IN THE HIGH COURT OF FIJI AT SUVA

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

[APPELLATE JURISDICTION]

RAVINDRA SINGH

Appellant

CASE NO: HAA. 35 of 2019
[Nausori Criminal. Case No. 220 of 2018]

Vs.

STATE

Respondent

Counsel	**:**	Mr. A. Naco for the Appellant Mr. Y. Prasad for the Respondent
Hearing on	**:**	24 June, 2020
Judgment on	**:**	16 July, 2020

JUDGMENT

Introduction

1. The appellant was charged before the Magistrate Court at Nausori for one count of found in possession of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act 2004. The charge reads thus;

> ***Statement of Offence (a)***
> **FOUND IN POSSESSION OF ILLICIT DRUGS:** Contrary to section 5 (a) of the Illicit Drugs Control Act of 2004.

Particulars of Offence (b)

RAVINDRA SINGH, on the 23rd day of March, 2018 at Nausori in the Central Division, without lawful authority had in his possession 0.2 grams of Methamphetamine, an illicit drugs.

2. After trial, on 22/08/19, the appellant was convicted by the Learned Magistrate as charged and, on 10/09/19 was sentenced to an imprisonment term of 02 years and 07 months (02 years and 06 months remaining to be served) with a non-parole period of 02 years.

3. Being aggrieved by the conviction and the sentence, the appellant had taken steps to file a timely appeal on the following grounds of appeal;

   1. *THAT the Magistrate erred in law when he overlooked the fact that the Search Warrant that was relied upon by the Police was dated the day after the Search was done resulting in the illegal and unlawful collation of the evidence by the State.*
   2. *THAT the Magistrate erred in law and in fact when he satisfied himself that the chain of custody of the said drugs was intact in spite of the State not calling the a Corporal Leone Davila who was given custody of the drugs and then took it to the Government analyst for analysis.*
   3. *THAT the Magistrate erred in law and in fact when he proceeded is not hearing the evidence of Corporal Leone Davila which was crucial to the defence of the Appellant as he was the police fingerprint expert.*
   4. *THAT the learned trial Magistrate took into account irrelevant matters when he referred to in his sentencing remarks of "Recently the Fiji police revealed that Nakasi-Nausori corridor has been identified as the main market of methamphetamine in Fiji" resulting in a manifestly excessive sentence.*
   5. *THAT the sentence passed against the Appellant is disproportionate in all the circumstances of the case and failed to properly consider relevant issues whilst taking into account irrelevant matters resulting in a sentence which is manifestly excessive.*
   6. *THAT the learned trial magistrate erred in law when he failed to properly address the evidence applicable to each element of each of the count distinctly and separately as required by law, the failure of which resulted in a judgment which was perverse and amounts to a miscarriage of justice.*

4. Subsequently, the counsel for the appellant by notice dated 02/06/20 submitted

the following as an additional ground of appeal against conviction;

> *That the Magistrate erred in law and fact when he refused the application for an adjournment by the Appellant through his Counsel to allow them to subpoena a critical witness who was also present at the time of his arrest by the police.*

5. Then on the date of the hearing, the counsel for the appellant informed the court that he will only be relying on the additional ground of appeal alluded to above in relation to the appeal against the conviction and only on the fifth ground outlined in the notice of appeal in relation to the appeal against the sentence. The remaining grounds of appeal in the notice of appeal were thereby abandoned.

The factual matrix

6. The prosecution case was that the appellant was strip searched during a raid conducted in his office by the police on 23/03/18 and 0.2 grams of methamphetamine was found hidden in his underwear. The appellant had taken up the position that nothing was found on him during the search and the police had framed him.

Discussion

The ground of appeal against conviction

7. The appellant assails the conviction based on the allegation that the Learned Magistrate refused to allow an application by the appellant for an adjournment in order to summon a critical defence witness.

8. A party cannot secure an adjournment of a hearing in a criminal case as of right. Sections 170(1) and 170(2) of the Criminal Procedure Act 2009 reads thus;

> *Adjournment*
>
> *170. (1) During the hearing of any case, the magistrate must not normally allow any adjournment other than from day to day consecutively until the trial has reached its conclusion, unless there is good cause, which is to be stated in the record.*
> *(2) For the purpose of sub-section (1) "good cause" includes the reasonably excusable absence of a party or witness or of a party's lawyer.*

9. Section 179 of the Criminal Procedure Act states thus;

The defence

179. (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require the making of a defence, the court shall —

(a) again explain the substance of the charge to the accused; and

(b) inform the accused of the right to —

(i) give evidence on oath from the witness box, and that, if evidence is given, the accused will be liable to cross-examination; or

(ii) make a statement to the court that is not on oath; and

(c) ask the accused whether he or she has any witnesses to examine or other evidence to adduce in his or her defence; and

(d) the court shall then hear the accused and his witnesses, and other evidence (if any).

(2) If the accused person states that he or she has witnesses to call but that they are not present in court, and the court is satisfied that —

(a) the absence of the witnesses is not due to any fault or neglect of the accused person; and

(b) there is a likelihood that they could, if present, give material evidence on behalf of the accused person —

the court may adjourn the trial and issue process, or take other steps in accordance with this Decree to compel the attendance of the witnesses.
[Emphasis added]

10. The issue raised on the appeal against the conviction falls squarely within the ambit of section 179(2) of the Criminal Procedure Act. When the Magistrate Court had required the making of a defence and the accused wants to have the hearing adjourned to call witnesses who are not present in court, the accused should satisfy the court that;

a) The absence of the witnesses is not due to any fault or neglect of the accused person (or his/ her counsel); and

b) There is a likelihood that they could, if present, give material evidence on behalf of the accused person

11. The appellant failed to demonstrate before this court that material sufficient to satisfy the Learned Magistrate in relation to the two tests provided under section 179(2) alluded to above was placed before the Learned Magistrate when the adjournment in question was sought and therefore the Learned Magistrate erred by not granting the said adjournment. On the other hand, the relevant court record in fact suggests that the appellant and/ or his counsel who appeared before the Magistrate Court had not exercised due diligence in taking steps to summon the witness in question as a defence witness.

12. According to the relevant court record, the appellant was produced before the Magistrate Court on 26/03/18. The hearing before the Learned Magistrate had commenced on 01/07/19 where the prosecution case was closed on the same day. The case was thereafter adjourned to 05/07/19 for the defence case. On the said date, the Learned Magistrate had granted an adjournment for the reason that the defence counsel was sick. The hearing was accordingly adjourned to 17/07/19. On 17/07/19 the appellant had been absent and the hearing was again adjourned to 31/07/19. On 31/07/19 the case had been adjourned to 09/08/19 for the reason that the appellant was sick. On 09/08/19 both the accused and the defence counsel had been absent and the case was adjourned to 12/08/19. On 12/08/19, the Learned Magistrate had further adjourned the hearing to 16/08/19 for the reason that the counsel for the defence had to attend High Court.

13. The defence case had finally commenced on 16/08/19 after the appellant being granted five adjournments where the appellant and another defence witness had given evidence on that day. After the evidence of the second defence witness was recorded, the unsuccessful application for adjournment which is the subject matter of this appeal has been made, seeking further 14 days to subpoena a third witness. The Learned Magistrate has been informed that the witness in question has refused to come to court when the appellant had approached him.

14. Thus, from the date the prosecution case was closed, until the date the application for the adjournment relevant to this appeal was made, the Learned Magistrate had

granted five adjournments due to the absence of either the appellant or his counsel. More importantly, the appellant and his counsel had sufficient time and opportunity at least from 01/07/19 until 16/08/19 to take steps to organize and summon the necessary defence witnesses.

15. Based on the above circumstances that are reflected in the relevant court record, it is manifestly clear that the appellant could not have passed the first of the two tests provided under section 179(2) alluded to above. Therefore, the Learned Magistrate had not erred by refusing to grant the adjournment sought by the appellant on 16/08/19.

16. Even though the counsel for the appellant initially claimed that this particular witness whom the appellant was unable to call was a crucial witness for the defence, when questioned by the court, the counsel said that the said witness had been present at the time of arrest of the appellant and could have corroborated the appellant's version.

17. The case at hand was not one where the burden of establishing a particular defence would shift to the appellant. The appellant did not deny criminal responsibility based on any of the specific provisions to that effect in the Crimes Act 2009. His defence was one of denial. Whereas the prosecution (police) witnesses had testified that the drugs were found inside the appellant's underwear during the strip search, the appellant had claimed that those witnesses have lied and nothing was found in his possession during the strip search.

18. It was clear from the submissions made on behalf of the appellant that the evidence relating to the appellant's defence was raised when the appellant had given his evidence. There appear to be no evidence the witness in question could offer in relation to the appellant's defence, other than what the appellant could have offered in his evidence.

19. Therefore, given the material placed before me, not only that I am satisfied that the

Learned Magistrate had not erred when the application for the adjournment made on 16/08/19 was refused, I am also satisfied that the defence case was not affected by the absence of the evidence of the witness in question.

20. In the circumstances, the sole ground against conviction should fail.

21. I note that the Learned Magistrate in his judgment has listed "without lawful authority" which law identifies as a 'negative averment', as an element the prosecution is required to prove. Section 124 of the Criminal Procedure Act which expressly deals with negative averments, provides thus;

> *Division 4 — Negative Averments*
>
> *124. — (1) Any exception, exemption, proviso, excuse or qualification —*
>
> *(a) whether it does or does not appear in the same section as the description of the offence in the Act or Decree or Promulgation creating the offence; and*
>
> *(b) whether or not it is specified or negatived in the charge or complaint —*
>
> *is to be proved by the accused person on a balance of probabilities.*
>
> *(2) No proof in relation to any relevant exception, exemption, proviso, excuse or qualification applying under any Act or Decree or Promulgation to any offence shall be required from the prosecution.*

22. Therefore, the averment "without lawful authority" in section 5(a) of the Illicit Drugs Control Act 2004 is not an element the prosecution is required to prove. If an accused charged with that offence claims that he/ she had lawful authority to engage in the conduct in relation to the drugs in question, the burden of proving that is on that accused where it should be proved on a balance of probabilities.

The ground of appeal against sentence

23. The appellant assails the sentence on the basis that the sentence is "disproportionate in all the circumstances of the case and failed to properly consider relevant issues whilst taking into account irrelevant matters".

24. 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).*"

25. 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.

26. The appellant in this case claims that the Learned Magistrate had failed to consider relevant matters when determining the sentence.

27. The Learned Magistrate has relied on the majority decision in the case of ***Abourizk v State*** [2019] FJCA 98; AAU0054.2016 (7 June 2019) in identifying the applicable sentencing tariff. Accordingly the tariff applied by the Learned Magistrate was 2 ½ years to 4 ½ years of imprisonment.

28. The Learned Magistrate had mentioned in the impugned decision that he will be using the instinctive synthesis method of sentencing. That explains why a starting point was not selected by him. The Magistrate had stated that there are no aggravating factors, but listed three points identifying them as the factors submitted by the counsel for the appellant in mitigation. It is further noted that the appellant was a first offender. The Learned Magistrate has stated that the final sentence is an imprisonment term of 02 years and 07 months. Subsequantly, after deducting one month in view of the time spent in remand the Magistrate has declared that the appellant should serve 02 years and 06 months with a non-parole period of 02 years.

29. The counsel for the appellant has submitted that the Learned Magistrate had failed to consider the factors relevant to the case when the appellant was sentenced. He argued that the Magistrate was required to do so in view of the following dictum of Prematilaka JA in ***Abourizk*** (supra) at paragraph 145 in relation to the new sentencing tariff established in that case for offences involving hard/ major drugs;

> *". . . 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."*

30. The counsel has pointed out that the majority bench of the Court of Appeal in ***Abourizk*** (supra) was guided by the case of ***R v Fatu*** [2006] 2 NZLR 72 in establishing the aforementioned tariff, but however, the relevant tariff band according to ***Fatu*** (supra) was applicable to supply of drugs and not possession. The counsel for the appellant argued that the Learned Magistrate should have taken into account the fact that this was a case of possession and not of supply when determining the appropriate sentence, because the Court of Appeal in the aforementioned paragraph of the judgment in ***Abourizk*** (supra) has stated that the relevant guidelines should be applied subject to *inter alia* the sentencing discretion in individual cases.

31. I have sympathy for the argument raised by the counsel for the appellant. That is, it is just and appropriate to deal with possession, sale and supply, importation and manufacturing differently when it comes to sentencing as it was done in ***Fatu*** (supra) where different tariff bands were established in relation to sale and supply, importation and manufacturing. Needless to say, given the level of harm and the need for deterrence; manufacturing drugs is more serious compared to importation; importation of drugs is more serious compared to sale and supply; and sale and supply of drugs is more serious compared to mere possession.

32. However, the dictum in ***Abourizk*** (supra) alluded to above in paragraph 29 clearly dismisses the said argument raised on behalf of the appellant. Moreover, it is not

clear what the majority bench of the Court of Appeal meant by stating that the relevant guidelines should be applied subject to the sentencing discretion in individual cases and therefore whether that statement sanctions deviation from the relevant tariff band based on the facts of the case. It is pertinent to note however that in ***Fatu*** (supra) at paragraph 36, the court had made it clear that "*in cases where small quantities of methamphetamine have been imported for personal consumption, it is open to sentencing Judges to treat band one as not applicable*".

33. Therefore, the arguments presented on behalf of the appellant in relation to the issue raised in the ground of appeal against the sentence cannot succeed. However, even though it is not raised on behalf of the appellant, I note that though the Learned Magistrate had identified certain mitigating factors, no discount has been given in view of same.

34. According to ***Abourizk*** (supra), where the quantity of the drugs involved is less than 5 grams, the sentence should be an imprisonment term between 2 ½ years to 4 ½ years. The quantity involved in the instant case was 0.2 grams. For the reason that this tariff is based entirely on the quantity of the drugs involved, I thought it appropriate to calculate the term of imprisonment that is proportionate to 0.2 grams, given the aforementioned range. For the weight range of 0.1 grams to 5 grams (50 units), the sentencing range is 24 months.

35. Accordingly the relevant term that corresponds to 0.1 grams is 14.4 days [24x30/50] and for 0.2 grams it is 28.8 days which is around one month. Therefore, an offence under section 5(a) of the Illicit Drugs Control Act that involves 0.2 grams of methamphetamine without any other aggravating factor would attract a term of 02 years and 07 months imprisonment. This was however the final sentence arrived at by the Learned Magistrate. Given the Learned Magistrate's conclusion in the impugned decision that there were no aggravating factors but that there were mitigating factors, it is then clear that no discount has been given in view of any of the mitigating factors that were identified.

36. It appears that the Learned Magistrate had overlooked to give effect to the mitigating factors in determining the sentence. In my view, this is a danger inherent with the instinctive synthesis method. Instinctive synthesis method also does not support very well the notions of transparency and accountability. The application of this method poses a substantial challenge to the appellate courts when dealing with appeals against the sentence because the thought process of the sentencer in arriving at the final sentence cannot be analysed by the appeal court when this method is used. However, given the above discussion, it is clear that the Learned Magistrate had not considered relevant factors (the mitigating factors) when determining the final sentence in the case at hand.

37. It should be noted that, out of the points mentioned in the impugned decision as mitigating factors, the fact that the appellant was a first offender is in fact the only relevant and applicable factor that would justify a reduction of the sentence.

38. The appellant in this case was a first offender and was found in possession of 0.2 grams of methamphetamine. On the face of it, given the quantity of the drugs and the fact that the appellant was a first offender, an imprisonment term of 02 years and 07 months does not seem just and proportionate. All in all, I find that the Learned Magistrate had erred when he sentenced the appellant by not giving effect to the mitigating factor which was the fact that the appellant was a first offender when determining the sentence and that error has resulted in a sentence which is manifestly excessive.

39. In the circumstances, I have decided to set aside the sentence imposed by the Learned Magistrate and to pass a different sentence.

40. I would select 02 years and 06 months as the starting point of the sentence. I would add 01 month to reflect the quantity of the drugs involved which is 0.2 grams. Now the sentence is an imprisonment term of 02 years and 07 months. In view of the fact that the appellant was a first offender, I would deduct 07 months. Now the final sentence is an imprisonment term of 02 years. I would use the discretion provided

in section 18(3) of the Sentencing and Penalties Act 2009, not to impose a non-parole period. The month the appellant had spent in custody as at 10/09/19 will be regarded as a term already served. Therefore the time remaining to be served by the appellant from the date of sentence which is 10/09/19, is a term of 01 year and 11 months.

41. Considering the fact that the appellant is a first offender, the nature of the offending and again the quantity of the drugs involved, I would partially suspend the sentence upon the appellant completing 01 year of the said sentence where the remaining term would be suspended for 03 years.

Orders of the Court;

i.) Appeal against conviction is dismissed;
ii.) The conviction entered in Nausori Magistrate Court Criminal Case No. 220 of 2018 is affirmed;
iii.) Appeal against sentence is allowed;
iv.) The sentence imposed against the appellant in Nausori Magistrate Court Criminal Case No. 220 of 2018 dated 10/09/19 is quashed;
v.) A term of imprisonment of 02 years is substituted as the sentence to be effective from 10/09/19 where the time remaining to be served as at 10/09/19 is 01 year and 11 months; and
vi.) The remaining term of 01 year is suspended for a period of 03 years, upon the appellant completing a term of 11 months imprisonment from 10/09/19.

HIGH COURT OF FIJI
SUVA

Vinsent S. Perera
JUDGE

Solicitors;
Naco Chambers for the Accused
Office of the Director of Public Prosecutions for the State