

# ALIPATE KAKA

v

## THE STATE

[HIGH COURT, 1993 (Sadat J), 7 May]

### Appellate Jurisdiction

*Crime-procedure-imprisonment-activation of suspended sentence.*

*Crime-sentence-suspended term of imprisonment-limit of-Penal Code (Cap. 17) Section 29(1).*

On appeal against the activation of a suspended sentence of imprisonment the High Court considered the provisions of the Penal Code and discussed the relevance of lapse of time and the nature of the subsequent offence. Procuring the original case file from the Magistrates Court prior to activating a suspended sentence imposed by a Magistrate was also recommended.

No cases were cited.

*Appellant in person*  
*S. Senaratne for State*

**Sadat J:**

On 9th December 1992 at Tavua Magistrate's Court the appellant was convicted of criminal trespass contrary to Section 197(2) of the Penal Code and fined \$50 in default 50 days imprisonment.

The learned Magistrate also activated a three year prison sentence imposed on the appellant by the Magistrate's Court at Suva in the Criminal Case No. 1440 of 1989 on 17th October 1989.

The appellant appealed against the activation of the suspended sentence as being harsh and excessive.

This appeal was allowed at the conclusion of the hearing when the order for the activation of the suspended sentence was set aside. The reasons for the judgment were reserved to be given later and this I now proceed to do.

At the Suva Magistrate's Court the appellant was convicted on four separate counts - assaulting police officer in the due execution of his duty contrary to section 247(b) of the Penal Code, throwing objects contrary to section 105 of the Penal Code, house breaking with intent to commit felony contrary to section 302(1) of the Penal Code and act intended to cause grievous harm contrary to section 224(a) of the Penal Code. On each of the four counts the appellant was

sentenced to three years imprisonment suspended for three years. The sentences were ordered to be served concurrently.

The subsequent offence of criminal trespass was committed on 22nd April 1992 - two and a half years after the passing of the suspended sentence. A

The learned Magistrate paid no attention to the lapse of time factor when activating the suspended sentence.

Further, in the activation of the suspended sentence, no consideration appears to have been given to the fact that the subsequent offence was in a completely different category from that for which the original suspended sentence was imposed, rendering it unjust to make the original suspended sentence operative. B

Above all Suva Magistrate's Court which imposed the suspended sentence in the first place fell in error when it suspended the three year prison sentence as it had no power to do so. Section 29(1) of the Penal Code states - C

"29. - (1) A court which passes a sentence of imprisonment for a term of *not more than two years* for an offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year nor more than three years from the date of the order, the offender commits in Fiji another offence punishable with imprisonment and thereafter a court having power to do so orders under the provisions of section 30 that the original sentence shall take effect; and in this and in sections 30, 31 and 32 "operational period" in relation to a suspended sentence means the period so specified in the order" (Emphasis added). D

In the result the appeal was allowed and the order for the activation of the suspended sentence was set aside. The subsequent conviction and sentence of criminal trespass at Tavua Magistrate's Court stands. E

I like to make the observation that in the instant case the learned Magistrate had proceeded to give effect to the suspended sentence based only on the record of previous convictions produced by the prosecution officer without without sending for the original case file. F

Unfortunately it has transpired that a Police Certificate of Previous Convictions cannot be relied on and that errors occur in regard to the date of sentence, the sentencing court, the case file number and even the type of sentence imposed. Consequently it is recommended that before a court gives effect to a suspended sentence it obtains the original case file from the Magistrate's Court which imposed the suspended sentence so as to ensure that errors do not occur. G

(Sentence varied)