IN THE HIGH COURT OF FIJIAT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

RUSIATE NARUBE

Appellant

CASE NO: HAA. 08 of 2018
[MC Suva, Crim. Case No. 124 of 2017]

Vs.

STATE

Respondent

Counsel	:	Mr. L. Qetaki for Appellant Ms. S. Navia for Respondent
Hearing on	:	24 May 2018
Judgment on	:	17 July 2018

JUDGMENT

1. The appellant was convicted by the magistrate court for one count of possession of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act of 2004 upon his plea of guilty. He was sentenced on 27th March 2017 for an imprisonment term of 40 months with a non-parole period of 30 months. The charge reads thus;

Statement of Offence

FOUND IN POSSESSION OF ILLICIT DRUGS: *contrary to section 5(a)) of the Illicit Drugs Act of 2004.*

Particulars of Offence

RUSIATE NARUBE, *on the 30th day of January 2017, at Lami in the Central Division without lawful authority possessed 1.5 kilograms of Cannabis Sativa an illicit drugs.*

2. The appellant had taken steps to file a document titled "NOTICE OF APPLICATION FOR EXTENSION OF TIME WITH WHICH TO APPEAL - CRIMINAL CASE NO: 124/2017" which had been received by the registry on 18/01/18. This document is dated 03/12/17. It is pertinent to note that no grounds of appeal against the sentence are outlined in this document. It is stated in that document that the notice is filed on the following grounds;

    1. *Lack of legal knowledge and need assistance while in prison.*
    2. *Need court to consider sentence in order to allow more rehabilitation programme available for offender (Appellant).*

3. Thereafter, another document was received by the High Court Registry on 25/01/18 with the title 'NOTICE OF APPEAL' which was dated 21/01/18 where the following were listed as the grounds of appeal against the sentence;

    1. *That the learned resident magistrate erred in law and in fact in imposing a very harsh sentence which manifest wrongly in principle in according to the establishment required by law.*
    2. *The learned magistrate erred in law and in fact in taking irrelevant factors into consideration in sentencing the appellant when he has only charged for one count of possession.*
    3. *The learned magistrate erred in law and in fact in not considering the provisions of the Sentencing and Penalties Decree 2009 when sentencing the appellant in order to allow more rehabilitation programme available for the appellant.*
    4. *The learned magistrate erred in law and in fact when imposing 2 years as an aggravating factors which was not co-related to the charge of possession.*

4. By way of the aforementioned document dated 03/12/17 the appellant had indicated his intention to appeal against his sentence and it is evident that he knew that his application is out of time. Even if the date on the said document is regarded as the date of filing this appeal, there is a delay of more than 7 months in filing this appeal.

5. The appellant retained the services of the Legal Aid Commission at a later stage and written submissions were filed by the said Commission on behalf of the appellant accordingly.

6. A party aggrieved by a decision of a magistrate has a right to appeal against such

decision within 28 days from the date of that decision. An appeal can be brought after that period only with the leave of the High Court. The High Court is given the power under section 248(2) to enlarge the period of limitation prescribed by section 248(1) for good cause.

7. Section 248(3) provides that;

"*(3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include –*

(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;

(b) any case in which a question of law of unusual difficulty is involved;

(c) a case in which the sanction of the Director of Public Prosecutions or of the commissioner of the Fiji Independent Commission Against Corruption is required by any law;

(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents."

8. Apart from the above factors, this court would also consider the following factors outlined in the case of ***Kumar v State; Sinu v State*** [2012] FJSC 17 in deciding whether there is a good cause to enlarge the period of limitation to file a petition of appeal provided under section 248 of the Criminal Procedure Act;

a) The reason for the failure to file within time.

b) The length of the delay.

c) Whether there is a ground of merit justifying the appellate court's consideration.

d) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

e) If time is enlarged, will the Respondent be unfairly prejudiced?

9. The submission made on behalf of the appellant does not provide any reasons for the delay of 07 months in filing this appeal. What is submitted as the first ground in the document dated 03/12/17 alluded to above which refers to lack of legal knowledge and lack of assistance while in prison appear to be the only reason the appellant had provided for his delay.

10. It is clear that the said reason does not come under any of the factors provided

under section 248(3) of the Criminal Procedure Act and also would not justify the delay of more than 7 months which is substantial. The appellant had legal representation and was represented by the Legal Aid Commission before the learned Magistrate.

11. I would now turn to the grounds of appeal to consider whether there is a ground of merit justifying this court's consideration or whether there is a ground of appeal that will probably succeed.

12. In the case of ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999)] the court of appeal said thus;

> *"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 mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error 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) 55 CLR 499)."*

13. Therefore, in order for this court to disturb the impugned sentence, the appellant should demonstrate that the Learned Magistrate in arriving at the sentence had;

    a) acted upon a wrong principle;
    b) allowed extraneous or irrelevant matters to guide or affect him;
    c) mistook the facts; or
    d) did not take into account some relevant consideration.

14. The drug, *cannabis sativa* found in the possession of the appellant was in the form of dried leaves and the quantity was 1.5kg. The Learned Magistrate had used the sentencing tariff established in ***Sulua v. State*** [2012] FJCA 33 to sentence the appellant and he had correctly identified that the case falls under the third category of that tariff where the sentence should be an imprisonment term between 3 years and 7 years.

15. The Learned Magistrate had considered the weight of the drug found in the

possession of the appellant and the fact that the appellant had the drugs in his possession to 'sell and make money' as admitted by the appellant in his mitigation to add 02 years to the sentence and had deducted 2 years in view of the mitigating factors he identified. I note that the Learned Magistrate had considered the appellant as a first offender despite the fact that a conviction was recorded in 2005. Finally the Learned Magistrate had deducted 20 months in view of the early guilty plea which was one-third of the interim sentence he reached after adjusting the sentence in view of the aggravating and mitigating factors.

16. In selecting the starting point of 5 years imprisonment where the applicable sentencing tariff is 3 to 7 years, the Learned Magistrate said thus;

> *"Considering the nature of offending and your culpability, I select 5 years imprisonment as the starting point".*

17. In view of the language used in the above sentence, it is evident that the Learned Magistrate had used the same aggravating factors which he took into account to enhance the sentence by 02 years when he had selected the high starting point. I cannot find any other facts in the summary of facts apart from the aggravating factors that are outlined in the sentence that can be considered as "nature of offending" or "culpability" to add 2 years to the lower end of the applicable tariff to have the starting point of 5 years.

18. I am compelled to form the view that the first ground will probably succeed given the double counting that is reflected in the impugned sentence. In my view, there is a good cause in this case to enlarge the period of limitation prescribed under section 248.

19. In the circumstances, I would grant the appellant leave to appeal on the first ground of appeal by enlarging the period of limitation accordingly.

20. In this case the appellant had in his possession 500g more than the lower limit of the weight of the drugs that is considered for the third tariff category in ***Sulua*** (supra). This factor would justify selecting a starting point above the lower end of

the tariff but certainly would not justify selecting a starting point 2 years above the lower end of the tariff.

21. The third category of the sentencing tariff established in ***Sulua*** (supra) applies when the weight of the drug found in possession is between 1000grams and 4000grams. The range of the sentence is 3 years to 7 years imprisonment. It is pertinent to note that for 3000grams beyond the lower end of the weight which is 1000grams, the there is an increase of 4 years. Therefore it could be deduced that for every 500grams there is an increase of 8 months. It is my considered view that, in order to arrive at a just and a fair sentence and in order to maintain parity in the sentences for the possession of illicit drugs under the 3rd category pronounced in ***Sulua*** (supra), a sentencer should bear this fact in mind when taking into account the weight of the drugs either in selecting the starting point or as an aggravating factor.

22. In the instant case, apart from selecting the high starting point, the Learned Magistrate had further increased the sentence by 2 years for the aggravating factor he had described as follows;

"The amount of the drugs suggest this was for commercial purpose and in your mitigation also you accepted that."

23. The above statement suggests that the Learned Magistrate had considered the weight of the drug to further increase the sentence.

24. The above circumstances compels me to substitute the sentence imposed by the Learned Magistrate in terms of section 256(3) of the Criminal Procedure Act 2009.

25. Taking into account the fact that the appellant had 1.5kg of cannabis sativa in his possession; the fact that he had the drug in his possession for commercial purposes which I would consider as an aggravating factor; his previous good character where he had not had any conflicts with the law for 12 years which I would consider as a mitigating factor; in my judgment, the appellant's sentence should be an imprisonment term of 4 years. In view of the fact that the appellant had pleaded guilty at the earliest opportunity, I would grant him a one-third discount and deduct 1 year and 4 months from the above sentence. In the circumstances, I would

sentence the appellant to an imprisonment term of 2 years and 8 months. I order that the appellant is not eligible to be released on parole until he serves 02 years of the sentence in terms of section 18(1) of the Sentencing and Penalties Act.

26. According to the summary of facts the appellant was arrested on 30/01/17 and therefore he had spent close to 2 months in custody in view of this case before being sentenced on 27/03/17. I hold that the period that should be regarded as served pursuant to the provisions of section 24 of the Sentencing and Penalties Act should be 2 months.

27. In the result, the appellant is sentenced to an imprisonment term of 2 years and 8 months with a non-parole period of 2 years. In view of the period spent in custody, the remaining period of the head sentence is 2 years and 6 months; and the remaining non-parole period is 1 year and 10 months.

Orders;

a) Leave to appeal out of time granted on the first ground of appeal;
b) The appeal against the sentence is allowed;
c) The sentence imposed in Magistrate Court Suva, Crim. Case No. 124 of 2017 dated 27/03/17 is quashed and substituted with the following sentence effective from 27/03/17;

Imprisonment term of 2 years and 8 months with a non-parole period of 2 years.

Time remaining to be served is;

Head sentence – 2 years and 6 months

Non-parole period – 1 year and 10 months

HIGH COURT OF FIJI SUVA

Vinsent S. Perera
JUDGE

Solicitors;
Legal Aid Commission for Appellant.
Office of the Director of Public Prosecutions for State.