IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 51 OF 2016

BETWEEN : **TASLIM A ALI**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : **Ms U. Baleilevuka for Applicant**
Mr J. Niudamu for Respondent

Date of Judgment : **29th of December 2016**

JUDGMENT

Introduction

1. The Appellant was charged in the Magistrates court for one count of Driving Motor Vehicle without a Driving Licence contrary to Section 56 (6) and 114 of the Land Transport Act and one count of Dangerous Driving Occasioning Grievous Bodily Harm, contrary to Section 97 (4) (a) (b) and 114 of the Land Transport Act.

2. The Appellant was first produced before the Magistrates court on the 25th of July 2016. The Appellant was unrepresented in the Magistrates court. He pleaded guilty for both of the counts and made his submissions in mitigation on the same day. The learned Magistrate then imposed a fine of $ 100 in default 10 days of imprisonment for the first count and six months of imprisonment period for the second count. Furthermore, the learned Magistrate has suspended the driving

licence for a period of 9 months. Aggrieved with the said sentence, the Appellant filed this petition of appeal on the following grounds *inter alia;*

i) *The learned Magistrate erred in fact and law when he failed to give the accused sufficient time to seek further legal advice and submit his mitigating grounds*

ii) *The learned Magistrate erred in fact and law when he failed to take into consideration the circumstances of the case,*

iii) *Alternatively, the overall sentence was harsh and excessive considering the circumstances of the case.*

3. The Appellant filed an affidavit in support of the first ground of appeal. The learned counsel for the Appellant and the Respondent consented to have the hearing by way of written submissions. Accordingly, the Appellant and the Respondent were directed to file their respective written submissions, which they filed as per the direction. Having carefully perused the affidavit of the Appellant, respective written submissions of the parties and the record of the proceedings of the Magistrates court, I now proceed to pronounce the judgment as follows.

The Law

4. Since the Appellant has been convicted upon his own plea of guilt, he is only allowed to appeal against the Sentence pursuant to Section 247 of the Criminal Procedure Decree, which states that;

"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates court, except as to the extent, appropriateness or legality of the sentence"

5. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** has discussed the applicable approach of the Appellate court in intervening into the sentences imposed by the lower courts, it states;

'It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence.'

6. The Fiji Court of Appeal in **Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015)** held that;

"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the

sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust".

7. Gounder JA in **Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015)** has discussed the applicable principles of reviewing of a sentence by an appellate court, where his Lordship held that;

"It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v The State, unreported Cr. App. No. CAV0010 of 2013; 20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:

i) Whether the sentencing judge acted upon a wrong principle;

ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;

iii) Whether the sentencing judge mistook the facts;

iv) Whether the sentencing judge failed to take into account some relevant consideration.

Reasons for sentence form a crucial component of sentencing discretion. The error alleged may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)"

Ground I

8. The first ground of appeal is founded on the contention that the plea of the Appellant was not unequivocal. The Appellant contends that he was wrongly advised by one police officer to plead guilty in order to get a lenient sentence. He further deposed in his affidavit that he was not aware of the court proceedings and did not understand the consequence of his plea of guilt.

9. Fiji Court of Appeal in **Tuisavusavu v State [2009] FJCA 50; AAU0064.2004S (3 April 2009)** has discussed the correct approach in determination of the validity of a guilty plea, where the Court of Appeal held that;

> *"The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see Bogiwalu v State [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (Liberti (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.*
>
> *Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered".*

10. Accordingly, the onus rests on the Appellant in establishing that the plea of guilt is equivocal. The court must approach such an application with caution.

11. The Appellant contends that he was wrongly advised by one police officer to plead guilty for the two offences in order to obtain a lenient sentence. According

to the record of the proceedings of the Magistrates court, the Appellant was given an opportunity to choose the language that he wishes to conduct the proceedings. He was then explained about his rights to obtain a legal counsel, for which he decided to proceed without a lawyer. He was then explained the nature of the charges, which he has understood. Having understood the charges, he pleaded guilty for the two offences. The learned Magistrate has satisfied that the Appellant had pleaded guilty on his own free will. The Summery of Facts were then explained to the Appellant, which was admitted by him in open court. He then made his submissions in mitigation.

12. In **Tuisavusavu v State (supra)** the Fiji Court of Appeal held that;

"As the 1st appellant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence. As was stated by the High Court of Australia in Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132);

"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or

if upon the facts admitted by the plea he could not in law have been guilty of the offence."

13. The Appellant claimed that he pleaded guilty in order to get a lenient sentence on the advice of a police officer. He was aware of the consequence of his plea of guilt as he was expecting a lenient sentence. Hence, I am satisfied that the plea of guilt entered by the Appellant was unequivocal.

14. As the learned counsel for the Respondent submitted in her written submission, I now briefly draw my attention to consider whether the second count as charged was defective and misled the Appellant in his plea of guilt.

15. Sections 58 and 61 of the Criminal Procedure Decree have dealt with regard to framing of charges, where Sections 58 states that;

Every charge or information shall contain—

a) a statement of the specific offence or offences with which the accused person is charged; and

b) such particulars as are necessary for giving reasonable information as to the nature of the offence charged.

16. Section 61 of the Criminal Procedure Decree has stipulated the manner in which the charges have to frame, where it states that;

i) A count of a charge or information shall commence with a statement of the offence charged, and this shall be called the statement of offence.

ii) Each statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence.

iii) The charge shall contain a reference to the section of the law creating the offence.

iv) After the statement of the offence, particulars of the offence shall be set out in ordinary language, and the use of technical terms shall not be necessary.

v) Where any rule of law or any Act Decree or Promulgation limits the particulars of an offence which are required to be given in a charge or information, nothing in this section shall require any more particulars to be given than those so required.

vi) The forms applying or approved under this Decree (or forms conforming to these forms as nearly as may be) shall be used in cases to which they are applicable; with the statement of offence and the particulars of offence being varied according to the circumstances of each case.

vii) Where a charge or information contains more than one count, the counts shall be numbered consecutively.

17. Accordingly, the charge constitutes two main components. The first is the statement of the offence. The second component is the particulars of the offence. The statement of the offence should state the offence in ordinary language, avoiding as much as possible the use of technical terms. It is not required to mention all the essential elements of the offence. However, it must refer the relevant Section or provision of the law that creates the offence. Subsequent to

the statement of the offence, it is required to state the particulars of the offence. It should also be in ordinary language.

18. The statement of the offence for the second count has been stated that the Appellant is charged for one count of Dangerous Driving Occasioning Grievous Bodily Harm, contrary to Section 97 (4) (a) (b) and 114 of the Land Transport Act. Section 97 (4) of the Land Transport Act states that;

"A person commits the offence of dangerous driving occasioning grievous bodily harm if the vehicle driven by the person is involved in an impact occasioning grievous bodily harm to another person and the driver was, at the time of the impact, driving the vehicle -

a) under the influence of intoxicating liquor or of a drug

b) at a speed dangerous to another person or persons; or

c) in a manner dangerous to another person or persons,

19. According to the particulars of the offence and the summery of fact, the prosecution alleges that the Appellant drove the vehicle in a manner dangerous to other person, which does not correspond with Section 97 (4) (a) and (b) as stated in the Statement of the Offence. The particulars of the offence and summery of facts actually correspond with the Section 97 (4) (c) of the Land Transport Act.

20. It is my view that the omission to state the relevant sub paragraph of Section 97 in the Statement of offence has not caused any fatal prejudice to the Appellant as

the particulars of offence and the summery of fact have specifically explained the nature of the offence with clarity.

21. In view of the above discussed reasons, I find the first ground of appeal has no merit and falls accordingly.

Ground II & III

22. I now draw my attention to consider the second and third ground of appeal together as both of the grounds are founded on same contention against the Sentence. The Appellant argues that the learned Magistrate has failed to take into consideration the circumstances of the case. He further argues that the overall sentence is harsh and excessive.

23. The learned counsel for the Appellant submitted in his written submission that the learned Magistrate has not taken into consideration that the Appellant was not intoxicated. The learned counsel further submitted that the learned Magistrate has failed to consider in Appellant favour that the Appellant had cared and assisted the victim.

24. In fact, the learned Magistrate has given a discount of four months for the payment of $800 to the victim. However, he has not considered the said payment in favour of suspending the sentence, which I will discuss in details later.

25. The ground of intoxication is not a relevant factor to be considered in this sentence as the second count is founded on the allegation that the Appellant has driven the vehicle in a manner dangerous to another person.

26. The learned Magistrate has correctly considered the applicable tariff for the offence of Dangerous Driving Occasioning Grievous Bodily Harm as from a fine and suspended term to 12 months of imprisonment **(Chand v State [2015] FJHC 192; HAA11.2015 (18 March 2015)**. He then selected six months as the starting point. For the aggravating factors, the learned Magistrate has added nine months, making an interim sentence of 15 months. He then reduced five months for the early plea of guilt and further 4 months for the other mitigation and the payment of $800 to the victim, reaching the final sentence of six months.

27. The final sentence of six months of imprisonment period is within the acceptable tariff limit for this offence. Having reached to the above final sentence, the learned Magistrate has then considered whether he could suspend the sentence pursuant to Section 26 (2) (b) of the Sentencing and Penalties Decree.

28. Section 26 (1) of the Sentencing and Penalties Decree states that;

"On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances"

29. Section 26 (2) (b) of the Sentencing and Penalties Decree defines the jurisdiction of the Magistrates court in respect of imposing suspended sentence, where it states that;

"A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—

(b) Does not exceed 2 years in the case of the Magistrate's Court.

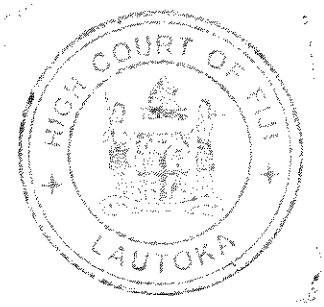
30. Accordingly, it is a discretionary power of the sentencing court to impose a suspended sentence. If the court contemplates to suspend a sentence, it must be satisfied, having considered all the circumstances, that it is prudent to do so.

31. Having considered the purpose of the sentence and the nature of the payment made by the Appellant, the learned Magistrate has concluded that this case does not warrant a suspended sentence.

32. Having considered the above discussed reasons, it is my considered opinion that the sentencing discretion exercised by the learned Magistrate in this sentence is not founded on erroneous principle. Hence, I do not find any merits in ground two and three.

33. In conclusion, I refuse this petition of appeal and disallow it accordingly.

34. Thirty days (30) to appeal to the Fiji Court of Appeal.



R. D. R. Thushara Rajasinghe
Judge

At Lautoka
29th of December 2016

Solicitors : **Messrs Iqbal Khan & Associates**
Office of the Director of Public Prosecutions