IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 43 of 2018

BETWEEN : **PITA KENI**

APPELLANT

A N D : **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

RESPONDENT

Counsel : Mr. M. Yunus for the Appellant.
: Ms. F. Pulewai for the Respondent.

Date of Hearing : 01 November, 2018
Date of Judgment : 15 November, 2018

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Nadi with one count of failure to render assistance contrary to section 16(2) to be read with sub-section (1) of the Prevention of Bribery Promulgation No. 12 of

2007. It was alleged the appellant between the 29th day of September 2013 and 21st day of March, 2014 at Nadi whilst being a public servant namely an Assistant Superintendent of the Fiji Police Force without reasonable excuse failed to render assistance to FICAC Commission Officer namely Jeremaia Natoko by refusing to provide information requested that was relevant to the bribery case against former Acting Inspector Timoci Naulu in the Nadi Magistrates Court Case Number 953 of 2013.

2. In respect of the other count the appellant was charged with resisting or obstructing officers contrary to section 13A of the FICAC Promulgation No. 11 of 2007. It was alleged the appellant between 29th September, 2013 and 21st March, 2014 at Nadi whilst being a public servant namely an Assistant Superintendent of the Fiji Police Force obstructed FICAC Commission Officers in the execution of their duties as Commission Officers by interfering with the investigation into the bribery case against Former Acting Inspector Timoci Naulu in the Nadi Magistrates Court Case Number 953 of 2013.

3. The appellant pleaded not guilty to the charges and the matter proceeded to trial. The prosecution called three witnesses, the defence also called three witnesses including the accused.

4. After trial the appellant was found guilty of count one and convicted accordingly. In respect of count two the appellant was acquitted.

5. After hearing mitigation, on 11 June, 2018 the appellant was sentenced to 6 months imprisonment suspended for 3 years with a fine of $500.00 to be paid in 30 days in default 50 days imprisonment.

6. By Notice of Motion dated 9 July, 2018 the appellant sought leave to file his Petition of Appeal which was out of time by one day.

7. On 18 July, 2018 by consent this court granted the appellant leave to appeal out of time.

PETITION OF APPEAL

8. The appellant being dissatisfied with the conviction and sentence filed the following grounds of appeal:

GROUND ONE

"The learned Magistrate erred in law and in fact when he failed to consider that police officers do not fall within the ambits of Public Official as per the interpretation section of the Prevention of Bribery Promulgation (Act) No 12 of 2007.

GROUND TWO

"The learned Trial Magistrate erred in law and in fact to allow the prosecution of the matter, despite the information filed by the Respondent was defective from the outset of the trial. In that the Appellant being a police officer did not fall within the ambits of Public Official under the interpretation section of the Prevention of Bribery Promulgation (Act) No. 12 of 2007.

GROUND THREE

"The learned Trial Magistrate erred in law when at paragraph 10 of his judgment he said that, 'as a result, the evidential burden of proving the

third element lies on the accused in this case and the prosecution needs to prove only the second and fourth element of the first count which is failure to render assistance.

9. Both counsel filed written submissions and also made oral submissions for which this court is grateful.

10. When the matter was for hearing on 1 November, 2018 the counsel for the appellant withdrew all grounds of appeal against conviction but proceeded against sentence appeal.

APPEAL AGAINST SENTENCE

GROUND FOUR

"The Learned Sentencing Magistrate erred in his sentencing discretion by not allowing a discharge without conviction based on the facts that the Appellant had a history of good service to the State, combined with a good character.

GROUND FIVE

"That the sentence is harsh and excessive in all the circumstances of the matter.

11. Both grounds of appeal will be dealt with together.

LAW

12. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must

demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentencing discretion.

13. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

> *"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-*
>
> *(i) Acted upon a wrong principle;*
>
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
>
> *(iii) Mistook the facts;*
>
> *(iv) Failed to take into account some relevant consideration."*

14. The learned counsel for the appellant submits that the learned Magistrate erred by acting upon a wrong principle and also allowed extraneous or irrelevant matters to guide him or affect him when he did not order a discharge without conviction.

15. Counsel further states that the appellant had a history of good service to the State combined with a good character and that this court should not rely on the case of *State v David Batiratu [2012] Revisional Case no. HAR 001 of 2012* since the comments made by Gates CJ was applicable to enforcement of safety and public health or tax legislations. The current case was different therefore *Batiratu's* case was not applicable.

16. Furthermore, counsel finds support in the case of *Ravind Kumar v State, Criminal Appeal No. 89 of 2007 (12 February, 2018)* where Madigan J at paragraphs 14 and 18 had stated:

Paragraph 14

"The appellant has served the State for 30 years in the Meteorological Department and he is presently the Director. He is required at times to travel abroad for conferences and meetings.

Paragraph 18

"This is an entirely suitable case for a conviction not be recorded in terms of the Chief Justice's judgment in Batiratu (supra) and pursuant to section 45 (1) of the Sentencing and Penalties Act 2009 this court dismisses the charges and does not record any conviction."

17. Counsel finally submits that a discharge without conviction was an appropriate sentence.

18. At the time of mitigation in the Magistrate's Court the appellant had sought a discharge without conviction which was refused by the learned Magistrate. The following paragraphs of the sentence are noteworthy:

Paragraph 9

"In the Court's view, it was never claimed by the Accused that he was famous and neither does a history of good service to the State combined with good character mandate that a discharge be accorded to the Accused. The latter are 'both strongly mitigatory factors'.

Paragraph 10

"On the issue of discharge, His Lordship the Chief Justice stated in Batiratu case [supra] as follows:
[27] It is clear from the cases that the public interest in enforcement and deterrence is of some significance when considering whether a discharge can be imposed. Because of the need to enforce safety and public health or tax legislation, the public interest lies in imposing a penalty and not a discharge in such cases. Penalties, whether fines or terms of imprisonment may override mitigating factors such as previous good character or other personal issues: Foster v The State (supra); Commissioner of Inland Revenue v George Rubine [1995] HAC79 of 1993; Tebutt v Commissioner of Inland Revenue Cr. App 108 of 1998S; LTA v Lochan Cr. App. HAA88.2002S (22nd November, 2002). [emphasis is mine]

Paragraph 11

"Having considered the submissions for and against a discharge, and considering the remarks by His Lordship the Chief Justice in Batiratu case [supra], it is the Court's finding that the previous good character or personal circumstances of the Accused including his long service history to the State as a police officer, though strongly mitigatory, is overridden by public interest which is for 'imposing a penalty and not a discharge'.

19. In *Batiratu's case* (supra) at paragraph 29 His Lordship Gates CJ mentioned the following questions that must be answered if a discharge without conviction is urged upon the sentencing court whether:

"(a) The offender is morally blameless.

(b) Whether only a technical breach in the law has occurred.

(c) Whether the offence is of a trivial or minor nature.

(d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.

(e) Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.

(f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender."

20. Furthermore, the Sentencing and Penalties Act provides for situations and circumstances where a court can consider a discharge without entering a conviction. Part IX begins with the heading "Dismissals, Discharges and Adjournments", section 43 of the Sentencing and Penalties Act states:

21. *"43. (1) An order may be made under this Part:*

(a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;

(b) to take account of the trivial, technical or minor nature of the offence committed;

(c) to allow for circumstances in which it is inappropriate to inflict any punishment other than nominal punishment;

(d) to allow for circumstances in which it is inappropriate to record a conviction;

(e) to allow for the existence of other extenuating or exceptional circumstances that justify a court showing mercy to an offender."

22. Section 45 specifically governs discharges or releases without conviction as follows:

(1) A court on being satisfied that a person is guilty of an offence may dismiss the charge and not record a conviction.

(2) A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) adjourn the proceedings for a period of up to 5 years and release the offender upon the offender giving an undertaking to comply with the conditions applying under sub-section (2), and any further conditions imposed by the court.

(3) An undertaking under sub-section (2) shall have conditions that —

(a) that the offender shall appear before the court if called onto do so during the period of the adjournment, and if the court so specifies, at the time to which the further hearing is adjourned;

(b) that the offender is of good behaviour during the period of the adjournment; and

(c) that the offender observes any special conditions imposed by the court.

(4) A court may make an order for restitution or compensation in accordance with Part X in addition to making an order under this section.

(5) An offender who has given an undertaking under sub-section (1) may be called upon to appear before the court —

(a) by order of the court;

(b) by notice issued by a court officer on the authority of the court.

(6) If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding."

23. The Fijian Courts have over the years developed the jurisprudence relating to discharge without conviction which commensurate with the Sentencing and Penalties Act. In *State v Patrick Nayacalagilagi and others (2009) FJHC 73; HAC165 of 2007 (17th March 2009)* Goundar J looked at the principles governing discharge without a conviction under the repealed section 44 of the Penal Code.

24. His lordship succinctly outlined the situations where the courts have exercised its discretion in regards to granting a discharge without conviction. His lordship at paragraph 3 mentioned the following:

"Subsequent authorities have held that absolute discharge without conviction is for the morally blameless offender, or for an offender who has committed only a technical breach of the law (State v. Nand Kumar [2001] HAA014/00L; State v Kisun Sami Krishna [2007] HAA040/07S; Land Transport Authority v Isimeli Neneboto [2002] HAA87/02. In Commissioner of Inland Revenue v Atunaisa Bani Druavesi [1997] 43 FLR 150 HAA 0012/97, Scott J held that the discharge powers under section 44 of the Penal Code should be exercised sparingly where direct or indirect consequences of convictions are out of all proportion to the gravity of the offence and after the court has balanced all the public interest considerations."

25. In the appeal of *The State v Mosese Jeke Cr. App HAA 010.2010 (2nd July 2010)* Goundar J substituted a term of 6 months imprisonment

suspended for 12 months. The Magistrate's Court had ordered an absolute discharge. The injuries to the complainant were minor scratches and tenderness as a result of two blows from the blunt side of a cane knife. There were other mitigating factors, however, the imposition of a term of imprisonment was necessary to demonstrate the seriousness with which the court viewed the offence of act with intent to cause grievous bodily harm together with the circumstances of aggravation, particularly the use of cane knife.

26. Goundar J correctly took into account the seriousness of the offending and at paragraph 11 mentioned about the use of cane knife as:

"...The court would not condone the use of a cane knife in a family conflict. The circumstances of the case warranted imposition of a sentence on the respondent despite his previous good character."

27. The submission by appellant's counsel that *Batiratu's* case does not apply is misconceived since the underlying principle emanating from *Batiratu's* case is that public interest plays a dominant role when a sentencer considers whether a discharge without conviction was warranted in a given situation which was mentioned at paragraph 27 in *Batiratu's* case as follows:

"It is clear from the cases that the public interest in enforcement and deterrence is of some significance when considering whether a discharge can be imposed. Because of the need to enforce safety and public interest lies in imposing a penalty and not a discharge in such cases. Penalties, whether fines or terms of imprisonment may override mitigating factors such as previous good character or other personal issues..."

28. The cases mentioned above takes into account general and specific

deterrence which public interest demands in imposing a penalty and not a discharge. In such cases fines or terms of imprisonment will override mitigating factors such as previous good character or other personal mitigating factors.

29. In *State v Nand Kumar Cr. App. No. HAA014 of 2000 (2 February, 2001)* Gates J (as he then was) in the matter of an appeal from the Magistrate's Court against an order of absolute discharge for the offence of common assault said:

"...The court, in its sentencing remarks, said rightly, it was faced with "a very awkward situation" for this accused was facing dismissal from his employment if a conviction were to be entered. Nevertheless, a discharge without conviction being entered, was not an appropriate sentence here. Absolute discharges are appropriate only in a limited number of circumstances, such as where no moral blame attaches (R v O'Toole (1971) 55 Cr App p 206) or where a mere technical breach of the law has occurred, perhaps by imprudence without dishonesty (R v Kavanagh (unreported) May 16th 1972 CA)".

30. The appellant submits that his service to the community as a Police Officer was not taken into account in the sentence. At paragraphs 13 and 14 of the sentence the learned Magistrate had correctly taken into account the mitigation presented on behalf of the appellant at paragraph 28 as follows:

"... The sentence is however reduced by 6 months imprisonment for a very strong and comprehensive mitigation inclusive of previous good character and being a first offender."

31. It is not for an Appellate Court to revisit mitigation which was before the Magistrate's Court at the time of sentencing unless manifest injustice will be caused to the appellant (see *Josaia Leone & Sakiusa Naulumatua vs.*

State [2011] HAA 11 of 2011 (8 July, 2011). Here the learned Magistrate had taken all the mitigating factors as presented into account and no manifest injustice has been caused to the appellant.

32. When it comes to whether a conviction is recorded or not the law bestows discretion upon the sentencing court as per section 16 of the Sentencing and Penalties Act. This discretion must be exercised judicially by the sentencer having regards to all the circumstances of the case including:
    (a) the nature of the offence;
    (b) the character and past history of the offender;
    (c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.

33. The appellant had pleaded not guilty, after hearing evidence the learned Magistrate by judgment dated 13 October, 2017 had found the appellant guilty and convicted him. The learned Magistrate had correctly recorded a conviction after finding the appellant guilty.

34. Considering the nature and circumstances of the offending it cannot be said to be a trivial offending. The maximum penalty under section 16 (2) of the Prevention of Bribery Promulgation No. 12 of 2007 is a fine of $20,000.00 and 1 year imprisonment.

35. Although the appellant was a first offender with an impeccable record a conviction was inevitable and warranted considering the nature and circumstances of the offending. Here the facts are much more serious where the appellant had not only delayed investigations but was deliberately unhelpful from the time his assistance was requested by the investigating officer from Fiji Independent Commission against Corruption. The evidence adduced at the first instance showed that the appellant was shielding his colleague from a bribery related investigation.

36. As a Senior Police Officer of many years experience the appellant knew or ought to have known the consequences of his actions. The nature of the offending called for a deterrence factor principle to be invoked by the Magistrate's Court which was just in all the circumstances of the case.

37. The learned Magistrate had complied with the purposes of the sentencing guidelines stated in section 4 (1) of the Sentencing and Penalties Act and the factors that must be taken into account namely section 4 (2).

38. It is not incumbent upon a court to list every mitigation and consider every point made by counsel. The court will of course consider and adopt all points that are relevant.

39. Furthermore, there is no requirement of the law that where there are several mitigating factors each one of them should be dealt with separately. The Supreme Court in *Solomone Qurai vs. The State, Criminal Petition No. CAV 24 of 2014 (20th August, 2015)* stated this very clearly at paragraph 53 in the following words:-

"Although section 4 (2) (j) of the Sentencing and Penalties [Act] requires the High Court Judge to have regard to the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence, there is no requirement that in any case where there are several mitigating circumstances, each one of them should be dealt with separately..."

40. *Ravind Kumar's* case (supra) is distinguished from the current case in that Mr. Kumar was charged with two counts under the Dog Act, the maximum sentence for failing to muzzle dangerous dog contrary to section 4 and dog attacking person contrary to section 5 is a fine of $100.00 upon conviction for each count. The appellant had pleaded

guilty to the charges which were minor offences here the offence committed was serious and the appellant was found guilty after trial.

41. There is no error by the learned Magistrate in the exercise of his sentence discretion the sentence is neither harsh nor excessive considering the circumstances of the offending a conviction was justified.

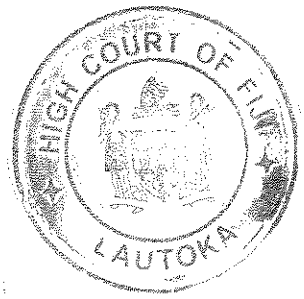
42. The appeal against sentence is dismissed.

ORDERS

1. The appeal against sentence is dismissed.

2. The sentence of the Magistrate's Court is affirmed.

3. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka
15 November, 2018

Solicitors

Messrs M.Y. Law, Ba for the Appellant.
FICAC, Legal Section for the Respondent.