
AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 028 of 2022

BETWEEN : **ANISH ASHISH CHANDRA**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. A. Datt for the Appellant.
: Mr. J. Nasa for the Respondent.

Date of Hearing : 09 November, 2022

Date of Judgment : 16 December, 2022

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Nadi for one count of driving a motor vehicle whilst there was present in the blood a concentration of alcohol in excess of the prescribed limit contrary to section 103 (1) (a) (2) and 114 of Land Transport Act 35 of 1998. It was alleged as follows:

Particulars of Offence

ANISH ASHISH CHANDRA on the 26th day of May, 2022 at Nadi, in the Western Division drove a motor vehicle registration number JD-330 on Wailoaloa Road, Nadi whilst there was present in 100 milliliters of his

of the prescribed limit.

2. The matter was first called in the Magistrate's Court on 20th June, 2022 the appellant in the presence of his counsel pleaded guilty to the charge. On the same day the accused admitted the summary of facts read in court which was as follows:

On 26th May, 2022 at about 11.15 pm at Wailoaloa Road, Nadi the complainant PC 6297 Mateo, 21 years, Police Officer of Namaka Police Station was on mobile patrol along Wailoaloa Road when he stopped the appellant, 30 years, Doctor of Vuda Point, Lautoka.

The complainant whilst talking to the accused could smell liquor from the appellant's breath. The complainant asked the appellant to step out of the vehicle. The complainant saw that the appellant could not stand straight and was staggering.

The appellant was escorted to Namaka Police Station and handed over to PC 4620 Maba of traffic department. The appellant was tested in dragger 7110 machine where the result was 99 micrograms of alcohol per 100 milliliters of breath, which was multiplied by 2.2 in accordance with Regulations 3(3) of the Land Transport (Breath Test & Analysis) regulation 2000, which is equivalent to 217.8 milligrams of alcohol per 100 milliliters of blood.

The appellant during the interview admitted consuming twelve bottles of Fiji Gold Beer with his friends and was driving the vehicle when intercepted by police. The appellant was charged for the offence committed.

voluntarily entered an unequivocal plea and the summary of facts read satisfied all the elements of the offence charged, found the appellant guilty and convicted him accordingly.

4. After hearing mitigation on 30th June, 2022 the appellant was fined \$200.00 in default 20 days imprisonment with a mandatory disqualification from driving for 3 months.
5. The appellant being aggrieved by the sentence of the Magistrate's Court filed a timely petition of appeal in this court. By virtue of the amended petition of appeal dated 23rd September, 2022 the appellant filed his amended grounds of appeal.

APPEAL AGAINST SENTENCE

(i) *That the learned Magistrate erred in law and fact when she failed to correctly identify, assess and accord appropriate weight to the appellant's mitigating facts against the factors listed under section 16(1) of the Sentencing & Penalties Act 2009 for grant of a non-conviction order.*

(ii) *That the learned Magistrate erred in law and fact when she misapplied State v Batiratu [2012]FJHC 864, which is a case involving 'discharge', to the mitigating facts of the Appellant's case to determine whether a non-conviction order should be made when the correct test for assessment of a non-conviction order is in section 16(1) of the Sentencing & Penalties Act 2009.*

6. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

7. 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.”*

8. For expediency and completeness both grounds of appeal will be dealt with together.
9. The appellant’s counsel argued that the learned Magistrate did not give any weight to the mitigation submitted by the appellant in respect of a non-conviction order. In this regard the factors mentioned in section 16 (1) of the Sentencing and Penalties Act was not considered by the learned Magistrate at all.
10. Counsel further submitted that by relying on the case of *State vs. Batiratu [2012] FJHC 864* the learned Magistrate misapplied the principle that came out from the above case which was for a discharge without conviction and not a non-conviction order as in this case.

DETERMINATION

11. The main thrust of the appellant's argument is that in this case a conviction ought not to have been entered. At paragraph 22 of the sentence the learned Magistrate had directed her mind to this aspect of the mitigation as follows:

Your counsel sought a non-conviction order to be entered considering your mitigatory factors stated by your counsel verbally in open court.

12. It is also noted that the learned Magistrate had directed her mind to the case of *State v David Batiratu [2012] Revisional Case no. HAR 001 of 2012* at paragraph 7 of the sentence and correctly stated that *Batiratu's* case (supra) was regarding a discharge of an accused without a conviction. In *Batiratu's* case at paragraph 29, his lordship Gates C.J (as he was) 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."*

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:

"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."

14. 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 subsection (2), and any further conditions imposed by the court.

(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.”

15. The courts in this country have over the years developed the jurisprudence relating to discharge without conviction. 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 Criminal Procedure Code.

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."

17. 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.

18. 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

19. 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 (supra) 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..."

20. 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.

21. In *State v Nand Kumar Cr. App. No. HAA014 of 2000 (2 February, 2001)* Gates J. (as he was at the time) 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,

22. It is noted from the mitigation presented in the Magistrate's Court that the appellant was asking for a non-conviction order in accordance with section 16 of the Sentencing and Penalties Act.
23. Section 16 (1) of the Sentencing and Penalties Act states that a sentencing court shall have regard to all the circumstances of the case when exercising its discretion whether or not to record a conviction, including the three factors listed in that section which is as follows:
 - (a) the nature of the offence committed;
 - (b) the character and past history of the offender; and
 - (c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.
24. Furthermore, section 174 of the Criminal Procedure Act 2009 states that:
 - (1) The substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.*
 - (2) If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Act 2009.*
 - (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as provided in this [Act]...*
25. In my considered judgment the case of *Batiratu* (supra) was in respect of discharge without conviction and not in respect of a non-conviction order

case was judicially reviewed by the High Court on the motion of the then Chief Justice Gates after the Magistrate's Court made an order under section 15(1) (i) of the Sentencing and Penalties Act.

26. In this case, the appellant by his mitigation was specifically asking for a non-conviction order under section 16 of the Sentencing and Penalties Act which is different to a discharge without conviction order. An application for a discharge without conviction falls under section 45 of the Sentencing and Penalties Act. This was not what the appellant was asking for because section 174(2) of the Criminal Procedure Act makes it mandatory for a Magistrate to convict an accused upon a guilty plea or finding of guilt.
27. The Magistrate's Court upon finding an accused guilty must convict before proceeding to sentence under the Sentencing and Penalties Act. The effect of sections 15(1) (e), (f), (i) or (j) of the Sentencing and Penalties Act is to give a discretion to the sentencer not to record a conviction or dismiss a charge as a sentencing option based on the mitigating factors and the nature of the offence committed.
28. An order not to record a conviction as per section 15(1) (e), (f), (i) or (j) read with section 16(1) of the Sentencing and Penalties Act forms part of the sentence. Accordingly, if a sentencer uses the discretion not to record a conviction in terms of the above sub sections then the conviction entered under section 174(2) of the Criminal Procedure Act is to be regarded as a conviction not recorded.
29. The mitigation advanced on behalf of the appellant at page 11 of the copy record states inter alia the following:
 - *Medical Officer;*
 - *His medical licence can be suspended;*
 - *Not to enter a conviction, reason future prospects;*

- *Good character, no previous conviction...*

30. In this case the appellant had specifically made an application under section 16 of the Sentencing and Penalties Act and had made submissions in respect of the factors required under this section. The learned Magistrate unfortunately did not direct her mind to section 16.
31. In the interest of justice and in accordance with section 256 (2) (e) of the Criminal Procedure Act this court on its own volition takes into consideration all the circumstances of the offending including the nature of the offence committed, the character and past history of the appellant, the impact of the conviction on the appellant's economic or social well-being, and his employment prospects when addressing whether a non-conviction order was justified in this case. In this regard I have gone ahead to address each factor as follows:

a) Nature of the offence

From the summary of facts admitted by the appellant the offence committed was serious. The appellant being a Medical Officer knew or ought to have known the consequences of his actions. Driving under the influence of alcohol is a dangerous thing to do.

b) Character and past history of the offender

There is no dispute that the appellant was a first offender and of good character.

c) Impact on economic and social well-being and employment prospects

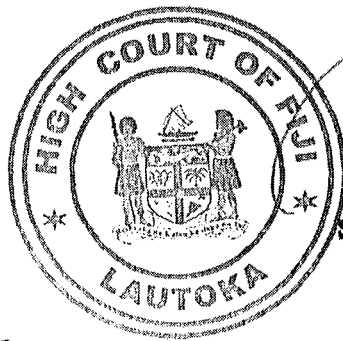
It is a well-known fact that a conviction will have an impact on a person's future opportunities and employment. In this case there are facts which suggest that the appellant will be affected in his employment and future prospects as a Medical Officer.

appellant's overseas employment and/or migration is likely to be affected if a non-conviction order is not considered. The appellant was genuinely remorseful he accepted his guilt at the earliest opportunity. This court also accepts that the appellant has learnt his lesson from his wrong doing.

33. Considering all the circumstances of the offending and the above mentioned factors even though the nature of the offending by the appellant was serious, the facts do not show any blatant non-cooperation by the appellant when stopped by the police. He was cooperative and had surrendered to custody immediately. In my considered judgment the mitigation offered by the appellant in the Magistrate's Court to some extent was reflected in the lenient sentence (minimum fine and minimum disqualification of drivers licence) imposed by the learned Magistrate.
34. In exercise of my discretion and in accordance with section 16 (1) of the Sentencing and Penalties Act I order that the conviction entered against the appellant be set aside. However, under section 256 (2) (a) of the Criminal Procedure Act considering the seriousness of the offence committed this court revisits and varies the fine imposed. In view of the appellant's means the fine of \$200.00 is varied. The appellant is sentenced afresh to pay an additional fine of \$600.00 within 14 days from today in default 21 days imprisonment.
35. In accordance with section 4(1) of the Sentencing and Penalties Act the reason for the increase in fine is to act as a remainder and a deterrent for those drivers who choose to drink and drive that a heavy financial burden will befall if they disregard this provision of the law. The only reason why I am not increasing the appellant's disqualification from holding a driver's licence is because as a Medical Practitioner the appellant may be required to attend to emergency cases which may require him to drive from one place to another.

ORDERS

1. The appeal against sentence is allowed;
2. The conviction entered against the appellant is set aside and a non-conviction order is effected;
3. The appellant's fine imposed by the Magistrate's Court is varied. He is fined \$800.00 out of which \$200.00 paid is deducted. The appellant is to pay the sum of \$600.00 within 14 days from today in default 21 days imprisonment;
4. The disqualification from driving by the appellant imposed by the Magistrate's Court is affirmed;
5. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka

16 December, 2022

Solicitors

Messrs Datt Legal, Ba for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.