IN THE COURT OF APPEAL
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO: AAU0023/09

BETWEEN:

URAIA TIRAI

Appellant

AND:

THE STATE

Respondent

Coram: Byrne JA
Pathik JA
Goundar JA

Hearing: 18th September 2009

Counsel: Mr. A.K. Singh for Appellant
Mr. P. Bulamainaivalu & Ms R. Drau for State

Date of Judgment: 23rd September 2009

JUDGMENT OF THE COURT

---

[1] Following a trial in the extended jurisdiction of the Magistrates' Court at Suva, the appellant was convicted of the following offence:

Statement of Offence

FOUND IN POSSESSION OF ILLICIT DRUGS: Contrary to Section 5[a] of the Illicit Drugs Control Act No. 9 of 2004.

Particulars of Offence

> URAIA TIRAI, on the 3rd day of March, 2006 at Nasinu, in the Central Division, without lawful authority had in your possession 617.6 grams of Indian Hemp leaves botanically known as Cannabis Sativa an Illicit Drug.

[2] He was sentenced to two years imprisonment. He filed an appeal against conviction and sentence. However, at the hearing of the appeal, the appellant abandoned the appeal against conviction and pursued the appeal against sentence alone.

[3] The two main contentions of the appellant are that the learned Magistrate erred in relying on his previous convictions to deprive him of a reduction in sentence for previous good character and that the learned Magistrate erred in considering the drugs were for sale when there was no evidence of it.

[4] After the appellant was convicted, the learned Magistrate heard mitigation from him before passing sentence. The court record does not show the prosecution tendered any previous criminal record of the appellant. However, the previous convictions of the appellant are in the record and were referred to by the learned Magistrate in his sentencing decision. Between 1974 and 1978, the appellant was convicted of a number of offences ranging from disorderly conduct to stowaway. From 1978 he did not reoffend until 2002 when he was convicted of drunk and disorderly conduct. In 2004 he was convicted of drunk and disorderly conduct for the second time. Except for the two misdemeanour convictions in 2002 and 2004, respectively, the appellant's other convictions were 18 years old.

[5] In his sentencing decision, the learned Magistrate did not regard the appellant as a first time offender, to deserve reduction in sentence for previous good character. The learned Magistrate said:

> "You are not a first offender. Your two latest convictions were in 2002 and 2004 and prior to that your last previous conviction was in 1978."

[6] Under the Rehabilitation of Offenders Act 1998, convictions which are more than 10 years old are regarded as irrelevant. Anyone who intends to refer a sentencing court to an irrelevant conviction must seek the leave of the court. There has been no mention of any such application by the prosecution in this case before the irrelevant convictions of the appellant were referred to the learned Magistrate. We are satisfied that the appellant's previous convictions which were more than ten years old were irrelevant and should not have been considered by the learned Magistrate.

[7] The relevance of previous conviction in a sentencing process is that if an offender has previous conviction he or she will not be entitled to a reduction in sentence that is generally afforded to an offender with previous good character. In ***Emirami Saurara v. The State*** *CAV0020/07* the Supreme Court observed:

> "...In our opinion it is wrong in principle to treat convictions for prior offences as aggravating circumstances attaching to a subsequent offence for the purposes of sentencing. An offender who has a significant record of prior offences is obviously unable to claim the benefit of mitigation on account of previous good character or a relatively minor criminal record..."

[8] There are situations where, notwithstanding a previous conviction, it is appropriate to treat the offender as being rehabilitated and of good character. This will be especially so if there has been a considerable lapse of time since the last conviction (***R v. Smith*** *(1983) 5 Cr. App. R(s) 61).*

[9] The appellant was forty-six years old when he committed the offence in this case. Except for two convictions for drunk and disorderly conduct in 2002 and 2004, respectively, he had not reoffended since 1978. The latter two minor convictions had no relevance to the offence of found in possession of an illicit drug that the appellant committed in 2006. In our view, these minor convictions should have been disregarded and the appellant should have been given some reduction in sentence for not having reoffended since 1978. A reduction of three months would have properly reflected this fact.

[10] The second contention is that the learned Magistrate erroneously took into account the drugs were for sale as a matter of aggravation to increase the sentence when there was no evidence of it.

[11] In his decision, the learned Magistrate presumed from the quantity of drugs found in the appellant's possession that he was a supplier. Apart from the quantity of drugs the prosecution led no other evidence of circumstances of possession such as packaging or markings on the drugs, from which an inference could have been made that the drugs were for peddling.

[12] Further the learned Magistrate erroneously considered that in mitigation the appellant admitted dealing in drugs. The learned Magistrate said:

> "In your mitigation you said you are:
> ...
> (e) Remorseful about your dealing drugs and you are not dealing anymore."

[13] According to the court record, the appellant in his mitigation said he was remorseful. He made no mention that he was remorseful for dealing in drugs or that he was no longer dealing in drugs. We cannot find any facts to support the finding of the learned Magistrate that the appellant was supplying drugs to the public. We are satisfied that the learned Magistrate erred in taking into account the drugs were for sale as a matter of aggravation to increase the sentence by three months when there was no evidence to support that finding. The appellant was virtually sentenced for an offence he was not being charged and tried.

[14] In ***Vakalalabure v. State*** *[2006] FJSC 8; CAV0003U.2004S (15 June 2006)* the Supreme Court said:

> ".... it is a fundamental principle of our criminal law, inherited from England, that a person must not be punished except for offences for which he has been tried and convicted. It is a necessary corollary of this principle that a convicted person must not be sentenced for uncharged offences or matters of aggravation....."

[15] This principle was adopted from the judgment of the English Court of Appeal in ***The King v. Bright*** *[1916] 2 KB 441*, where Darling J at 445-5 said:

> "... the judge ... must not attribute to the prisoner that he is guilty of an offence with which he has not been charged – nor must he assume that the prisoner is guilty of some statutory aggravation of the offence which might, and should, have been charged in the indictment if it had been intended that the prisoner was to be dealt with on the footing that he had been guilty of that statutory aggravation."

[16] In ***The Queen v. De Simoni*** *(1981) 147 CLR 383* the High Court of Australia followed the principle in ***R v. Bright*** and said at 389:

> "... the general principle that the sentence imposed on an offender should take into account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted ... a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."

[17] We conclude that the evidence of quantity alone did not give rise to the only reasonable inference that the drugs found in the appellant's possession were for sale. Other reasonable inferences were available on the evidence. For instance, the drugs could have been in the appellant's possession for safe keeping for someone else. The prosecution did not rebut the other inferences that were available on the evidence.

[18] We are satisfied that the learned Magistrate erred in increasing the sentence of the appellant by three months to reflect the fact that the appellant was a supplier of drugs. The appellant was not charged with the offence of supply of an illicit drug. The prosecution did not lead any evidence to show the appellant was a supplier of an illicit drug.

[19] In our view the appellant's sentence should not have been increased to reflect he was a supplier of drugs when there was no evidence of it.

[20] For the reasons given, we quash the sentence of two years imprisonment and substitute a sentence of eighteen months imprisonment effective from 28 November 2008.

[21] The appeal against sentence is allowed.

Hon. Justice John Byrne
Judge of Appeal

FIJI COURT OF APPEAL

Hon. Justice Devendra Pathik
Judge of Appeal

Hon. Justice Daniel Goundar
Judge of Appeal

Solicitors:

Messrs. A.K. Singh Law for Appellant
Office of the Director of Public Prosecutions for State