

IN THE HIGH COURT OF FIJI (AT LAUTOKA)

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA0013 OF 1994L

BETWEEN :

THE COMMISSIONER OF INLAND REVENUE

APPELLANT

AND :

ISLAND THRUSH INVESTMENT LTD

RESPONDENT

Mr I Blakeley for the Appellant
N/A for the Respondent

Date of Hearing 2nd August 1996
Date of Decision 1st November

DECISION

The circumstances in this matter are identical to that in the **COMMISSIONER OF INLAND REVENUE –v- BULA INVESTMENTS PTY LTD. HAA0014 OF 1994L.** I understand from submissions made that the same persons are involved in both these Corporate structures.

The reasons for my Decision therefore are the same and are as follows;

ISLAND THRUSH INVESTMENT LTD. was charged pursuant to the Value Added Tax Act of 1991 contrary to S.71 (c) thereof, it did fail to furnish VAT return as required S.33.

The nature of the offence under S.71 (c) are that they are continuing offences. Thus four counts were alleged covering the period from the 1st July 1992 until the 13th June 1993.

The Respondent herein failed to appear before the Magistrate at Sigatoka wherein this Prosecution was originally commenced. After hearing submissions of proof, the Magistrate did, on 3rd December 1993 convict the Respondent on all four counts. He levied fines of \$50.00 on the first offence and \$25.00 on each of the remaining three counts.

The Magistrate refused to make an order as to costs.

The Appellant appeals on the ground that the Magistrate erred in law in that the fines so imposed did not reflect the continuing nature of offences.

Events somewhat overtaken us, as whilst this appeal was originally intended to establish some precedent and bench mark, the subsequent decisions of Mr Justice PAIN in the **COMMISSIONER OF INLAND REVENUE - BALFIT SINGH SONS LTD. (SUVA) HAA0054D.94** and **COMMISSIONER OF INLAND REVENUE –v AUTOMART LTD.** (Mr Justice Sadal – Lautoka Appeal 4/74), adequately perform that task. Both my brother Judges dealt with the provisions questioned here. In a most adequate summary, Mr Justice PAIN said at p.7 and 8 of BALJIT SINGH's case:-

“The first is the requirement for the Court to have regard to, is the intention of Legislature. This is reflected by the penalty prescribed by the Decree. It can be imprisonment for 3 months for each imprisonment was an option) the maximum sentence on Count1 would be 3 years imprisonment. The level of fine is prescribed as \$500 for each month of default. In the present case that is a maximum on all 12 counts would be 19and half years imprisonment and fines of \$39,000.00. Although such maximums become somewhat academic in most cases, the Legislature has nevertheless prescribed these severe penalties for lengthy default. A sentence must be imposed that realistically reflects the gravity of the offence as indicated by the level of punishment prescribed.

It is also be remembered (as we noted by Mr Justice Sadal in CIR –v- Automart Limited) that the due maintenance of the tax collection system and the necessity for traders to account on time is important to the financial welfare of the country. The prescribed penalties give a clear indication that are deterrent to those who are minded to default on their obligations.

Consideration must also be given to the gravity of the offending in each individual case. This can be ascertained from the particular facts of the case.”

There was no appearance by the Respondent either before the Magistrate nor myself, so one is placed in some difficulty in matters of mitigation such as suggested by Mr Justice PAIN in the following pages of his Decision.

The appellant through his counsel, did advise the court that the Respondent is not a very large concern and that with a proper representation necessary submissions, it may well be that the Respondent is of such insignificant size as to freed from the obligations under the subject legislation.

But, be that as it may, the Respondent is registered as having an obligation to abide by the Act and I must deal with it accordingly.

In view of the maximum penalties prescribed by the legislation and taking into consideration the above comments by my brother Judges, I am in no doubt that the interest of the legislation are poorly served by such small fines which amount to little else but, “a slap on the wrist.” Clearly no considerations have been taken of the fact that the offences were continuing.

The Courts have a duty to impose penalties which assist the Government in collecting revenue from those who have liability, but think, for some reason or another to avoid it. If not then the burden of such a loss of revenue (caused by those who ignore their obligations for whatever reason) is shouldered by those who chose to meet their obligations. This is hardly fair.

The fines imposed by the Magistrate are to my mind wrong at law in that there appears from the face of the record a failure to recognise (and account for) the continuing nature of these offences. It is clear from the legislature and the reasoning of my brother Judges in the Decisions noted above, that that is what these offences are.

It would be more appropriate as a “bottom line” bench mark for a fine of \$50.00 for each period during which the offence continues.

On the authorities presented to me by counsel, that amount would be a bare minimum in any instance, accepting as I do, the concession given in this case that the Respondent company is a small trading entity. I allow the appeal.

I order that the penalty imposed by the Magistrate be vacated.

In its place I order the following fine be imposed:-

COUNT 1	\$200.00
COUNT 2	\$150.00
COUNT 3	\$100.00

<u>COUNT 4</u>	<u>\$ 50.00</u>
<u>TOTAL FINES</u>	<u>\$500.00</u>

I am also required to consider the Magistrate's Court order in refusing to allow the Appellant its costs.

The reason given:-

“Courts fee are exempted. I am not prepared to order costs unless I am satisfied the expenses have actually incurred. Prosecution can't say how they arrive at the figure of \$50.00.”

The Courts in my experience regularly award costs in small prosecution of this type. S.158 of the Criminal Procedure Code gives the power. The award is compensatory of costs incurred by the Government or Statutory body (Taxpayer) in chasing up the recalcitrant. It is only proper to award costs. Arguably even more so in times when public purse is under some economic strains.

There is no valid reason why the Government (Re Taxpayer) should not be so compensated. It is a matter of the recalcitrant reimbursing, by compensation, the responsible.

For the Magistrate to refuse to grant the order because he was not satisfied that expenses had actually been incurred is, with respect, to deny the obvious. The mere fact that the matter was before the Court evidence that some expense (by way of labour) must have been incurred in getting there.

Further to decide that costs not be given because the Magistrate can't say how they arrived at the figure is again untenable. The party claiming costs always has a right to assess those costs by way of and assessment on the day rather than going to the expense and trouble of having the costs taxed. In my experience it happens all the time and it is the court's province to decide if the assessment is an appropriate amount.

It happens more than not particularly in the Civil Courts when costs arguments are settled on what may well seem to be a figure picked at random but which is in fact an assessment made on the spot. In this instance it is for the court in the proper exercise of its decretion to decide of the amount claimed as appropriate.

The alternative would be tax every matter in which a cost award has been made. That would hardly be in the interest of good administration. Probably it would also be unjust to the person adversely affected by the order as experience suggest that the quick “assessment” is often less than the detailed tax account. A cursory look at the court record and the amount of work undertaken by the Appellant in the first instance indicates to me that a cost assessment of \$50.00 is well on the “lighter” side.

I thus vacate the Magistrate’s Order of “no costs” and substitute therein an order for **\$50.00 (FIFTY DOLLARS)** costs being the cost of the hearing at first the instance.

I also order that the Respondent pay the Appellant’s costs in this Appeal set at a further **\$50.00 (FIFTY DOLLARS)**

JOHN D. LYONS
JUDGE