

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No.: HAA 70 of 2016

AVIYASHNI VANDHANA NAIDU

vs.

STATE

Counsel : Ms J. Singh (L.A.C) for the Appellant
Ms S. Kiran for the State

Dates of Hearing : 18 January 2017, 6 February 2017

Date of Judgment : 9 February, 2017

JUDGMENT

- 1] On the 31st day of August 2016 the Appellant was convicted after trial in the Magistrates Court in Lautoka of one count of escape from lawful custody. She was sentenced on the 27th day of October 2016 to a term of imprisonment of 10 months.
- 2] The appellant appeals both the conviction and the sentence.
- 3] In her grounds against conviction, the Appellant prays:
 - The Magistrate erred in not allowing a second medical report to be Placed before the Court when the trial resumed after a long period of

adjournment.

- That the Magistrate failed to consider sections 104 and 105 of the Criminal Procedure Decree.

4] In her grounds against sentence the Appellant prays:

- The sentence is manifestly harsh and excessive;
- The Magistrate should have suspended the Appellant's sentence given her medical condition;
- The Magistrate took extraneous factors into consideration when arriving at his sentence;
- The Magistrate increased the sentence for aggravating features without saying what those features were;
- (Other grounds pleaded are repetitive or frivolous).

5] The facts of the case were that the Appellant was being held in custody at Lautoka Police Station on the 3rd February 2015 after being remanded for some other cases by the Lautoka Magistrates' Court. At around 4am it was noticed by officers at the Station that the appellant had escaped. A search of the station and of the town failed to find her. She was later arrested, returned to custody and produced in Court to be charged with escape on 17 February 2015.

6] The trial against the Appellant was lengthy and tortuous, with multiple bail applications, applications to vacate the hearing and the absence of the Appellant after she had escaped for a second time.

7] There were frequent applications from the defence for bail and to abort the trial on the basis of the then accused's medical condition. In evident frustration therefore the learned Magistrate called for a comprehensive report from Psychiatrists and medical specialists as to the accused's Psychiatric and medical condition. He received a very comprehensive 9 page report from senior Government medical officers, a report which is exhibited in the lower Court record.

8] That report (dated 29 June 2015) made the following concluding findings:

- the accused was fit to plead;
- she was mentally stable to go to hearing;

- she was physically fit to go to hearing.
- 9] Not being satisfied with those findings the Defence thereafter made frequent applications to place before the Court another report they had obtained which made different findings.
 - 10] Not surprisingly, the learned Magistrate preferred to rely on the comprehensive Government report and refused to entertain another report of unknown provenance.
 - 11] It is the foundation of this Appeal against conviction that the Magistrate failed to accept this second report into evidence. The second ground of appeal seeks to rely on sections 104 and 105 of the Criminal Procedure Decree. Those sections provide legislative authority to postpone proceedings or to make other provisions for care of a person of unsound mind.
 - 12] In advancing that second ground of appeal, Counsel for the appellant is merely repeating the first ground. A ground that was soundly rejected by the Court below and a ground that is similarly rejected by this Court.
 - 13] It can be seen from the record of proceedings the steps that this Appellant took, apart from escape, to avoid proceedings against her.
 - 14] The Magistrate was perfectly entitled to rely on an extremely authoritative report that he had called for himself and to reject a second report that has never been seen by this court.
 - 15] The appeal against conviction is vexatious and it is dismissed.

Sentence

- 16] Although counsel for the appellant has advanced several grounds of appeal against the sentence, the thrust of her oral arguments at hearing was that the appellant had been in remand for this offence for 18 months and the learned Magistrate had discounted her sentence by only 5 months in respect of time served.
- 17] Unfortunately Counsel has misled the Court in this argument and had

she properly read the record of proceedings below, she would not have advanced this spurious position.

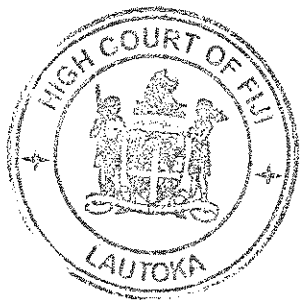
- 18] The appellant escaped from the Lautoka Police Station on 3rd February 2015 and was re-arrested shortly after and returned to Court on 17th February, charged with escape and remanded in custody pending trial.
- 19] Counsel had submitted that this period of remand commencing 17th February, was in respect of the escape only and nothing else. That submission is not correct and was misleading.
- 20] In February the Appellant was also in custody for several other matters including cases from Lautoka Magistrates Court (711/14 and 608/09). The appellant also faced two matters in the Ba Magistrates Court but it is not known whether she had been remanded for those or not.
- 21] A perusal of File 608/09 a case of deception from the Lautoka Magistrates Court reveals an Affidavit of this Appellant (the accused in the mentioned 608/09 case) dated 23 March 2015 in which she deposes that she is in custody for the case and wished to apply for bail.
- 22] Bail was refused by the Magistrate and the record shows that she was further remanded in custody until the 18th August 2015. A production order shows that she was ordered to be brought before the court on 4th December 2015.
- 23] Similar findings with regard to remand are found in respect of Lautoka File 711/14. This was another charge of deception. She was being held in remand in respect of this case from 17 February 2015 until January 2017.
- 24] The argument of time spent in custody not accounted for is totally without merit and it is disallowed. A proper reading of the record from below and a small amount of research (which this Court has been constrained to do) would have easily revealed the deceitful instructions given by this Appellant to her Counsel. It is necessary to note that during the course of the trial below a previous Legal Aid Counsel was professionally embarrassed after misleading the Court on instructions from this Appellant, and had to withdraw. That should have put this rather junior Counsel on notice.

- 25] The maximum penalty for escape is 2 years' imprisonment. The Supreme Court has said that the appropriate range of sentence is from 6 to 12 months (**Alifereti Misioka & Josua Nasiyaga** CAV 12/07 (25 Feb '08) and sentences for escape can never be served concurrently with existing sentences.
- 26] This is the position now reflected in section 22(2) of the Sentencing and Penalties Decree 2009 which exempts sentences for escape from being served concurrently.
- 27] Although not stated in the Sentencing Decree it would follow that a suspended sentence for escaping from custody would only be passed in exceptional circumstances given justified reasons from the Judge.
- 28] In sentencing the accused the Magistrate took into account the fact that she had at that time one previous conviction.
- 29] He took a starting point of 12 months' imprisonment and allowed her 3 months discount for her mitigating circumstances. He added 6 months for aggravating factors which he did not specify.
- 30] For reasons stated above he allowed but 5 months for time spent in custody for this offence (emphasis added) arriving at a final sentence of 10 months imprisonment.

Conclusion:

- 31] The Magistrate has started his sentence at the top of the tariff and has added 6 months for unstated aggravating features. Although this would appear rather harsh, it no doubt reflects the frustration of the Magistrate in having had to deal in this trial with multiple adjournments and applications and obfuscations mounted by this Appellant.
- 32] This Court too is frustrated by the dishonesty of the Appellant in the grounds and submissions she has advanced.
- 33] The sentence is harsh but not excessive. The starting point is within the range set by the Supreme Court and three months has been allowed for the mitigation advanced below.

- 34] It is of concern that six (6) months was added for unspecified aggravation. A Judicial Officer passing sentence must fully explain every step on the way to his final sentence. The only aggravation to the escape could be said to be the escape in the early hours before dawn, forcing the Police Officers on duty to leave their post and search for the escapee in the town. For this, this court would have added a term of four (4) months' imprisonment.
- 35] The sentence passed below is set aside pursuant to s. 256 (2) (a) of the Criminal Procedure Decree and a new sentence substituted.
- 36] The Magistrates' starting point of 12 months is retained but four months only is added to the sentence for the aggravation referred to above. Three months are deducted for mitigation (as ordered by the Magistrate) and five months for the time spent in custody for this crime alone.
- 37] The resultant sentence of eight months running from 27 October 2016 is the varied sentence passed by this Court.
- 38] The appeal against sentence succeeds to this extent.



P. Madigan
JUDGE

At Lautoka
9th February 2017