IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 46 OF 2020

IN THE MATTER of an Appeal from the decision of the Magistrate's Court of Suva, in Criminal Case No. 1428 of 2019 and 1555 of 2020.

BETWEEN : ALIFASI KIRIKITI

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : The Appellant appears in person
Mr. Eoghn Samisoni for the Respondent

Date of Hearing : 11 February 2021

Judgment : 24 March 2021

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Suva. This is a joint Appeal in relation to 2 Magistrate's Court criminal cases- Criminal Case No. 1428 of 2019 and 1555 of 2020.

[2] In Criminal Case No. 1428 of 2019, the Appellant was charged in the Magistrate's Court of Suva for the following offence:

Statement of Offence (a)

UNLAWFUL POSSESSION OF ILLICIT DRUGS: Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.

Particulars of Offence (b)

ALIFASI KIRIKITI, on the 20th day of September 2019, at Suva, in the Central Division, without lawful authority possessed **3.4 grams of *Cannabis Sativa***, an illicit drug.

[3] In Criminal Case No. 1555 of 2020, the Appellant was charged in the Magistrate's Court of Suva for the following offence:

Statement of Offence (a)

UNLAWFUL POSSESSION OF ILLICIT DRUGS: Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.

Particulars of Offence (b)

ALIFASI KIRIKITI, on the 25th day of July 2020, at Suva, in the Central Division, without lawful authority possessed **1.6 grams of *Cannabis Sativa***, an illicit drug.

[4] In Criminal Case No. 1428 of 2019, the Appellant was first produced in Court on 24 September 2019, and was enlarged on bail. However, since he was not present in Court on 25 November 2019, a bench warrant was issued for his arrest. He was then arrested and produced in Court on 4 December 2019.

[5] On 28 July 2020, the Appellant had been again arrested and produced in Court in respect of both matters.

[6] On 11 August 2020, the Appellant was ready to take his plea, in both cases. Accordingly, the Appellant pleaded guilty to the respective charges in both cases. The Learned Resident Magistrate had been satisfied that the Appellant pleaded guilty voluntarily and on his own free will. On the same day the Summary of Facts had been read over and explained to the Appellant. Having understood same the Appellant admitted to the said Summary of Facts. Accordingly, he had been found guilty and convicted of the charges in both matters on his own plea.

[7] It must be mentioned that during these proceedings in the Magistrate's Court the Appellant was unrepresented, since he had waived his right to Counsel, in both cases.

[8] Thereafter, on 31 August 2020, the Appellant was sentenced to 12 months imprisonment, to be served in custody. The Learned Resident Magistrate made one Order (Sentence) in respect of both matters.

[9] Aggrieved by the said Order, on 9 September 2020, the Appellant filed a Petition of Appeal in the High Court. The Petition of Appeal is in respect of both his conviction and sentence.

[10] Even during these proceedings in the High Court the Appellant had waived his right to Counsel and remained unrepresented.

[11] This matter was taken up for hearing before me on 11 February 2021. The Appellant and the State Counsel for the Respondent were heard. Both the Appellant and the State filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[12] As per the Petition of Appeal the Grounds of Appeal taken up by the Appellant are as follows:

APPEAL AGAINST CONVICTION

1. That the sentencing Magistrate erred in law in accepting an equivocal plea where the accused pleaded guilty by mistake without his freewill.

2. That the sentencing Magistrate erred in law in convicting the accused on an equivocal plea thus failed to ensure or take into consideration whether the plea is made by mistake or not of his own freewill or the plea was voluntary

APPEAL AGAINST SENTENCE

1. That the sentencing Magistrate failed to deduct the Accused/Appellant's remand period of other (2) months under Section 24 of the Sentencing and Penalties Act reads thus:

   "If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the Court as a period of imprisonment already served by the offender".

2. That the sentencing Magistrate failed to give proper deduction for the accused's mitigating factors, with remorse etc.

3. That the sentencing Magistrate erred in law thus breaching the sentencing guidelines in determining a starting point picked from higher tariff thus failed to provide the reason why the sentence was outside the range. The Court of Appeal in ***Laisiasa Koroivuki v. State*** [2013] FJCA 15 AAU 0018 of 2010 (5 March 2013) has formulated the following guide principle:

   "In selecting a starting point, the Court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher that the tariff, then the sentencing court should provide reasons why the sentence is outside the range".

[13] As can be observed there are 2 Grounds of Appeal against the conviction; and 3 Grounds of Appeal against the sentence.

The Law and Analysis

[14] Section 246 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law."

[15] Section 247 of the Criminal Procedure Act, which is relevant as the Appellant has pleaded guilty to the respective charges against him, stipulates that *"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[16] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

The Grounds of Appeal against Conviction

Grounds 1 and 2

[17] These Grounds of Appeal are that the Learned Sentencing Magistrate erred in law in accepting an equivocal plea where the Appellant pleaded guilty by mistake without his freewill. And that the Learned Sentencing Magistrate erred in law in convicting the Appellant on an equivocal plea thus failed to ensure or take into consideration whether the plea is made by mistake or not of his own freewill or whether the plea was voluntarily made. In my opinion, both these Grounds of Appeal against conviction are inter-connected and can be dealt together.

[18] The Appellant is alleging that he pleaded guilty by mistake, and that his plea was not made voluntarily or on his own free will. Therefore, that his plea was equivocal. However, when examining the Magistrate's Court Case Records in both matters, it is clearly recorded (in the proceedings of 11 August 2020), that the Appellant was pleading guilty voluntarily and on his own freewill. Furthermore, when the Summary

of Facts had been read out and explained to him he had said that he understood and admitted to the said Summary of Facts.

[19] In the circumstances, it is now not permissible for the Appellant to submit that his plea was made by mistake or not of his own freewill or that the plea was not made by him voluntarily.

[20] In any event, in terms of Section 247 of the Criminal Procedure Act, it is stated that where the Appellant has pleaded guilty to the charge/s against him, as in this case, no Appeal shall be allowed against his conviction. An Appeal may only be permitted in respect to the extent, appropriateness or legality of the sentence.

[21] In the circumstances, I see no reason or justification to interfere with the Learned Magistrate's Order convicting the Appellant in the two cases.

[22] For the aforesaid reasons, I find that the Grounds of Appeal against the Conviction are without merit.

The Grounds of Appeal against Sentence

[23] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

> *"...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 he 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] HCA 40; [1936] 55 CLR 499)."*

[24] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

> *"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. AAU 0015 of 1998. 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."

[25] Therefore, it is well established law that before this Court can interfere with the Sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(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.

[26] In ***Sharma v. State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

*"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*

" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability ___."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

.....

[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."

Ground 1

[27] This Ground of Appeal against sentence is that the Learned Magistrate failed to deduct the Accused/Appellant's original remand period of 2 months, under Section 24 of the Sentencing and Penalties Act No 42 of 2009.

[28] With regard to the remand period served by the Appellant, the Learned Magistrate had considered that the Appellant had been in remand since 28 July 2020, the day on which he had been arrested and produced in Court in respect of the two matters. Accordingly, the Learned Magistrate has reduced 1 month from the time spent by the Appellant in remand custody.

[29] I concede that the Learned Magistrate has not taken into consideration the time period the Appellant was in remand custody, from 4 December 2019, for Magistrate's Court of Suva Criminal Case No. 1428 of 2019. This is justifiable since the Appellant had several pending cases against him at the time, and it is unclear as to whether the Appellant was actually in remand for Magistrate's Court of Suva Criminal Case No. 1428 of 2019 or for any other matter.

[30] For these reasons, I find that the first Ground of Appeal against sentence is without merit.

Ground 2

[31] This Ground of Appeal against sentence is that the Learned Magistrate failed to give a proper deduction for the accused's mitigating factors, such as remorse etc.

[32] The only mitigating factor, other than the Appellant's guilty plea, was his show of remorse. Personal factors as stated in paragraph 6 of the Sentence imposed by the Magistrate cannot be strictly considered as mitigating circumstances. The Learned Magistrate has duly granted the Appellant a discount of 1 month for remorse.

[33] For these reasons, I find that the second Ground of Appeal against sentence is also without merit.

Ground 3

[34] This Ground of Appeal against sentence is that the Learned Magistrate erred in law thus breaching the sentencing guidelines in determining a starting point picked from higher tariff thus failed to provide the reason why the sentence was outside the range.

[35] In determining the tariff for this offence the Learned Magistrate has correctly considered the authority of ***Sulua v. State*** [2012] FJCA 33; AAU 93 of 2008 (31 May

2012), where the Fiji Court of Appeal laid out the following tariffs for the possession of cannabis sativa:

(i) ***Category 1:*** *possession of 0 to 100 grams of cannabis sativa - a non-custodial sentence to be given, for example, fines, community service, counselling, discharge with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.*

(ii) ***Category 2****: possession of 100 to 1,000 gram of cannabis sativa. Tariff should be a sentence between 1 to 3 years imprisonment, with those possessing below 500 grams, being sentenced to less than 2 years, and those possessing more than 500 grams, be sentenced to more than 2 years imprisonment.*

(iii) ***Category 3:*** *possessing 1,000 to 4,000 grams of cannabis sativa. Tariff should be a sentence between 3 to 7 years, with those possessing less than 2,500 grams, be sentenced to less than 4 years imprisonment, and those possessing more than 2,500 grams, be sentenced to more than 4 years.*

(iv) ***Category 4:*** *possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment.*

[36] It has been further held in ***Sulua v. State*** *(Supra)* that in respect of Category 1 Offences, if a custodial sentence was warranted, it was generally between 1 to 12 months imprisonment.

[37] In determining the starting point within the said tariff, the Court of Appeal, in ***Laisiasa Koroivuki v. State*** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

> *"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the*

starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

[38] The Learned Magistrate has arrived at a starting point of 8 months imprisonment based on the above case authorities. I see no error of law made by the Learned Magistrate.

[39] The Magistrate has considered the fact that the Appellant was arrested once during the day time and once during the night time at the Suva bus stand and that he had more than one sachet of dried leaves wrapped in aluminium foil at the time, as aggravating factors. He has increased the Sentence by 12 months by virtue of this factor, bringing the Sentence to 20 months imprisonment.

[40] Thereafter, the Learned Magistrate has reduced 1 month for the Appellant's show of remorse and a further 6 months for his guilty pleas and arrived at a Sentence of 13 months imprisonment.

[41] Pursuant to Section 24 of the Sentencing and Penalties Act, the Learned Magistrate has deducted a further 1 month as time spent in remand and arrived at a final Sentence of 12 months imprisonment.

[42] Considering the aforesaid, I am of the opinion that this Ground of Appeal against sentence is also without merit.

Conclusion

[43] Accordingly, I conclude that this Appeal should stand dismissed and the conviction and sentence be affirmed.

FINAL ORDERS

[44] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.

2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Suva in Criminal Case No. 1428 of 2019 and 1555 of 2020 is affirmed.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA
This 24th Day of March 2021

Solicitors for the Appellant : Appellant in Person.
Solicitors for the Respondent: Office of the Director of Public Prosecutions, Suva.