IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAA 70 of 2019

BETWEEN **DAVID DAVENDRA PRASAD**

APPELLANT

AND **THE STATE**

RESPONDENT

Counsel	:	Mr. M. Naivalu for the Appellant
	:	Ms. R. Uce for the Respondent
Date of Hearing	:	27 February, 2020
Date of Judgment	:	28 February, 2020

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Nadi with two counts of unlawful possession of illicit drugs contrary to section 5(a) of Illicit Drugs Control Act 2004.

2. In respect of count one it was alleged that the appellant on the 3rd of June, 2016 at Nadi without lawful authority was found in possession of illicit drugs name methamphetamine weighing 0.1 grams.

3. In respect of count two it was alleged that the appellant on the 3rd day of June, 2016 at Nadi without lawful authority was found in possession of illicit drugs name cannabis sativa weighing 0.5 grams.

4. When the appellant first appeared in court on 13th June, 2016 his plea was deferred. After some adjournments, on 12th October, 2016 the appellant pleaded not guilty to both the counts. After numerous adjournments, on 12th March, 2018 the appellant pleaded guilty to both the counts after the charges were read and explained to the accused in the presence of his counsel.

5. Thereafter on the same day the summary of facts was admitted by the appellant, the matter was adjourned to next day for sentencing at 2.30pm. On 13th March, the appellant raised some complaints about his counsel, the guilty plea was vacated and a not guilty plea was entered on both counts.

6. After some adjournments, the matter was assigned a voir dire hearing date on 27th May, 2019. On this date the appellant who was represented by counsel pleaded guilty to both the counts after the charges were read and explained to him.

7. On this date the appellant admitted the summary of facts read to him. The brief facts were as follows:

   On 3rd day of June, 2016 at about 5.30pm there was a police raid conducted at the house of the appellant upon receipt of information. The raid was conducted by police officer DC 3313 Joshua (PW1) and DC 3800 Emori (PW2) of Namaka Police Station. In the presence of the appellant (PW1) discovered white crystal substance wrapped in clear plastic hidden inside the toilet pan of the appellant's bedroom. PW2 also discovered cannabis sativa wrapped in clear plastic inside the fridge of the appellant.

Both plastics were sent for testing, the Principal Scientific Officer of the Fiji Police Forensic Chemistry Laboratory certified the contents as follows:

a) The white substance tested positive for methamphetamine with total weight of 0.1 grams; and
b) The dried leaves tested positive to Indian Hemp botanically known as cannabis sativa with a weight of 0.5 grams.

The accused was arrested, caution interviewed and charged.

8. After hearing mitigation and upon being satisfied that the appellant had entered an unequivocal plea the learned Magistrate convicted the appellant.

9. On 12th September, 2019 the appellant was sentenced to 2½ years imprisonment for the first count and 3 months imprisonment for the second count which was made concurrent to the first count with a non-parole period of 1½ years to be served.

10. The appellant being dissatisfied with the sentence filed a timely appeal against the sentence as follows:

APPEAL AGAINST SENTENCE

(a) That the learned Magistrate erred in law when she chose to begin her sentencing for count 1 at the higher end of the applicable sentencing tariff.

(b) That the learned Magistrate erred in law when she did not apply the sentencing principles and options available to her according to category one offence for count two.

(c) *That the learned Magistrate erred in law and/or in fact when according to her sentencing for count two she deemed it unfit to consider your Petitioner's mitigation for that count.*

(d) *That the learned Magistrate erred in law and/ or in fact when she failed to consider section 4(2)(i) of the Sentencing and Penalties Act in your Petitioner being a first offender.*

(e) *That the learned Magistrate erred in law and/ or in fact in sentencing your Petitioner to 2 and ½ years custodial, 1½ years non-parole for a 0.1 gram of Methamphetamine possession.*

(f) *That your Petitioner appeals against sentence with respect being manifestly harsh and excessive and wrong in principle in all the circumstances of the case in that the honourable court was amenable to the options available to it pursuant to section 4 of the Sentencing & Penalties [Act] 2009 including a partial sentence to effect rehabilitation.*

LAW

11. 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 sentence discretion.

12. 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."

GROUND ONE

That the learned Magistrate erred in law when she chose to begin her sentencing for count one at the higher end of the applicable sentencing tariff.

13. The counsel for the applicant argued that the learned Magistrate had erred when she took the higher range of the tariff which was maximum of 4½ years which was contrary to the principle in *Laisiasa Koroivuki v State, AAU 0018 of 2010 (05/03/2013).*

14. The learned Magistrate at paragraph 9 of the sentence had taken into account the case authority of *Laisiasa Koroivuki* (supra).

15. There is no doubt that in *Koroivuki* case (supra) the Court of Appeal as a matter of good practice encouraged the sentencing court to take into account a starting point from the lower or middle range of the tariff.

16. For count one the learned Magistrate identified the correct tariff as per *Joseph Abourizk vs. State, AAU0054 of 2016 (7 June, 2019)* to be between 2½ years to 4½ years imprisonment.

17. Although the learned Magistrate had taken 4½ years imprisonment as the starting point she did not add any aggravating factors. After allowing for

mitigation the final sentence was 2½ years imprisonment which was within the tariff.

18. In view of the above, there is no substantial miscarriage of justice, although the starting point was on the higher scale the learned Magistrate did not add any aggravating factors and the final sentence was within the accepted tariff.

19. This ground of appeal is dismissed due to lack of merits.

GROUND TWO

That the learned Magistrate erred in law when she did not apply the sentencing principles and options available to her according to category one offence for count two.

GROUND THREE

That the learned Magistrate erred in law and/or in fact when according to her sentencing for count two she deemed it unfit to consider your Petitioner's mitigation for that count.

20. The above two grounds of appeal were abandoned during the hearing.

GROUND FOUR

That the learned Magistrate erred in law and/ or in fact when she failed to consider section 4(2) (i) of the Sentencing and Penalties Act in your Petitioner being a first offender.

21. The counsel for the appellant submitted that the learned Magistrate did not give any discount for the appellant's good character being a first offender.

22. At paragraph 12 of the sentence the learned Magistrate had set out the mitigating factors from (i) to (vi) but there is nothing mentioned in respect of the appellant being the first offender. Although the learned Magistrate did

not specifically state the appellant's good character as part of mitigation she did so at paragraph 16 of the sentence as follows:

"You are a first offender. Your counsel requested that a non-custodial sentence and a second chance be given for the offence of having in possession methamphetamine which is a dangerous substance. This is considered as a social harm which should be eradicated from Fiji without leaving any ground to spread through the society. Therefore, this offence is considered as a serious offence in the Fiji judiciary and a custodial sentence is inevitable."

23. This suggests that the learned magistrate was aware that the appellant was a first offender. Even though the learned Magistrate had omitted to mention the appellant's good character when pointing out the mitigating factors at paragraph 12 of the sentence no manifest injustice has been caused to the appellant. The final sentence is within tariff and even if good character was taken as a mitigating factor the final sentence would not have been affected. When the sentence is looked at a holistically the learned Magistrate had taken into account all the relevant mitigating factors.

24. It is not for an Appellate Court to revisit mitigation which was before the Magistrate 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).*

25. 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) (j).

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

27. 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..."*

28. It is also noted that at paragraph 14 of the judgment the learned Magistrate had given a discount of one year for early guilty which was incorrectly allowed since the appellant did not enter an early guilty plea (see paragraphs 4 to 6 above). The appellant had pleaded guilty on the day of the voir dire hearing, yet a substantial discount was given by the learned Magistrate which is favourable to the appellant.

29. This ground of appeal is dismissed due to lack of merits.

GROUND FIVE

That the learned Magistrate erred in law and/ or in fact in sentencing your Petitioner to 2 and ½ years custodial, 1½ years non-parole for a 0.1 gram of Methamphetamine possession.

GROUND SIX

That your Petitioner appeals against sentence with respect being manifestly harsh and excessive and wrong in principle in all the circumstances of the case in that the honourable court was amenable to the options available to it pursuant to section 4 of the Sentencing & Penalties [Act] 2009 including a partial sentence to effect rehabilitation.

30. Both the above grounds were argued together the main complaint is that since the appellant was a first offender the learned Magistrate could have given him a one year non-parole period for possessing 0.1 gram of methamphetamine or a partial suspended sentence.

31. The submission of counsel is misconceived, according to section 18 of the Sentencing and Penalties Act (as amended) any non-parole period must be at least 6 months away from the head sentence. Here the head sentence was 2½ years imprisonment and the learned Magistrate after exercising her discretion imposed a non-parole period of 1 ½ years which was 12 months less than the head sentence. This was favourable to the appellant and therefore no error can be attributed to the learned Magistrate.

32. In respect of the argument that for 0.1 gram of methamphetamine the term of imprisonment should have been partially suspended does not make sense. The Court of Appeal in *Joseph Abourizk case* (supra) has set down the following tariff for all hard/ major drugs (such as cocaine, heroin and methamphetamine etc.) at paragraph 145 as follows:

Having considered all the material available and judicial pronouncements in Fiji and in other jurisdictions, I set the following guidelines for tariff in sentences for all hard/major drugs (such as Cocaine, Heroin, and Methamphetamine etc.). These guidelines may apply across all acts identified under section 5(a) and 5(b) of the Illicit Drugs Control Act 2004 subject to relevant provisions of law, mitigating and aggravating circumstances and sentencing discretion in individual cases.

Category 01: ***– Up to 05g – 02 ½ years to 04 ½ years' imprisonment.***
Category 02: ***– More than 05g up to 250g - 03 ½ years to 10 years' imprisonment.***
Category 03: ***– More than 250g up to 500g - 09 years to 16 years' imprisonment.***

***Category 04**:– More than 500g up to 01kg – 15 years to 22 years' imprisonment.*

***Category 05** – More than 01kg - 20 years to life imprisonment*

33. The Court of Appeal has clearly set out the different categories of sentencing for the possession of methamphetamine/hard drugs to be terms of imprisonment only there is no provision for a partial suspension of sentence.

34. The above grounds of appeal are also dismissed due to lack of merits.

ORDERS

a) The appeal against sentence is dismissed.
b) The sentence of the Magistrate's Court is affirmed.
c) 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka
28 February, 2020

Solicitors
Messrs Law Naivalu for the Appellant.
Office of the Director of Public Prosecutions for the State.