IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO: HAA 011 OF 2017 LAB

BETWEEN: PETERO YAVALA

APPELLANT

AND: STATE

RESPONDENT

Counsels : Mr. A. Kohli for Appellant
Ms. A. Vavadakua for Respondent

Hearings : 21 and 24 July, 2017

Judgment : 28 July, 2017

JUDGMENT

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1. On 3 April 2012, in the presence of his counsel, at the Labasa Magistrate Court, the following charges were put to the appellant (accused):

FIRST COUNT

Statement of Offence

FOUND IN POSSESSION OF ILLICIT DRUGS: Contrary to Section 5 (a) of the Illicit Drug Control Act of 2004.

Particulars of Offence

PETERO YAVALA, on the 3rd day of February, 2012 at Navesidrua, Seaqaqa in the Northern Division without lawful authority was found in possession of 4.0 kilograms of cannabis, an illicit drug.

SECOND COUNT

Statement of Offence

CULTIVATION OF ILLICIT DRUGS: Contrary to Section 5 (a) of Illicit Drug Control Act of 2004.

Particulars of Offence

PETERO YAVALA, on the 03rd day of February, 2012 at Naweni, Savusavu in the Northern Division without lawful authority cultivated 32 plants of cannabis sativa an illicit drugs.

2. The charges were read and explained to the appellant in the i-taukei language. He said, he understood the same. His right to counsel was put to him. He said, Mr. A. Kohli was his counsel. He then pleaded not guilty to the charges. In other words, he denied the allegations against him. For the next 8 months, the matter went through various pre-trial conferences.

3. On 20 December 2012, the appellant (accused) did not turn up in court. A bench warrant was issued against him. He did not turn up in court until 12 May 2015. He was on the run for 2 years 4 months 23 days. For the next 2 months, the court went through various pre-trial conferences. The trial proper began on 16 July 2015, then on 2 November 2015, then 17 November 2015, then 9 May 2016 and on 19 October 2016, the defence closed their case.

4. On 3 May 2017, the Labasa Magistrate Court delivered its judgment. In a 7 pages judgment, it found the accused guilty as charged on both counts and convicted him accordingly on the

same. On 5 May 2017, the court passed its sentence. On count no. 1, the court sentenced the accused to 5 years imprisonment. On count no. 2, the court sentenced the accused to 6 years imprisonment. In Warrant No. 674/17, the above sentences were made consecutive to each other, that is, a total sentence of 11 years imprisonment, with no non-parole period imposed.

5. The appellant (accused) was not happy with the above conviction and sentence. On 2 June 2017, he filed a petition of appeal. On 19 July 2017, he filed an amended ground of appeal, which were as follows:

(i) That the Learned Trial Magistrate erred in law and in fact in admitting the evidence of PW1 Miliana Werebauinona in the absence of any evidence of her qualifications.

(ii) That the Learned Trial Magistrate erred in law and in fact in coming to a finding that since PW1 Miliana Werebauinona held the post of Government Analyst appointed by the Government she was not required to produce all her educational certificate before the hearing.

(iii) .That the Learned Trial Magistrate erred in law and in fact in admitting the evidence of PW1 Miliana Werebauinona in reading the report of former Government Analyst Miliakere Nawaikula when Mere Nawaikula could have given evidence.

(iv) That the Learned Trial Magistrate erred in law and in fact in admitting the evidence of PW1 Miliana Werebauinona when the prosecution had failed to inform the accused that it intended not to call the person who made the analysis, as a witness.

(v) That the Learned Trial Magistrate erred in law and in fact in finding that the drugs that was analyzed was the drug that was found in the possession of the accused.

(vi) That the Learned Trial Magistrate erred in law and in fact in failing to take into consideration that the weight of the drugs in Count 1 was the weight of the wet leaves.

(vii) That the sentence handed out by the Learned Trial Magistrate is harsh and excessive and wrong in principal.

(viii) That the Learned Trial Magistrate erred in law and in fact in admitting the caution interview of the accused.

6. I have carefully considered the parties' written and verbal submissions. I have carefully read the court record. We will now consider the above grounds in turn.

Conviction Appeal Ground No. 5 (i) and 5 (ii):

7. I will discuss the two appeal grounds together because they relate to the same issue. It was well settled that in a Magistrate Court trial, the learned trial Magistrate was the judge of fact and law. As such, he decides all questions of law that arises in the proceeding. As the judge of fact, he decides all questions of fact that arises in a trial. In this case, the prosecution called six witnesses, while the defence called one witness.

8. Of course, in his judgment on 3 May 2017, the trial Magistrate accepted the evidence of Miliana Raravuso Werebauinona (PW1). The appellant complained that she did not provide evidence of her qualification. The complaint is not correct and misconceived. On pages 63 and 101 of the court record, she outlined her qualifications while giving evidence on oath. The learned trial Magistrate, as judge of fact, accepted the above in his 3 May 2017 judgment, and as such, he was entitled to do so. Appeal Grounds 5 (i) and 5 (ii) are thus dismissed.

Conviction Appeal Ground No. 5 (iii) and 5 (iv):

9. I will consider the two grounds together because they involved the same issue. The answer to the appellant's complaint abovementioned lies with an understanding of section 133 (1), (2), (3) (b), (4) and (5) of the Criminal Procedure Act 2009, which read as follows:

> ***133.—(1) Any plan, report, photograph or document purporting to have been made or taken in the course of an office, appointment or profession by or under the hand of any of the persons specified in sub-section (3), may be given in evidence in any trial or other proceeding under the provisions of this Decree, unless the person shall be required to attend as a witness by—***
> ***(a) the court; or***
> ***(b) the accused person, in which case the accused person shall give notice to the prosecutor not less than 14 clear days before the trial or other proceeding.***
>
> ***(2) In any case in which the prosecutor intends to adduce in evidence a plan, report, photograph or document a copy of it shall be delivered to the accused not less than 21 clear days before the commencement of the trial or other proceeding.***
>
> ***(3) The following persons shall be the persons to whom this section shall apply—***
> ***(b) Government analysts and chemists and laboratory superintendents employed by the Government;***

(4) The court may presume that the signature to any plan, report or document is genuine and that the person signing it held the qualification, appointment or office which he or she professed to hold at the time when the plan, report or document was signed.

(5) The contents of any report which the prosecution intends to give as evidence under this section and about which notice has been given under sub-section (2), may be referred to and commented upon by any other expert called as a witness in any criminal trial.

10. Section 133(I) of the Criminal Procedure Act 2009 allowed the receipt into evidence of the "Certificate of Analysis" prepared by Ms. Miliakere Nawaikula, who was the Government Analyst at the material time. The "Certificate of Analysis" were tendered as Prosecution Exhibit No. 1 by the then Government Analyst Ms. Miliakere Werebauinona (PW1). This procedure was permissible by virtue of section 133 (1), (3) (b), (4) and (5) of the Criminal Procedure Act 2009. The problem of Ms. Miliakere Nawaikula actually attending the trial to give evidence on the "Certificate of Analysis" lies on the court and the accused, by virtue of section 133 (1) (a) and/or (b) of the Criminal Procedure Act 2009. The burden is on the court or the accused to call for Ms. Miliakere Nawaikula to give evidence on the "Certificate of Analysis" within the terms of section 133 (1) (a) and/or (b) abovementioned. The defence, by their own actions, choose not to call Ms. Nawaikula. They did not repeatedly call on the prosecution and check whether or not Ms. Miliakere Nawaikula will be called on the trial date. So many pre-trial conferences were carried out but the above actions were not noted in the record. Thus, the defence can blame no-one, but themselves. Appeal Grounds 5 (iii) and 5 (iv) are not made out, and they are accordingly dismissed.

Conviction Appeal Ground No. 5 (v):

11. Again, in a Magistrate Court trial, the learned trial Magistrate was the judge of fact and law. In the court record, at pages 113, 115, 117, 119 and 131, Corporal Opeti (PW2) gave evidence that he was part of the police team that seized the relevant cannabis sativa drugs from the accused in the taxi and from his farm. PW2 said, he took the relevant drugs to Seaqaqa Police Station and handed the same to Police Officer Ratu Meli (PW4). PW4, in pages 79 to 81, 87 to 89 and pages 159 to 167 of the court record, said he received the relevant drugs from PW2 and later took the same to Ms. Miliakere Nawaikula (government analyst) for analysis. PW4 said he later received the "certificate of analysis" and the relevant drugs from Ms.

Nawaikula, and took the same to Seaqaqa Police Station for safe-keeping. The certificate of analysis was the one tendered as Prosecution Exhibit No. 1 in this case. The appellant's complaint in Appeal Ground 5 (v) were unfounded. It is dismissed accordingly.

Conviction Appeal Ground No. 5 (vi)

12. In section 2 of the Illicit Drugs Control Act 2004, the word "illicit drug" means any drug listed in Schedule 1. In Schedule 1 of the Act, the word "cannabis plant" means "any fresh, dried or otherwise" cannabis plant, and includes "any part of any plant of the genus cannabis". Whether or not the weight of the cannabis plant seized in count no. 1 was wet or dried, was really irrelevant, in terms of the definition abovementioned. Thus the learned Magistrate did not err at all. He took into account what was said in the government analyst's "certificate of analysis" i.e. Prosecution Exhibit No. 1. This appeal ground is misconceived and thus dismissed accordingly.

Conviction Appeal Ground 5 (viii):

13. The learned Magistrate referred to the Fiji Court of Appeal authority of **Rokonabete** v **State**, Criminal Appeal AAU 0048 of 2005S. The case had directed on the procedure to be followed when a voir dire trial was conducted in the Magistrate Court. Mr. A. Kohli is an experienced criminal lawyer in Fiji, and he doesn't need to be told on the voir dire trial procedure in the Magistrate Court. For the purpose of this appeal, a voir dire trial is normally done before the trial proper or during the trial proper, when the prosecution intends to call into evidence the caution interview and/or charge statements, containing the alleged confession. A voir dire is not done, after the prosecution closes its case. Counsel filed his voir dire challenge after the prosecution had closed their case. Simply, they had missed the boat. In any event, there was no miscarriage of justice because the defence throughly challenged the voluntariness of the alleged confession in the trial proper. This obviously went to the weight of that evidence. This appeal ground is misconceived and it is accordingly dismissed.

Sentence Appeal Ground 5 (vii):

14. On this ground, the prosecution fouled up on the drafting of count no. 2. They did not include the weight of the illicit drugs. Why they did not do so, I don't know. In the 50 cases that was examined in **Kini Sulua** vs **State**, Criminal Appeal AAU 0093 of 2008, they all had weights

mentioned in the particulars of offence. **Bavesi** v **The State** [2004] HAA 0027 of 2004 had been overruled by **Kini Sulua** v **State** (supra). Consequently, the learned Magistrate sentencing in count no. 2 was flawed because he was relying on an authority that had been overruled. I understand the learned Magistrate's dilemma. But the problem started with the prosecution in how they draft the charges. On count no. 2 as it is presently drafted, no possible sentence can be passed because no weight is attached. What should had been done was that the learned Magistrate should have asked the prosecution to correct the problems created by count no. 2 before the prosecution closed their case during the trial proper.

15. Given the above, the sentence in count no. 1 remained and is affirmed. The sentence in count no. 2 is quashed. In its place, the accused still stands convicted and is discharged. To the above extent, the appellant succeeds in his sentence appeal.

16. In summary, the learned Magistrate's sentence in count no. 1 stands i.e. 5 years imprisonment, and no-parole period is given. On count no. 2, accused remained convicted, but is discharged.

Salesi Temo
JUDGE

HIGH COURT OF FIJI
LABASA

Solicitor for Appellant : **Kohli & Singh, Labasa**
Solicitor for Respondent : **Office of Director of Public Prosecution, Labasa**