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

CRIMINAL APPEAL NO. HAA 82 OF 2020

IN THE MATTER of an Appeal from the Decision of the Magistrate's Court of Lautoka, in Private Prosecution Case No. 35 of 2019.

BETWEEN : **FIJI REVENUE AND CUSTOMS SERVICE**

APPELLANT

AND : **MOHAMMED YUSUF**

RESPONDENT

Counsel : Mr. Edward Eterika with Mr. Sekaia Goneyali for the Appellant
Ms. Lavenia Ravuikadavu for the Respondent

Dates of Hearing : 21 September 2022

Judgment : 6 January 2023

JUDGMENT

[1] This is an Appeal made by the Appellant against the sentence imposed against the Respondent by the Magistrate's Court of Lautoka.

[2] In the Magistrate's Court of Lautoka, the Respondent was charged with one count of Fraudulent Evasion of Duty, contrary to Section 139 (b) of the Customs Act No. 11 of 1986 (Customs Act). The full details of the charge reads as follows:

FIRST COUNT

Statement of Offence (a)

FRAUDULENT EVASION OF DUTY: Contrary to Section 139 (b) of the Customs Act 1986.

Particulars of Offence (b)

Mr. Mohammed Yusuf, of Evan Street, Drasa Vitogo, Lautoka, trading as Tosoviti Travel Tours and Marketing and Zohil Motors, on or about the 28th of December 2018, at Lautoka, in the Western Division, imported one Used Blue Toyota Hilux Utility 2017 with VIN: MROHA3CD0000402604 and one Used Red Nissan Navara Utility 2016 with VIN: MNTCB23A00028644 which was entered on Customs Entry SAD C37012 of 20/12/2018 as spare parts knowingly concerned in fraudulent evasion of duty chargeable amounting to $63,623.20 (sixty-three thousand six hundred and twenty-three dollars and twenty cents).

[3] The Respondent pleaded not guilty to the charge and the matter had proceeded to trial. The trial in the matter commenced on 30 June 2020 and concluded on the same day.

[4] On 15 October 2020, the Respondent had been found guilty of the charge and accordingly convicted [Vide Judgment from pages 7-15 of the Magistrate's Court Record].

[5] On 27 November 2020, the sentence was pronounced [Vide Sentence from pages 4-6 of the Magistrate's Court Record]. The Respondent had been imposed a sentence of 18 months imprisonment which term was suspended for 3 years. In addition he was imposed a fine of $4,000.00 which was to be paid within 60 days and in default four months' imprisonment.

[6] Aggrieved by the said Order, on 23 December 2020, the Appellant filed a timely appeal in the High Court by way of a Petition of Appeal. The Petition of Appeal filed is in respect of only the sentence.

[7] In addition to the Petition of Appeal, the Appellant also filed a Notice of Motion for Leave to Appeal against Sentence. The Notice of Motion was supported by an Affidavit deposed to by Mrs. Timaima Rayawa, Team Leader, Legal Services, Fiji Revenue and Customs Service.

[8] This matter was taken up for hearing before me on 21 September 2022. The Learned Counsel for the Appellant and Respondent were heard. Both parties have filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

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

Grounds of Appeal against Sentence

1. The Learned Magistrate erred in law and principle when he failed to apply the correct maximum penalty for the offence when he relied on an older provision of the Act when issuing the Sentence against the Respondent.
2. That the Learned Magistrate erred in law and principle in failing to consider the powers of the Magistrate's to impose any fine or any sentence of imprisonment which may be imposed under the Customs Laws on any person convicted of the offence.
3. The Learned Magistrate erred in law and principle by failing to take into account any aggravating factors as highlighted in the Sentence.

The Law and Analysis

[10] 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."

[11] 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 Sentence

[12] 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)."*

[13] 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."

[14] 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.

[15] 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:*
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> *" 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."*
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> *[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:*
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> *"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."*
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> *[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

[16] The first Ground of Appeal against Sentence is that the Learned Resident Magistrate erred in law and principle when he failed to apply the correct maximum penalty for the offence when he relied on an older provision of the Act when issuing the Sentence against the Respondent.

[17] In the Magistrate's Court the Respondent was charged for the offence of Fraudulent Evasion of Duty, contrary to Section 139 (b) of the Customs Act. At the time of its enactment (on 19 June 1986) Section 139 of the Customs Act read as follows:

139. Without limiting any other provision of this Act, a person who-

(a) with intent to defraud the Government of any duty payable thereon, acquires possession of or is in any way concerned in dealing with goods which

have been unlawfully removed from a bonded warehouse or customs warehouse or which are chargeable with a duty which has not been paid;

(b) is, in relation to any goods, in any way knowingly concerned in a fraudulent evasion or attempt at evasion of any duty chargeable thereon;

(c) unlawfully and with guilty intent imports any prohibited or restricted import; or

(d) unlawfully and with guilty intent exports any prohibited or restricted export,

is guilty of an offence and is liable to a fine not exceeding 3 times the value of the goods or $5,000 whichever is the greater or to imprisonment for 2 years or to both such fine and imprisonment and the goods, if any, which are the subject matter of the offence are liable to forfeiture.

[18] However, over the years, the Customs Act, including Section 139, has been was amended on numerous occasions. Section 40 of the Customs (Budget Amendment) Act No. 37 of 2017 (which came into force on 30 June 2017) introduced further amendments to Section 139.

[19] Therefore, as at 28 December 2018, the date of offending in this case, Section 139 of the Customs Act read as follows:

139. Without limiting any other provision of this Act, a person who-

(a) with intent to defraud the Government of any duty payable thereon, acquires possession of or is in any way concerned in dealing with goods which have been unlawfully removed from a bonded warehouse or customs warehouse or which are chargeable with a duty which has not been paid;

(b) is, in relation to any goods, in any way knowingly concerned in a fraudulent evasion or attempt at evasion of any duty chargeable thereon;

(c) unlawfully and with guilty intent imports any prohibited or restricted import; or

(d) unlawfully and with guilty intent exports any prohibited or restricted export,

is guilty of an offence and is liable to a fine not exceeding 3 times the value of the goods or $25,000 or a term of imprisonment not exceeding 10 years or both and the goods, if any, which are the subject matter of the offence are liable to forfeiture.

[20] In this case, it is clear that the Learned Resident Magistrate has made reference to Section 139 as it stood in its original form. He has failed to consider the fact that the said Section had been amended on several occasions, with the latest amendment being by virtue of Section 40 of the Customs (Budget Amendment) Act No. 37 of 2017 (as at the date of offending 28 December 2018).

[21] The Counsel for the Respondent submitted that the charge filed against the Respondent should have made mention of the latest amendment to Section 139 of the Customs Act. This may have been so. However, it was incumbent on the Learned Resident Magistrate to consider the law as it stood as at the date of offending.

[22] In fact, when perusing the Sentencing Submissions filed by the Appellant [Vide Sentencing Submissions from pages 83-92 of the Magistrate's Court Record], it is clear that due reference has been made by the Counsel for the Appellant to the latest amendment to Section 139 of the Customs Act.

[23] Therefore, the first Ground of Appeal against Sentence has merit. I agree with the contention of the Appellant that if the Learned Resident Magistrate had considered Section 139 of the Customs Act as amended at the time, it was likely that he would have imposed a higher term of imprisonment and a greater fine on the Respondent.

[24] For the purpose of clarity it needs to be mentioned that Section 139 of the Customs Act was further amended by Customs (Budget Amendment) Act No. 14 of 2019, which came into force on 1 August 2019. The Principal Act was amended by inserting the portion ***"whichever is greater",*** after *is guilty of an offence and is liable to a fine not exceeding 3 times the value of the goods or $25,000.*

[25] However, this amendment would not be applicable in respect of the instant charge against the Respondent, as the date of offending in this case was 28 December 2018, which was prior to the said amendment.

Ground 2

[26] The second Ground of Appeal against Sentence is that the Learned Resident Magistrate erred in law and principle in failing to consider the powers of the Magistrate's to impose

any fine or any sentence of imprisonment which may be imposed under the Customs Laws on any person convicted of the offence.

[27] Section 172 of the Customs Act makes reference to jurisdiction of Resident Magistrate's. The Section is reproduced below:

> *172.-(1) If any resident magistrate hears and determines any prosecution for any offence under the customs laws, then, notwithstanding anything contained in any other Act, he shall have jurisdiction to impose any fine or any sentence of imprisonment which may be imposed under the customs laws on any person convicted of the offence.*
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> *(2) Without prejudice to the powers of any other court of competent jurisdiction, any proceedings for condemnation or for the recovery of any duty or other sum payable under the customs laws may be heard and determined, without limit of amount, by a resident magistrate.*

[28] It is manifest from the reading of the above provisions that the Customs Act grants jurisdiction to a Resident Magistrate to impose any fine or any sentence of imprisonment which may be imposed under the customs laws, on any person convicted of an offence, notwithstanding anything contained in any other Act.

[29] Therefore, this Section would enable a Resident Magistrate to impose a fine or sentence of imprisonment over and above the regular sentences a Resident Magistrate could impose in terms of the provisions of Section 7 of the Criminal Procedure Act.

[30] Therefore, this Ground of Appeal against Sentence also has merit.

Ground 3

[31] The final Ground of Appeal against Sentence is that the Learned Resident Magistrate erred in law and principle by failing to take into account any aggravating factors.

[32] When examining the sentence imposed by the Learned Resident Magistrate in this case, it is clear that he has made no reference to any aggravating factors in his sentence, although reference has been made to certain aggravating factors in the Sentencing Submissions filed by the Appellant.

[33] Therefore, this Ground of Appeal against Sentence also has merit.

[34] Considering the aforesaid, I am of the opinion that this Appeal against sentence should be allowed.

[35] However, the Respondent has already made payment of the $4000.00 fine imposed on him. It has also been confirmed that the two vehicles which were the subject matter of the offence have now been forfeited in terms of Section 139 of the Customs Act. The operational period of the 18 months term of imprisonment which was imposed on the Respondent, which was suspended for 3 years, would lapse on 27 November 2023.

[33] Therefore, this Court is not inclined to vary the sentence or to impose a higher sentence on the Respondent at this stage. In any event, even the Appellant is not insisting on imposing a higher sentence on the Respondent at this stage. Their primary objective for filing of this appeal was to obtain an order of Court setting out the correct position of the law as it stands today.

Conclusion

[34] Accordingly, I conclude that this Appeal against sentence be allowed.

FINAL ORDERS

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

1. Appeal is allowed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Lautoka in Private Prosecution Case No. 35 of 2019 is affirmed.

HIGH COURT OF FIJI LAUTOKA

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA
Dated this 6th Day of January 2023

Solicitors for the Appellant : Office of the Fiji Revenue and Customs Service, Suva.
Solicitors for the Respondent: Nand Lawyers, Barristers and Solicitors, Lautoka.