

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0056 of 2016
[High Court Criminal Case No. HAA 19 of 2013S]

BETWEEN : STATE

Appellant

AND : SAIMONI MATA
TOMASI KOROITUKU

Respondents

Coram : Prematilaka, JA
Fernando, JA
Nawana, JA

Counsel : Ms. Ratu. S for 01st Appellant
Miss. Nasedra. S for 02nd Appellant
Mr. Babitu. S for the Respondent

Date of Hearing : 13 February 2019

Date of Judgment : 07 March 2019

JUDGMENT

Prematilaka, JA

- [1] This appeal by the State in terms of section 22(1) of the Court of Appeal Act arises from the Judgment dated 22 April 2016 of the High Court delivered on an appeal from Nausori Magistrates Court that had convicted and sentenced the Respondents. The Respondents had pleaded guilty in the Magistrate Court and the appeal to the High Court had been only against the sentence. In appeal, the Learned High Court Judge had quashed the sentence and remitted the case to the Magistrates Court for the

Learned Magistrate to remit it to the High Court for it to be tried afresh. The State is now appealing against the said Judgment of the High Court.

- [2] Under the first count both Respondents had been charged with unlawful cultivation of 18.6 kilograms of Cannabis Sativa or Indian Hemp, an illicit drug without lawful excuse (should have been lawful authority) and under the second count the 01st Respondent alone had been charged with unlawful possession of 209.7 grams of Cannabis Sativa or Indian Hemp, an illicit drug without lawful authority. Both offences had been allegedly committed on 16 February 2013 at Batiki Settlement, Nausori in the Central Division contrary to section 5(a) of the Illicit Drugs Control Act No.9 of 2004.
- [3] On 19 February 2013 upon their plea of guilt, both Respondents had been sentenced to 07 years of imprisonment with a non-parole period of 05 years on count one and the 01st Respondent had been sentenced to 01 year of imprisonment on count two to be served concurrently with the sentence on count one.
- [4] Both Respondents had appealed against the sentence to the High Court on 06 grounds of appeal and later added two more grounds by way an amended petition of appeal. When the matter came up in appeal before the High Court, the 01st Respondent had withdrawn his appeal with leave of the Learned High Court Judge. The counsel for the 02nd Respondent indicated at the hearing before this Court that he had not withdrawn his appeal.
- [5] The Learned High Court Judge in the impugned judgment dated 22 April 2016 purporting to exercise powers of revision vested in the High Court by section 260(1) and 262(1) of the Criminal Procedure Act, 2009 had set aside the sentences passed on both Respondents on the basis that in view of the decision in Sulua v State AAU0093.2008: 31 May 2012 [2012] FJCA 33, the Learned Magistrate had no jurisdiction to deal with the case. The Learned High Court Judge had gone onto state that, the convictions and sentences were therefore null and void. According to the impugned judgment, the Learned High Court Judge had permitted the parties to make submission on the question whether or not the Learned Magistrate had erred in

applying the binding decision of Sulua and the State and the 01st Respondent had tendered written submissions as well. However, no such oral or written submissions can be found in the court record compiled for the appeal.

- [6] The State is contesting the said judgment of the Learned High Court Judge on the basis that the Learned Magistrate had jurisdiction to convict and sentence the Respondents in terms of section 5(2) of the Criminal Procedure Act, 2009 read with section 5 of the Illicit Drugs Control Act No.9 of 2004. The Respondents concede that section 5(2) of the Criminal Procedure Act read with section 5 of the Illicit Drugs Control Act gives jurisdiction to the Magistrates Court to try offences governed by the Illicit Drugs Control Act without limitation but argues that the Learned High Court Judge was within his powers in exercising revisionary powers under section 260 and 262 of the Criminal Procedure Act resulting in no miscarriage of justice.
- [7] Therefore, the ground of appeal articulated in this appeal is clearly a question of law only and therefore an appeal lies to this Court in terms of section 22(1) read with section 22(2) of the Court of Appeal Act. Though section 22(1) permits an appeal to the Court of Appeal from a decision of the High Court made in its appellate jurisdiction only, a decision given by the High Court such as the one canvassed in this appeal, in its revisionary jurisdiction too is deemed to be a decision in appellate jurisdiction of the High Court by virtue of section 22(2).
- [8] Section 5 of the Illicit Drugs Control Act No.9 of 2004 states as follows.

'5. Any person who without lawful authority-

- (a) acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or*
- (b) engages in any dealings with any other person for the transfer, transport, supply, use, manufacture, offer, sale, import or export of an illicit drug;*

commits an offence and is liable on conviction to a fine not exceeding \$1,000,000 or imprisonment for life or both.'

[9] Section 5 of the Criminal Procedure Act, 2009 states

- ‘5.— (1) *Any offence under any law other than the Crimes Decree 2009 shall be tried by the court that is vested by that law with jurisdiction to hear the matter.*
- (2) *When no court is prescribed in any law creating an offence and such offence is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Court in accordance with any limitations placed on the jurisdiction of classes of magistrate prescribed in any law dealing with the administration and jurisdiction of the Magistrates Courts.’*

[10] A plain reading of section 5 of the Illicit Drugs Control Act No.9 of 2004 shows that it does not prescribe any particular court to try offences created by that section. It is also clear that, therefore, section 5(2) of the Criminal Procedure Act makes it possible for the Magistrates Court to try offences created under section 5 of the Illicit Drugs Control Act subject to the limitations of the jurisdiction of the Magistrates Court prescribed in any law.

[11] Section 7 of the Criminal Procedure Act sets out the jurisdiction of the Magistrates Court regarding the sentences that could be passed by a Magistrates Court as follows.

- ‘7.— (1) *A magistrate may, in the cases in which such sentences are authorised by law, pass the following sentences, namely—*
- (a) *imprisonment for a term not exceeding 10 years; or*
- (b) *fine not exceeding 150 penalty units.*
- (2) *A magistrate may impose consecutive sentences upon a person convicted of more than one offence in a trial, but in no case shall an offender be sentenced to imprisonment for a longer period than 14 years.*
- (3) *The sentencing limits prescribed in sub-section (1) may be further restricted in relation to magistrates of certain classes as provided for in any law dealing with the establishment and jurisdiction of the Magistrates Court.*

(4) *Where any magistrate of a certain class sentences an offender for more than one offence in a trial, the aggregate punishment shall not exceed twice the amount of punishment which that magistrate has jurisdiction to impose.'*

[12] Therefore, it is clear from a collective reading of section 5 of the Illicit Drugs Control Act and sections 5(2) and 7 of the Criminal Procedure Act that the Magistrates Court has jurisdiction to try offences created under section 5 of the Illicit Drugs Control Act and impose any sentences upon the accused subject to the limitations prescribed under section 7 of the Criminal Procedure Act.

[13] Moreover, the presumption against the ouster of jurisdiction militates against the decision of the Learned High Court Judge. Exclusion of jurisdiction of courts must be either by clear, unambiguous and express terms (see generally **Maxwell on Interpretation of Statutes** 12th Edition pages 153-159) or by such terms that would lead necessarily to the inference of such exclusion and it cannot be done by implied reasoning (see **N S Bindra Interpretation of Statutes** 12th Edition page 233). Peacock CJ. in **Prosunno Coomar Paul v Koylash Chunder Paul** 8 WR 428, 436 said

'The jurisdiction of the ordinary courts of judicature is not to be taken away by putting a construction upon an Act of the legislature which does not clearly say that it was the intention of the legislature to deprive such courts of their jurisdiction.'

[14] In terms of **Sulua** sentencing guidelines possession of 4000 grams and above of Cannabis Sativa would attract a tariff between 07 to 14 years of imprisonment and for possession of 100 to 1000 grams of Cannabis Sativa the tariff is between 01 to 03 years of imprisonment with possession of 500 grams or less would attract a sentence of less than 02 years of imprisonment. The guidelines also refer to other acts set out in section 5(a) of Illicit Drugs Control Act. The other acts named in section 5(a) are '*acquires, supplies, produces, manufactures, cultivates, uses, or administers*' an illicit drug. Since those acts have been included in the same provision along with possession, sentencing guidelines in **Sulua** are equally applicable to such acts as well. In fact according to the judgment in **Sulua** its guidelines are applicable to all prohibitive acts set out in section 5(a) and 5(b) of Illicit Drugs Control Act as well.

[15] Therefore, 07 years of imprisonment with a non-parole period of 05 years on count one and 01 year of imprisonment on count two are in compliance with Sulua guidelines which the Learned Magistrate had adopted in the sentencing order. The Learned Magistrate would have been mindful of the fact that the Court of Appeal has also stated in Sulua that

'Categories numbers 1 to 4 merely sets the tariff for the sentence, given the weight of the illicit drugs involved. The actual sentence will depend on the aggravating and mitigating factors, in the particular circumstances of the case, and it may well fall below or above the set tariff.'

[16] The impugned decision of the Learned High Court Judge does not appear to have been influenced by any perceived inadequacy of the sentences passed on the Respondents by the Learned Magistrate. If so, the Learned Judge could have revisited the sentences by virtue of revisionary powers vested in the High Court in the same proceedings. It should also be remembered that in any event the quantum alone can rarely be a ground for an intervention (see Raj v. State CAV0003 of 2014:20 August 2014 [2014] FJSC 12) unless the impugned sentence is caught up within the guidelines for challenging a sentence stated in House v The King [1936] HCA 40; (1936) 55 CLR 499), Bae v State AAU0015u of 98s: 26 February 1999 [1999] FJCA 21 and approved by the Supreme Court in Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14. I do not see the sentencing order of the Learned Magistrate coming under any of these guidelines for challenging a sentence in appeal.

[17] The Learned High Court Judge's finding that the Magistrate had no jurisdiction to hear the case against the Respondents appears to be based on the statement in Sulua that 'Category 4 is to be tried in the High Court,' (emphasis added)

[18] In my view, the above pronouncement in Sulua should be treated as a mere guidance and not as a binding statement of law, for the jurisdiction of the Magistrate Court to try any offence under section 5(a) and 5(b) of Illicit Drugs Control Act vested in it by the legislature in terms of section 5 of the Criminal Procedure Act cannot be taken away by a judicial pronouncement. The decision in Sulua should not be deemed or taken to have intended such an outcome.

- [19] The tariff of 07 to 14 years of imprisonment for category 4 offences prescribed may have prompted the Court of Appeal to have come up with the above guideline in Sulua as to the appropriate court for such offences, for the Magistrates Court cannot impose any sentence above 10 years of imprisonment. However, it should be kept in mind that in terms of section 190 of the Criminal Procedure Act the Magistrate is empowered to transfer a person convicted by the Magistrates Court to the High Court for sentencing and greater punishment. Therefore, there is no reason to fear that offenders tried and convicted in the Magistrate Court for category 4 offences would go inadequately punished. Neither is there any reason to distrust good judgment of the Magistrates in the matter of sentence.
- [20] I may take liberty to usefully quote from Ratuvawa v State AAU121 of 2014: 26 February 2016 [2016] FJCA 45 where a similar issue as to whether or not the Magistrates Court had jurisdiction to try and sentence the accused for unlawful cultivation of illicit drugs, namely 221 plants of Cannabis Sativa, weighing 69.5 kilograms contrary to section 5(a) of the Illicit Drugs Control Act, in view of the majority decision in Sulua, had been dealt with and the Court of Appeal arrived at an affirmative finding in favour of the Magistrates Court jurisdiction.

'16. Section 5 of the Illicit Drugs Control Act 2004 which creates the offence of cultivation of illicit drugs does not prescribe the court nor state whether the offence is an indictable or a summary offence. I am therefore of the view that the offence is triable by the Magistrate's court subject to the limitations set out in section 5 pertaining to sentence. There is no evidence of the Magistrate having acted contrary to such limitations.'

'20. I am of the view that the Magistrates Court had the jurisdiction to try all offences created by the Illicit Drugs Act 2004 in view of the clear provisions in Section 5(2) of the Criminal Procedure Decree 2009 and a Court is not competent to amend the Illicit Drugs Act, prospectively or with retrospective effect. That is a matter for the Legislature and to act contrary to this would be a violation of the principle of Separation Powers ingrained in our Constitution.

'21. I am of the view that the learned High Court Judge was in error to have quashed the conviction of the Magistrate's Court. What the learned High Court Judge should have done was to have called for the record

from the Magistrates Court and maintained the conviction and only vary the sentence, in view of the fact that the sentence was totally inadequate. Since the Appellant had pleaded guilty before the High Court, I would therefore dismiss his appeal against conviction as I consider that no substantial miscarriage of justice had occurred.'

- [21] Unfortunately the Learned High Court Judge had not considered at all section 5 of the Illicit Drugs Control Act and sections 5(2) and 7 of the Criminal Procedure Act prior to his decision that the Magistrates Court lacked jurisdiction.
- [22] At the hearing before this Court both parties informed us that subsequent to the High Court decision the matter had been remitted to Nausori Magistrates Court which had then transferred the case to the High Court. Proceedings before the High Court had discontinued on 07 July 2016 upon an application by the State pending the decision of this appeal and the Respondents had been discharged. Both Respondents had served 04 years and 04 months of imprisonment.
- [23] Therefore, I think that the decision of the High Court should be set aside by virtue of powers vested in this Court under section 22(3) of the Court of Appeal Act on the ground of the wrong decision of the question of law involved in this appeal. In the circumstances, I allow the appeal.

Fernando , JA

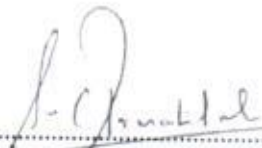
- [24] I agree with reasoning and conclusions reached by Prematilaka, JA

Nawana, JA


- [25] I agree with reasoning and conclusions of Prematilaka, JA

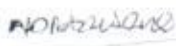
The Orders of the Court :

- (i) *Appeal is allowed.*
- (ii) *Quashing of and setting aside the convictions and sentences of the Respondents by the Judgment of the High Court dated 22 April 2016 are set aside.*
- (iii) *Convictions and sentences of the Respondents by the Magistrates Court are affirmed.*


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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL




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Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL


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Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL