 35. I pause here to observe that it seems to me that the common practice of fixing the default period at the rate of $1 per day is no longer appropriate given the decline in the value of the dollar. I should have thought that $5 per day is now a more appropriate rate.

Although Section 199 is not as specific as Section 88 when it comes to sentence it is clear from Section 205 that there is a similar power to sentence an accused in his absence under Section 199 and that similar Penal Code provisions apply.

As will be seen from the schedule tabled by Mr. Clarke the fines imposed on the Applicant ranged between about $25 and $60 these being tariff fines which it has been the practice of the Magistrates' Court to impose for these types of routine offences for many years.

In each case the Applicant was given time to pay the fines but he did not do so.

Where the fine is not paid the warrant which is issued is Form 22 of the CPC Forms. As can be seen from the Form an accused person who is arrested pursuant to such a warrant is given a final opportunity to pay the fine and any costs or compensation ordered together with a warrant issuing fee which I understand is now $6.50.

Where the procedure went badly wrong in this case was that whereas the convictions were entered and the fines and default periods were imposed during 1997 and 1998 the first warrants of execution were not issued until 1999 by which time, as has been seen, the Applicant had accumulated 93 unpaid fines, costs and warrant fees, together totalling no less then $5,754.00 with a total default period of 4465 days or 12.23 years!

The Legal Aid Commission became aware of the Applicant's predicament and commenced the proceedings for habeas corpus. At the application stage I gave leave to the Director of the Human Rights Commission to intervene in the proceedings under the provisions of Section 37(2) of the Human Rights Commission Act 1999.

Naturally, the Applicant's principal interest in the matter was to be released and having established the facts set out above it was immediately clear to me that the Applicant's release should be ordered. The reason is simple. In the words of the Magistrates' Bench Book (February 1994 Edition):

"where the Court imposes a custodial sentence it should review the aggregate to ensure that the overall effect is just."

The principle, usually known as the totality principle, as explained by D, A. Thomas in Principles of Sentencing is:

"that the aggregate of sentences must bear some relationship to the gravity of the individual offences."

It is abundantly plain and obvious that a man who parks his van illegally or uses his private vehicle as a taxi should not be required to serve a 12 year term of imprisonment. The Applicant had, by April 2000, already served 6 months imprisonment. Further imprisonment would clearly be unjust. Under the provisions therefore of Section 323 of the CPC I revised each of the sentences passed upon the Applicant so as to enable him to be immediately released.

Dr. Shameem advised me that she knew of at least 6 other cases of persons serving long sentences of imprisonment in default of payment of numerous small fines. Mr. Kumar suggested that the habeas corpus procedure was not the right procedure where a detention is perfectly lawful. I agree. If there are indeed other persons serving similar sentences of imprisonment then those sentences can most conveniently be brought before the Court under the provisions of sections 323 of the CPC.

For the avoidance of this sort of problem in future it is essential that the accumulation of unpaid fines and the consequent accumulation of unserved default periods of imprisonment be avoided. The Magistrates' Court must devise a procedure to ensure the execution of warrants reasonably soon after the period given for the payment of the fine has expired. While the person principally to blame for his incarceration must be the Applicant himself who thought he could simply ignore the orders of the Court, those responsible for issuing and executing default warrants must also bear some responsibility for giving the Applicant, and apparently others, the impression that the orders of the Court can be disregarded with impunity. Hopefully the eventual computerisation of the fines system will enable such cases of repeated offending to be spotted early and brought to the attention of the Resident Magistrate.

As appears from her written submission Dr. Shameem's interest in this case is rather wider than the sentences being served by any particular prisoner.

Her concern is with section 23 of the new Constitution of the Fiji Islands 1997.

Section 23(1) provides that:

"a person must not be deprived of personal liberty except:

(a) for the purpose of executing the sentence or order of a Court ... in respect of an offence for which the person has been convicted, (or)

(b) for the purpose of executing the order of the Court made to secure the fulfilment of an obligation imposed on the person by law".

Section 23(2) however states that:

"Paragraph 1(c) does not permit a Court to make an order depriving a person of personal liberty on the ground of failure to pay ... a ... fine unless the Court considers that the person has wilfully refused to pay despite having the means to do so."

The questions to which Section 23 immediately gives rise are whether the provisions of Section 88(4) of the CPC and the procedure whereby fines are imposed on absent offenders after a CPC Section 199 hearing are constitutional.

As appears from paragraph 10 of Dr. Shameem's written submission her view is that there being no evidence that the Court enquired into the Applicant's means to pay the fines before it imposed them. It could not have satisfied itself that the Applicant was in fact able to pay them. Accordingly therefore it could not be satisfied, as is required by Section 23, that the non payment was on the ground of wilful refusal.

Mr. Kumar, who had obviously spent much time preparing a very well researched written submission rejected that argument. Citing ***Sundarjee Bros Ltd v. Coulter*** 33 FLR 83, he submitted that "an obligation imposed by law" referred to in Section 23(1)(c) does not include a fine. I disagree. In my view Section 23(2) is clear: an offender may only constitutionally be ordered to serve a default period of imprisonment if the Court is satisfied that the offender had the means to pay the fine imposed but wilfully refused to pay it.

This reading of the Section is consistent with the detailed provisions of Section 37 of the Penal Code, subsection (4) of which requires the Court to examine the offender's means either before imposing the fine or before issuing a warrant for committal for non payment.

It is not easy to reconcile the requirements of Section 37 of the Penal Code with Sections 88 and 199 of the CPC. One way to do so, however, is to regard the Sections 88 and 199 procedures as being permitted deviations from the requirements of Section 37 in cases where the maximum permissible sentence does not exceed the limits imposed by the two sections.

If this approach be taken then providing the proceedings were commenced by a NAC and not by a summons it is possible to detect the reasoning which justifies the departure from the normal procedural requirements established by Section 37. In these cases, as can be seen by the CPC Form 9, the offender is clearly warned (as is required by Section 88 (4) that:

(i) If he does not attend Court then he may be fined in his absence;

(ii) That he will not be advised what fine is imposed upon him but that it is his duty to find out from the Court himself what fine has been imposed;

(iii) That he will be given an initial 8 days to pay the fine imposed;

(iv) That he may apply to the Court for the 8 day period to be extended; but that

(v) If the fine is not paid within the 8 day period or such extended period as is allowed by the Court then he will be liable without further notice to be committed to serve a default period of imprisonment.

This system which has been operating for many years is very well understood in Fiji. In my view it is a fair and reasonable procedure for the imposition of small to moderate fines. I take this view because the NAC not only gives an offender an opportunity to come to Court at the sentencing stage but also to come to Court to seek an extension of time within which to pay the fine imposed. It is time to pay which is the critical difference between the ways offenders of varying means are dealt with. As already seen, traffic and other minor offences are, and always have been dealt with on an informal tariff basis. In other words whatever the means of an offender a case of illegal parking, bald tyre or defective headlamp will attract more or less the same penalty. It is not the case in Fiji that a poor person will only have to pay a very small penalty for having a defective handbrake whereas a rich person will have to pay much more. Where the difference lies is that a poor person will be given much longer to pay the penalty. It is exactly that question of the length of time to pay which the NAC directly addresses both by warning the offender that he will only be given 8 days to pay the fine and that it is up to him to apply for longer to pay if that is what he needs.

The plain fact is that everyone in Fiji is well able to pay a small or modest fine given enough time to do so. It follows that failure to pay the small or modest fine imposed and failure to apply for an extension of time within which to pay it can reasonably be taken by the Court as evidence of the offenders' wilful refusal to pay. In my view Section 23 does not require a detailed examination of the offenders means when the Sections 88 and 199 procedures are properly used. Section 23 is not a licence to persistent offenders of very limited means to escape the sanction of imprisonment altogether. The fine imposed still has to be paid but the offender, upon request being made to the Court, will be given longer to pay it. Where, however, larger fines are imposed for more serious offences then, as already pointed out, the Penal Code requires an examination of means to take place before the fine is imposed and this is entirely consistent with Section 23.

Habeas corpus ad subjiciendum allowed.

Marie Chan
