

GROUND 1:

The Learned Trial Magistrate erred in law and in fact to convict the Appellant for importing 139.6 grams of Methamphetamine when the evidence of the Principal Scientific Officer was that no purity test was conducted and as such her report is not conclusive of the weight of methamphetamine.

GROUND 2:

The Learned Trial Magistrate erred in law and in fact when she believed that the chain of custody of the drug was not broken despite the State not calling any of the bios-security officers who had handled the drugs whilst conducting Bio-security examination or Venti who was given the drugs at the forensic lab and in the absence of the Principal Scientific Officer or WPC Bulou and WPC Shobna who were exhibit writers having custody of the drug at the police exhibit room before it was exhibited in Court.

GROUND 3:

The Learned Trial Magistrate erred in law and in fact when she held that the drug was not tempered (sic) by the Bio-security officers whilst PW-1's evidence was that he cannot recall whether it was opened or not by the Bio-security officers before it was handed over to him causing substantial doubt on whether the drugs were tempered (sic) by the Bio-security officers before being handed to PW1.

GROUND 4:

The Learned Trial Magistrate erred in law and in fact when she failed to recognize that the drug was tempered (sic) by PW2 and PW4 when they opened and examined the parcel in the absence of the Appellant.

GROUND 5:

The Learned Trial Magistrate erred in law and in fact when she stated that if the defence was contesting the Exhibit Register, he would have made an application to the Court for *Voir Dire* hearing to deal with the matter, when in fact the defence was not contesting the exhibit register but challenging that the exhibit writers that is WPC Bulou and WPC Shobna had the custody of the drug and in absence of their testimony in court the chain of custody is not intact.

GROUND 6:

The Learned Trial Magistrate erred in law and in fact when she failed to analyse the evidence of PW11 DCPL Aten Prasad who stated that the exhibit which was in the Court was not the same exhibit which was seized in the instant matter.

GROUND 7:

The Learned Trial Magistrate lacked jurisdiction to preside over the matter.

- 3 The Counsel from both sides filed written submissions and made further oral submissions when the matter was fixed for hearing. The Ground (vii) that was later added to the original grounds of appeal deals with jurisdiction. Therefore, I would deal with that ground first because if this ground succeeds, this Court is not required to deal with other grounds. For the sake of convenience, Grounds 2, 3, 4, 5 and 6 will be dealt with together as all of them deal with continuity or chain of custody.

Ground 7 - Jurisdiction

4. The Appellant argues that the Learned Magistrate lacked jurisdiction to preside over the matter in which he was convicted and sentenced. This argument appears to be based on Section 101(2) of the Constitution, Section 17 of the Magistrates Court Act, Sections 4, 5(2), and 7 of the Criminal Procedure Act (CPA).
5. Section 5(1) of the CPA provides that:

Any offence under any law other than the Crimes Act 2009 shall be tried by the court that is vested by that law with jurisdiction to hear the matter.
6. The Appellant was tried and convicted under Section 4 of the Illicit Drugs Control Act 2004 (IDCA). This Section does not specify the court in which this offence should be tried. Neither has

it specified if this offence is indictable or summary. In such a scenario, the courts should be guided by Section 5(2) of the Criminal Procedure Act which provides as follows:

When no court is prescribed in any law creating an offence and such offence is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Court in accordance with any limitations placed on the jurisdiction of classes of magistrate prescribed in any law dealing with the administration and jurisdiction of the Magistrates Courts.

7. The Appellant argues that the jurisdiction of the Magistrates Court should be exercised in accordance with any limitations placed on its jurisdiction as stipulated by the latter part of Section 5(2) and, since Section 7 of the CPA imposes such a limitation as it curtails the sentencing power of the Magistrates Court, the Learned Magistrate lacked jurisdiction to preside over the matter in which he was convicted as the offence carried a maximum sentence of life imprisonment/ fine of 1 Million or both.
8. This jurisdictional objection has not been taken up by the Appellant before trial at the Magistrates Court. In any event, even if he had taken up that objection, I do not see any merit in this objection.
9. Section 101(2) of the Constitution provides that the Magistrates Court has such jurisdiction as conferred by written law. The written law that confers jurisdiction in the Magistrates Court is the Magistrates Court Act. Section 17 of the Magistrates Court Act 1994 provides that:

in the exercise of their criminal jurisdiction, magistrates shall have all the powers and jurisdiction conferred on them by the Criminal Procedure Act 2009, this Act or any other law for the time being in force.

10. The law that creates the offence namely IDCA does not specify the court in which the offences should be tried.
11. Section 7 of the CPA generally limits the sentencing power of the Magistrate. The Section provides:

7(1) A magistrate may, in the cases in which such sentences are authorised by law, pass the following sentences, namely—

(a) imprisonment for a term not exceeding 10 years; or

(b) fine not exceeding 150 penalty units.

(2) A magistrate may impose consecutive sentences upon a person convicted of more than one offence in a trial, but in no case shall an offender be sentenced to imprisonment for a longer period than 14 years.

(3) The sentencing limits prescribed in sub-section (1) may be further restricted in relation to magistrates of certain classes as provided for in any law dealing with the establishment and jurisdiction of the Magistrates Court.

(4) Where any magistrate of a certain class sentences an offender for more than one offence in a trial, the aggregate punishment shall not exceed twice the amount of punishment which that magistrate has jurisdiction to impose.

12. The contention of the Appellant is that since the maximum sentence prescribed for the offence for which he was convicted exceeds the sentencing power of the Magistrate (life imprisonment /one Million or both), he should not have been tried and sentenced in the Magistrates Court. His position is that unless the High Court invests its jurisdiction in the Magistrates Court under Section 4(2) of the CPA, the Magistrates Court does not have jurisdiction to preside over the matter in which he was convicted and sentenced. I am unable to agree with this contention.

13. Sections 4(2) and 4(3) of the CPA provides as follows:

(2) Notwithstanding the provisions of sub-section (1), a judge of the High Court may, by order under his or her hand and the seal of the High Court, in any particular case or class of cases, invest a magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the magistrate's jurisdiction.

(3) A magistrate hearing a case in accordance with an Order made under subsection (2) may not impose a sentence in excess of the sentencing powers of the magistrate as provided for under this Act.

14. Section 4 of the IDCA provides for the maximum punishment that a convicted person could be enforced. Accordingly, a fine of up to one million dollars or imprisonment for life or both can be imposed. The range of imprisonment terms and the fine prescribed in the section is extremely wide and the section encompasses the importation of any type of illicit drug ranging from less harmful drugs like marijuana to harmful hard drugs like cocaine. There is no minimum sentence prescribed and therefore in an appropriate case, even only a fine can be imposed. If the argument of the Appellant is accepted, even a person found in possession of 5 grams of marijuana should be indicted in the High Court and that matter should be tried in the High Court unless the High Court Judge exercises his or her discretion to extend its jurisdiction to the Magistrates Court under Section 4(2) of the CPA.

15. I do not think that the legislature intended such a scenario that would flood the High Court with all types of cases involving minor offences with less public interest. At the time the CPA was promulgated, Fiji had a system of Assessors where the High Court judges sat with the assessors whose opinion was taken into consideration in determining the guilt or otherwise of an accused. The intention of the Legislature appears to be that only serious cases with much public interest should be tried in the High Court. The assessor system is no longer in place in Fiji and the distinction between the Magistrates Court and the High Court is significantly reduced. Magistrates are competent and capable as much as the High Court Judges to handle drug matters which are not complex and serious. Therefore, the argument that all types of drug cases must be filed in the High Court is not logical and cannot be accepted. This argument is not acceptable from a case management perspective also.
16. Section 35 of the CPA provides for the unlimited territorial jurisdiction of the High Court, for the requirement to initiate all criminal cases in the Magistrates Court and as to when the transfers to the High Court should be made:

The High Court may inquire into and try any offence subject to its jurisdiction at any place where it holds sittings.

All criminal cases to be heard by the High Court shall be—

- (a) instituted before a Magistrates Court in accordance with this Act; and
- (b) transferred to the High Court in accordance with this Act if the offence is—
 - i. an indictable offence; or
 - ii. an indictable offence triable summarily, and the accused has indicated to the Magistrates Court that he or she wishes to be tried in the High Court.

17. Rajasinghe J in *State v Rasoqosoqo* [2021] FJHC 74; HAC32.2021 (3 February 2021) [at paragraph 4 and (5) observed as follows:

There is no mandatory requirement to transfer the case to the High Court if the offence does not fall within the meaning of Section 35 (2) (b) (i) and (ii) of the Criminal Procedure Code.

18. His Lordship cited two cases decided by the Court of Appeal which are very much relevant to the issue at hand.

The Fiji Court of Appeal in *Ratuyawa v State* [2016] FJCA 45; AAU121.2014 (26 February 2016) had discussed the effect of the Sulua guidelines in respect of the jurisdiction of the

Magistrates' Court to hear the offence under the Illicit Drugs Control Act, where Fernando JA held that:

“I am of the view that the Magistrates Court had the jurisdiction to try all offences created by the Illicit Drugs Act 2004 in view of the clear provisions in Section 5(2) of the Criminal Procedure Decree 2009 and a Court is not competent to amend the Illicit Drugs Act, prospectively or with retrospective effect. That is a matter for the Legislature and to act contrary to this would be a violation of the principle of Separation Powers ingrained in our Constitution.”

In *State v Mata* [2019] FJCA 20; AAU0056.2016 (7 March 2019), the Fiji Court of Appeal found that:

“In my view, the above pronouncement in *Sulua* should be treated as a mere guidance and not as a binding statement of law, for the jurisdiction of the Magistrate Court to try any offence under section 5(a) and 5(b) of Illicit Drugs Control Act vested in it by the legislature in terms of section 5 of the Criminal Procedure Act cannot be taken away by a judicial pronouncement. The decision in *Sulua* should not be deemed or taken to have intended such an outcome.

The tariff of 07 to 14 years of imprisonment for category 4 offences prescribed may have prompted the Court of Appeal to have come up with the above guideline in *Sulua* as to the appropriate court for such offences, for the Magistrates Court cannot impose any sentence above 10 years of imprisonment. However, it should be kept in mind that in terms of section 190 of the Criminal Procedure Act the Magistrate is empowered to transfer a person convicted by the Magistrates Court to the High Court for sentencing and greater punishment. Therefore, there is no reason to fear that offenders tried and convicted in the Magistrate Court for category 4 offences would go inadequately punished. Neither is there any reason to distrust good judgment of the Magistrates in the matter of sentence.

19. In view of the above discussion, mainly four sections, Sections 4, 5, 35 and 189 of the CPA come into play in deciding which court should hear which offence. Accordingly,
- (a). All offences created by any law other than the Crimes Act shall be tried by the court that is vested by that law with jurisdiction to hear the matter.
 - (b). When no court is prescribed in the law creating the offence and such offence is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Court.
 - (c). If the Crimes Act offence is stated to be an indictable offence, it shall be tried by the High Court subject to Section 4(2) of the CPA.

- (d). Any offence stated to be a summary offence whether created by the Crimes Act or any other law shall be tried by the Magistrates Court subject to Section 4(3) of the CPA.
 - (e). Any Crimes Act offence stated to be an indictable offence triable summarily shall be tried by the High Court or a Magistrates Court, at the election of the accused person.
 - (f). Any offence whether stated to be an indictable offence or created by any other law shall be tried by the Magistrates Court if a judge of the High Court by order, invests a magistrate with jurisdiction to try, in the absence of such order, would be beyond the magistrate's jurisdiction.
 - (g) Any offence coming under the special procedure for minor cases as per Section 189 of the CPA shall be tried by the Magistrates Court.
20. It is my considered opinion that Section 7 of the CPA is intended to limit only the sentencing power and not the power to hear and determine a criminal matter which the Magistrates Court otherwise has jurisdiction to try under any written law.
21. Of course, a magistrate has no jurisdiction to impose a sentence that exceeds his sentencing power under Section 7 of the CPA. If the trial magistrate, upon conclusion of the trial, opines that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the magistrate has the power to impose, he can transfer the matter under Section 190 (1)(b) of the CPA to the High Court for sentencing.
22. Section 190 (1)(b) of the CPA provides:
- [t]he magistrate is of the opinion (whether by reason of the nature of the offence, the circumstances surrounding its commission or the previous history of the accused person) that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the magistrate has power to impose the magistrate may, by order, transfer the person to the High Court for sentencing.
23. The tenor of this section suggests that the Magistrates Court has the power to hear and determine criminal matters in respect of which it does not have the power to impose the sentence. In such cases, if the Magistrate, after hearing the case, opines that greater punishment should be imposed

in respect of the offence he /she does not have the power to impose, he/she can, after recording the conviction, transfer the matter to the High Court for sentencing.

24. It is in this context that *State v Vakula* [2017] FJHC 963; HAC247.2016S (11 August 2017), the case cited by the Respondent should be viewed. In *Vakula*, since there was no sentencing tariff for Methamphetamine offences in Fiji at that time, Temo J (as he then was) adopted the sentencing guidelines issued by the New Zealand Court of Appeal in *R v Fatu* [2006] 2 NZLR 72 in respect of all types of Methamphetamine offences. In reference to the importation of Methamphetamine, His Lordship stated at [7] and [14] as follows:

- [7] In cases involving the importation of methamphetamine, the sentence guidelines were as follows:
- (a) Band one – low-level importing (less than 5g) 0 two years six months to four years six months’ imprisonment.
 - (b) Band two – importing commercial quantities (5g to 250g) – three years six months’ to ten years’ imprisonment.
 - (c) Band three importing large commercial quantities (250g to 500g) – 9 years to 13 years’ imprisonment.
 - (d) Band four – importing very large commercial quantities (500g or more) – 12 years’ to life imprisonment.

- [14]. In terms of the allocation of work between the Magistrate Courts and High Courts, all Band One, Band Two and Band Three cases in paragraphs 6, 7 and 8 hereof are to be tried in the Magistrate Court, with the liberty to send the cases to the High Court for sentencing if a sentence of more than 10 years imprisonment is required. Band One, Band Two and Band Three cases are subject to appeals and reviews in the High Court. For offending in methamphetamine that are covered in the verbs or offending actions in sections 4, 5 and 6 of the *Illicit Drugs Control Act 2004*, but are not covered in the guidelines mentioned in *R v Fatu* (supra), the courts in Fiji are at liberty to use a guideline from *R v Fatu* (supra) that meets the justice of the case.

25. According to this judgment all Band Two cases - importation of commercial quantities (5g to 250g) carrying a sentence of three years six months to ten years’ imprisonment should be tried in the Magistrates Court. Therefore, the Appellant has in fact been tried and convicted by the correct court. The Appellant submits that *Vakula* should not be followed because this issue has not been comprehensively addressed by the High Court in that case.
26. Although the rationale for the allocation of cases between the Magistrates Court and the High Courts is not expressly stated in that Judgment, it is clear, that His Lordship had Section 7 of the CPA in mind when he took ten years imprisonment term as the threshold for the division. The importance of the *Vakula* Judgment to the present appeal is that it clearly recognises the

jurisdiction of the Magistrates Court to preside over illicit drug cases with liberty to send the cases to the High Court for sentencing if a sentence of more than 10 years imprisonment is required.

27. The Court of Appeal having reviewed the local and foreign judgments has now set sentencing guidelines in *Abourizk v State* [2019] FJCA 98; AAU0054.2016 (7 June 2019) for all types of offences involving hard drugs that include importation of Methamphetamine. The Court held [145]:

Having considered all the material available and judicial pronouncements in Fiji and in other jurisdictions, I set the following guidelines for the 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 1/2 years to 04 1/2 years' imprisonment.

Category 02: – More than 05g up to 250g - 03 1/2 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

28. If Vakula's formulation for allocation of cases between the Magistrates Court and the High Court is adopted in relation to Abourizk guidelines, the learned Magistrate clearly had jurisdiction to preside over the matter as the Appellant stood charged for the offence of importation of 139.6 grams of methamphetamine which falls under Category 02, which attracts an imprisonment term that does not exceed ten years.
29. In view of this discussion, whenever a magistrate is confronted with the issue before or during the trial of whether he or she should hear the case filed under the IDCA, he or she should, having regard to the weight of the illicit drug, look at the potential sentence that would attract the offence mentioned in the charge sheet. If the potential sentence exceeds 10 years, he/she in his/her discretion should transfer the matter to the High Court under Section 188 (1) or 188 (2) of the CPA, if it appears to him /her that the case is one which ought to be tried by the High Court. If the magistrate decides to hear the case and proceeds to a conviction, then he/ she can transfer the matter under Section 190 (1) (b) of the CPA to the High Court for sentencing if he/she is of the opinion that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the magistrate has the power to impose.

30. The learned Counsel for the Appellant further argues that by entrusting the power to issue and revoke search warrants in drug matters to the High Court under Section 12 of the IDCA, the Legislature has intended to vest the jurisdiction to preside over drug matters only in the High Court. This argument has no legal basis at all. I hope the learned Counsel was not misleading this Court in this regard. It is true that Section 12 of IDCA entrusts the High Court to issue interception warrants, the power to issue search warrants generally is entrusted to the Magistracy. Section 21 of the IDCA clearly empowers the Magistrates Court to issue search warrants to police and customs officers and more specifically to customs officers when it is satisfied that the applicant customs officer has reasonable grounds to suspect or believe that an offence under section 4 of the IDCA has been committed. Therefore, no inferences as to the intention of the Legislature as claimed by the Counsel can be drawn merely by looking at Section 12 of the IDCA. There is no basis for this argument.
31. I hold that Section 7 of the CPA limits only the sentencing power of the Magistrates Court and not its jurisdiction to preside over (hear and determine) criminal matters the Magistrates Court is entitled to hear under Section 5(2) of the CPA. In view of that, I hold that the learned Magistrate had jurisdiction to preside over the matter.

Ground -1 – Purity

32. The Appellant submits that the learned trial Magistrate erred in law and fact to convict the Appellant for importing 139.6 grams of methamphetamine when the evidence of the Principle Scientific Officer (PW 6) was that no purity test was conducted and as such her report is not conclusive of the weight of the methamphetamine and therefore the charge was not proved.
33. It is clear from the evidence of the Principle Scientific Officer (PW6) that no purity test was conducted as there was no request from the police. She had tested a sample from each of the five plastics and each confirmed the presence of methamphetamine, an illicit drug under the IDCA. She said that the total weight of the content in the five plastics is 139.6 grams.
34. I do not agree that the weight of the illicit drug is an element of the offence under Section 4(1) of the IDCA. What must be established by the prosecution is the identity of the drug referred to in the charge. The purity of the drug is a matter of sentence and not for conviction. Blackstone Criminal Practice (1996) B 20-9, p 470 states:

Although the expert evidence (such as an analyst's certificate) is not required in all cases, the prosecution must establish the identity of drug referred to in the charge with sufficient certainty. Hill (1993)96 Cr.App R 456

35. In respect of possession of controlled drugs contrary to Section 5(2) of the English Act, Blackstone in Criminal Practice (2019) 27-67 p 2929 further states as follows:

In order to find a conviction for the offence of being in possession of a controlled drug contrary to section 3(2), the prosecution do not have to prove possession of a usable quantity of the drug, but merely possession of any quantity, however minute, providing it amounts to something. The question is one of fact for the common sense of the tribunal. If it is visible, tangible and measurable it is certainly something. Quantity may also be relevant to the issue of knowledge. If knowledge cannot be proved, possession cannot be established. Possession denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature, but you do not possess it unless you know you have it: Boyesen (1982] A.C. 768, HL. See also DPP U Brooks [1974] A.C. 862, PC, per Lord Diplock at p. 866H.

36. In view of that, there is no legal basis for this argument.

The Grounds 2, 3, 4 and 5 -Chain of Custody

37. The Appellant submits that the chain of custody of the alleged illicit drug from the time it was seized by the authorities to the time it was brought to court was not intact and therefore was contaminated or tampered with. In each round, he highlights three particular instances where the chain of custody has been discontinued.
38. The chain of custody is a legal term that refers to the chronological sequence of the movement of a substance, or a documentation of certain evidence. Such a chronological sequence of the events or movements is important to establish that the alleged substance has not been contaminated or interfered with any other foreign objects, or that the integrity of the original version of the substance had not been interfered or contaminated until it was tested and documented. [State v Kumar [2018] FJHC 1217; HAC347.2017 (12 December 2018)].
39. The phrase "chain of custody" in a drug case refers to a list of all people who have had contact with the drugs from seizure to trial. It must be established as to the officer who takes or seizes the drug, the officer (s) stores the drugs, the drugs evaluated by an expert for their weight and identity and after evaluation, the drug must return for safe keeping until it is exhibited in court. Each person handling the drug should be called as a witness to explain their role in the investigation to

the court. If there is a gap in the chain of custody then that can create a doubt as to one or more aspects of the prosecution case that the drug may have been tampered, since there is no notion as to what happened with that drug when it was in the custody of the missing witness. A proper chain of custody is detailing who was involved, when the transaction occurred, where the drugs are located, and the reason for the transaction. The chain may also include photographs or videos of the transaction.

40. The first issue raised by the Appellant was that the alleged consignment of drugs was tampered with by a bio-security officer since there was evidence that it was opened and inspected by him and the failure of the prosecution to call any of the biosecurity officers to give evidence created a gap in the chain of custody raising a doubt of tampering the exhibit before it was handed over to the customs authority.

41. At paragraph 34 of the judgement, the Learned Magistrate has dealt with this issue and observed as follows:

after analysing the overall evidence of the First and Second Prosecution witnesses with the Exhibit 2, I am satisfied with the answers and explanation provided by the First and Second witnesses, I have no doubt that the package had not been tampered by the Bio Security prior to the examination conducted by the Fiji Customs on 11/4/2017.

42. The Appellant submits that the learned Magistrate's finding is not supported by the evidence given by the 1st and 2nd prosecution witnesses (PW1 and PW2). In her judgment, at paragraph 34, the Learned Magistrate stated that,

the first prosecution witness stated that none from Bio-security opened this consignment before him, in his evidence the First prosecution witness said on 10/4/2017, he received the Air Bill reference from the consignee and that he tracked the package for custom clearing and he said he cannot recall whether it was opened or not as this incident occurred a few years back. Later, the First Prosecution witness denied opening made by the Bio-Security before him.

43. The first prosecution witness, Suresh Sundaran Mudaliar, was Customs Bond Clerk or Customs Agent at DHL, (PW1) [his evidence is found on pages 34 to 59 of the Copy Record]. He, in his examination-in-chief, [at p 38 of the copy record (CR)] said:

A. I am not a bond officer but on that day one of our Bond officer was sick so I was relieving him so I had to do the bond duty. After that when I attached all the documents I went and engaged the customs officer to come and verify the item in our bond so the custom officer Joti came to our Bond, opened the package and after we opened the carton and from there it is the customs duty to verify everything with the contents of the item.

Q. You mentioned that Joti opened the package for Joti to verify?

A. No, when Joti was presenting the Bond to the customs officer. We called Joti the customs officer in our bond, so in front of the customs officer - we can't open the package-like we are not allowed to open the package. When the custom is present in front of us then we are allowed to open the package.

44. And, also on p 46 of the CR he said:

Q: So you opened the package in front of the customs officer Ms Joti (PW2)?

A Yes.

Q: when you opened that package you found these 5 coconut oil and 5 beanie hats?

A: Yes

Q: As a bond officer, it was my duty to open the box.

So you had opened the box?

A: Yes, I opened the box and the verification part is done by customs. [p 46 of the CR]

.....

Q: But my question is, you in the presence of Ms Jotika, you opened the parcels?

A: Yes

Q: Now what was your observation there and then?

A: My observation was that we have counted 5-5 each and after that we opened one of the cream bottles, we put our hand inside, she felt that something is inside, so she poured it and then he referred to the heads. [P 48 of the CR]

45. As per the evidence-in-chief, PW1 has clearly stated that the package was opened by him in the presence of customs officer Jotika (PW 2). However, under cross-examination, when he was shown his witness statement, PW1 admitted that the parcel had been opened on 10 April 2017 by a biosecurity officer before he handled it on 11 April 2017. Let me check what he had said under cross-examination.

46. PW 1 under cross-examination, said:

Q: Before you took the package to customs for verification, was it sent to biosecurity?

A: Biosecurity portion I have to check, I have told the court that I was the relieving officer on that day.

Court: You need to answer that, the question is did you take it to Biosecurity, yes or no?

A- No

[at pages 52 and 53 of the CR]

47. He agreed that, according to his witness statement, the biosecurity officer has verified the item on 10 April 2017. In his witness statement, PW1 stated:

A. After receiving the email, I checked the consignment, it was examined by the biosecurity officer by then it was 5 pm, I report off duty.

In his evidence, PW 1 said:

Q: I agree so if Biosecurity have to verify the package, they will have to open it, isn't it?

A: They will open the packet.

Q: They will open the packet, yes or no?

A: Yes

Q: So on the 10th the package was opened, isn't it by the Biosecurity officer?

A: In verification of that our bond officer was there.

Q: But it was opened, isn't it?

A: Yes

Q: And they have prepared a clearance report, isn't it?

A: That day I was not the bond officer.

.....

Q: Since you have been working with DHL for 15 years, the normal procedure for a biosecurity officer is to open and check the package, isn't it, verify the item by opening it, isn't it?

A: Yes

Q: Thank you. So, in this case, it was verified by the biosecurity officer according to your statement so there is clearance that they have opened it, isn't it because that is the procedure?

A: Yes that is the procedure

Q: And you don't know who was that officer who opened it?

A: Yes, I do not know who was the officer?

Q: And you also do not know who was the Bond officer on that day?

A: No

Q: So before this consignment came in your hand, it passed through another Bond officer and one bio security officer, isn't it?

A: Yes.

Q: So you were the third person handling this document when it arrived in Fiji, isn't it?

A: Yes. [p54 of the CR]

48. Under re-examination, PW1 had stated:

Q: Does Biosecurity open the package?

A: That part I have to check who was the Bond officer.

Q: Does Bio security opens any package sent through DHL, who all need to be present?

A: Bond officer, Biosecurity officer

[p56]

Q: Answer the question, when you saw with Jotika, was it opened before?

A: That part very hard to recognize, it's been 5 years back.

Q: How did you know that the biosecurity officers with one of your staff had checked the package?

A: The manifest copy came from USA.

Q: Witness do you have any knowledge or not on whether the Biosecurity officer with the customs officers at DHL actually opened the package and verified the content?

A: I am not sure of that day but on the next day the examination was done by the customs officer of that package I took the item to our bond to open the package from customs to verify.

49. PW1 has clearly stated in his witness statement as well as in evidence that on 10 April 2017, he was not at the bond office after 5 pm. He was merely explaining the normal procedure. The record shows (at p 54 of the CR) that PW 1 was warned by the Court not to give evidence based on assumptions if he was not there. Therefore, what PW1 has stated in his evidence should be considered hearsay evidence which has no probative value. His assumption appears to be based on his experience at DHL bond office.
50. The second prosecution witness was Jotika Mala (PW 2), the customs officer. In her examination-in-chief, she said that the consignment was opened by PW.1 in her presence for her to examine. [P 60 of the CR]. She agreed that, in general, the biosecurity officers are also authorized to open a consignment without the presence of a customs officer. She however cannot remember if this package had been opened on 10 April 2017, before it was opened by PW.1.
51. PW 2 had agreed that the package was verified by a biosecurity officer, but she could not remember whether it was opened by them or not. She took the view that the package was not tampered with before it was opened by PW1 [p61 and 62 of the CR]. She was not sure if the package had been opened because biosecurity documents were not presented to her at the time of her examination and that is an indication that the package was first opened by the customs officials. [p63 of the CR].
52. By looking at the date and the endorsement on Exhibit No. 2 (waybill), PW2 could not say if a physical examination was done on 10 April 2017 by biosecurity officers. The flight, FJ 811 landed at night on 10 April 2017. The inspections are generally done in the morning. The time of the inspection is not written on the waybill. Since Exhibit No 3(b) refers to the flight as FJ 811 of 11/04/2017, it can be assumed that the flight landed on 10 April 2017 late at night. It is possible, therefore, that the biosecurity clearance was done by merely looking at the manifest as PW2 said. It should also be noted that, according to what is written in Exhibit 2, clearance has been given for 'dietary supplements'. In view of this evidence, it was open for the Learned Magistrate to

assume that the consignment was not opened and contaminated before it came into contact with PW1 and PW2.

53. The template in the commercial invoice [(Exhibit 2(b))] that '*These commodities ...were exported from the United States in accordance with the Export Administration Regulations*' does not suggest that it is a certificate to the effect that the consignment is free from illicit drugs.
54. PW 2 had been the first person to entertain a doubt as to the contents of the jars prompting her to open them and further examine them. When coconut cream is readily available in Fiji for a much cheaper price, why would one import them from the US? PW 2 ruled out the possibility of this consignment being contaminated at the DHL Bond house.
55. There is no plausible evidence that the biosecurity officers and another bond officer from DHL had handled the consignment before it came into the custody of PW1 and PW2 in the sense that it was not opened and inspected by the biosecurity officers on 10 April 2017 before PW 1 and PW 2.
56. Even if the package had been opened and inspected by the biosecurity officer on 10 April 2017, the circumstances of this case do not give rise to a reasonable doubt that the jars were tampered with either by the biosecurity officer or the bond officer. They had no apparent motive or time to introduce methamphetamine crystals into the coconut cream jars sent to the accused from the USA. The package had not been moved away from the bond house at any time and the inspection had been done within a short period of time of its arrival in Fiji. Therefore, the Appellant's suggestion that the consignment was tampered with by the biosecurity or bond officers is far from believable.
57. Upon the discovery of the white crystals concealed in clear plastic bags in each jar, PW 2 called her team leader Sakiusa who had come with Fatiyaki of the K9 Unit as she entertained the doubt that I alluded to earlier. During the ten years of her service, she had seen white crystals of methamphetamine on several occasions. Her observation of the crystals would have helped her to identify the crystals to be methamphetamine. The conduct of the K9 dog indicated the presence of a controlled drug. The test done on the first Defender RM machine by Tiatia further confirmed the presence of methamphetamine in the jar that was tested. Everything happened at the DHL

bond itself. After the presumptive tests, the jars were repacked and sealed in PW.2's presence and were handed over to PC Jone (PW10) of Border Police with the documents for control delivery.

58. Although expert evidence (such as an analyst's certificate) is not required in all cases, the prosecution must establish the identity of the drug referred to in the charge with sufficient certainty. Hill (1993)96 Cr.App R 456. Blackstone- Criminal Practice (1996) B 20-9, p 470
59. The next issue pertaining to the chain of custody raised by the Appellant was that the alleged consignment of drugs was handed over to Venti at the Forensic Chemistry Laboratory and not directly to the scientific officer Miliana (PW6) and that since Venti wasn't called to give evidence, the chain of custody was not intact. The Appellant appears to argue that the consignment was tampered with or contaminated at the Forensic Chemistry Laboratory. In paragraph 35 of her judgment, the learned Magistrate addressed this issue in detail.
60. The principal scientific officer Miliana (PW-6) in her evidence-in-chief said that she was on duty on 12 April 2017 and received the samples from PC Jone (PW 10) at about 1550 Hrs. Under cross-examination, she agreed that the sample was physically received by Venti Chandra at the counter, but Venti received it in her presence. At page 111 of the CR PW6 said:

Q: No that is in the lab but at the moment I am talking about the counter.

A: Yes on the counter when Venti received from PC Jone, she documented receiving of the items and informed me that there was a case with white crystals being submitted and that is when I stepped in to verify that the items that she had said that she had received was being received and I processed to witness what was being documented by her.

Q: Witness I will stop you there, but the samples were received by Venti Chandra?

A: Yes, it was received in my presence.

61. PC Jone Nagiri (PW 10), in his evidence said that he handed the consignment over to Venti on 12 April 2017 and at that time Ms Miliana (PW 6) was not there. However, PW 6 said she was on duty at the lab on that particular day, but she agreed that the consignment was received by Venti at the counter. It is possible that PW 10 did not see PW 6 from the counter. Even though the consignment was not physically handed over to PW 6, Venti, after receiving it at the counter, had handed it over to PW 6. In Exhibit 7 she has certified that she received it from PC Jone on 12 April 2017. After that, PW 6 had been in control of the consignment on which she had commenced the testing on the 12th itself.

62. The Learned Magistrate at paragraph 35 of her judgment said:

The tenth prosecution witness said that the substances were handed over to Ms Venti and collected the consignment and the report from Ms Venti. The sixth prosecution witness the Principle Scientific Officer admitted samples are received and document by Venti for Chemistry Lab. She said whatever received shall be witnessed by a second person and she was the second person who received the samples. She said any person receiving samples are acting on behalf of her as she is the Principle Scientific Officer of the lab and with her authority and they are acting on behalf of her.

63. Even though PW6 has not physically received the consignment, she had attended to it immediately thereafter. In the circumstances, the Learned Magistrate's finding is evidence based and not unreasonable.

64. PW 6 further said that the analysis was done from 12 to the 16 April 2017 and the analyst report was signed on the 17 May 2017 when it was requested by the investigating officer. This evidence shows that the alleged drug was kept at the forensic lab from 12 April 2017 to the 17 May 2017. The Appellant argues that the prosecution failed to establish by evidence in whose custody the alleged consignment of drugs was kept at the forensic lab after the analysis.

65. The analysis was done through 12- 16 April 2017. According to PW 6, immediately after the analysis, the consignment had been repacked, sealed and the report had been prepared [p110 of the CR]. Until the consignment was handed over to PW10, it had been in the custody of PW 6 who has testified at the trial. When it was shown to PW6 in Court, she confirmed that the evidence seal from the lab was still intact.

66. In the circumstances, I do not think that the failure to call Venti as a witness affected the integrity of the chain of custody so as to create a reasonable doubt in the mind of the Learned Magistrate.

67. The third occasion where the alleged discontinuation of the chain of custody had occurred between the time when it was picked up by PW 10 from the Forensic Chemistry Lab and when it was exhibited at the trial.

68. PC Jone told the Court that he collected the consignment from Venti in May 2017 and took it to Namaka where he locked it up. In cross examination, PC Jone agreed that he was transferred to another branch whereupon he handed his duties over to the new exhibit writer WPC Bulou. Then

corporal Shobna took over the duties as the exhibit writer. He agreed that the alleged drug was not in his custody from 2018, and before it was exhibited in the court (pages 157, 160 of the CR).

69. The Appellant argues that the chain of custody was discontinued as neither WPC Bulou nor Corporal Shobna were called as witnesses. Learned Magistrate in her Judgment at paragraph 35 observed as follows:

...Later, he (PW 10) said he was transferred from Exhibit room to Investigation and WPC Bulou and WPC Shobna worked as Exhibit Writers. The Exhibit 12 was brought to the Court by Eleventh Prosecution witness, the Investigation Officer of this matter. I believe when the tenth Prosecution witness stated that he was transferred from Exhibit Writer position to Investigation and the exhibit was given to WPC Bulou that does not mean that tenth Prosecution witness has physically hand (sic) over the exhibit 12 to WPC Bulou. I believe what he meant was his duties of an Exhibit Writer was handed over with the Exhibit Register to the newcomer of the post. I believe in every workplace transferring of officers is a normal function. Therefore, I do not see any practicality with regards to the questions raised by the Defence counsel on transfer of Exhibit writers during the period of 2017 till the trial date has any concerns as the Drug Analysis Report is made by the Sixth Prosecution Witness under her signature and moving out of any such exhibits from the Exhibit Room will be recorded in the Register. If the Defence Counsel was contesting the Exhibit Register he would have made an application to the Court for a *voir dire* hearing to deal with this matter. I believe this has no bearing in this judgment. What it matters is whether the tenth Prosecution witness has lodged Exhibit 12 at the Exhibit Room. The Investigation Officer being the person who gathers all exhibitions (sic) pertaining to a case in this matter the Eleventh Prosecution witness tendered the exhibit 12 in open Court. Considering the evidence before me adduced by the First, Second, Fifth, Ninth, Sixth, Tenth and Eleventh Prosecution witnesses of these matter and exhibit 12 which I saw at the trial, I am satisfied with the chain of custody of the drugs and I believe it is unbroken.

70. In view of the evidence of PW 10 that Exhibit 12 was not in his custody from 2018 until it was exhibited at the trial by PW 11, the prosecution should have called WPC Bulou and WPC Shobna under whose custody the exhibits had been to give evidence at the trial. However, in the circumstances of this case, even in the absence of their evidence, the Learned Magistrate was not unreasonable in coming to the finding that the chain of custody was unbroken.
71. There is no dispute that Exhibit 12 was locked in the Exhibit Room at Namaka Police Station by PW 10. PW-11 stated that he brought the drugs to Court after picking it up from Shobna. There is no evidence to suggest that it was taken out of the Exhibit Room by anybody until it was taken out by PW 11 for the purpose of the trial. The only evidence available was that the person in charge of the Exhibit Room has changed. All the movements of the exhibits in and out should have been recorded in the Exhibits Registry and since there is no dispute as to the entries in the Exhibit Registry, as was observed by the Learned Magistrate, it is reasonable for her to assume

that the Exhibit 12 was intact in the Exhibit Room until it was taken out by the Investigation Officer (PW 11).

72. That was not the only justification for Learned Magistrate's finding. PW 6, the person who repacked and sealed the consignment upon conclusion of the analysis was present in Court to give evidence in Court. Her evidence is capable of supporting the finding of the Learned Magistrate. Upon Exhibit 12 being presented for her observation in Court, PW 6 said:

A: After the testing was concluded, we then packed it and labeled it with job number that corresponded with the report that was then sealed with our evidence tape and the packaging was also sealed, signed and dated and given back as dispatched to the IO.

Q: Thank you witness, so do you confirm this is the same packaging that you taped after that you had tested the 5 samples?

A: Yes, I do confirm.
[p110 of the CR]

73. Learned Magistrate has not only had the benefit of hearing the evidence of PW 6 but also of observation when the exhibit 12 was presented before her. There was no missing link to the chain of custody as suggested by the Appellant.

74. When PW 10 took custody of the consignment from PW2, it had already been packed and sealed by the customs officer (PW2). When he collected it from the Chemistry Lab, again it was packed and sealed by PW6. [p 110 of the CR] There is no doubt that the consignment was unpacked at the Chemistry Lab for the drug analysis [107 of the CR]. It can never be the same after the intervention of the analyst at the lab.

75. PW 10 agreed that, as per Force Standing Order 101, the carton must be sealed from the forensic lab to the Court [p 160 of the CR]. When PW 10 was shown the box, he conceded that there was no sealing wax but only the tape was present [At p. 161]. It should be noted that PW 10 had given evidence after PW 6 who had opened the box in Court when she was asked to do so. In these circumstances, it is obvious that PW 10 was not in a position to say if the box had sealing wax or not as it had already been opened by PW 6 in Court. The Learned Defence Counsel should have checked the presence of sealing wax with PW 6. This ground is not meritorious.

Ground 6

76. Ground 6 has been raised on the basis that the Learned Trial Magistrate erred in law and in fact when she failed to analyse the evidence of PW11 DCPL Aten Prasad who stated that the exhibit which was in the Court was not the same exhibit which was seized in the instant matter.
77. PW 11 is the investigating officer of this case. He also conducted the interview of the accused under caution. He was never involved in the seizure of the consignment. He never said that he was at the DHL bond at the time of the seizure of the drugs. The alleged consignment was seized and detained by PW2, who was a customs officer. PW 2 said she repacked and sealed it before it was handed over to the Boarder Police. PW 11 had signed the consignment as a witness when it was brought to him at the Charge Room. (p167 of the CR) Therefore, he was not able to say in Court that the exhibit (12) which was in Court was not the same exhibit which was seized in the instant matter.
78. Therefore, I find that the finding of the Learned Magistrate that the chain of custody of the drugs was unbroken is evidence-based and reasonable in the circumstances of this case.
79. As Rajasinghe J observed in State v Kumar (supra), the continued chronological sequence of the events or movements is important to establish that the alleged substance has not been contaminated or interfered with by any other foreign objects, or the integrity of the original version of the substance had not been interfered or contaminated until it was tested and documented.
80. Once the analysis has been done at the Forensic Chemistry Lab on the substance seized and the results thereof are documented, the most important part of the chain of custody comes to an end because, once that part is established and if the accuracy of the analyst's report could be believed, they establish that the substance seized contained an illicit drug, one of the main elements of the offence. The continuity of the rest of the chain of custody from the lab to the courthouse will be important to bolster up the credibility of the events of the prosecution case. By exhibiting the seized substance and the things that were associated with it at the time of the seizure such as the container or wrapping material, the prosecution will be able to convince the court that the seizure actually took place and that the seized substance was analysed at the lab before being brought to court. But they will not convince the Court or establish that the substance before it is an illicit drug.

81. It is in this sense that paragraph 11 of the judgment in *State v Calevu* [2020] FJHC 448; HAC211.2018L (25 June 2020), the case cited by the Appellant, should be read and understood. In that judgment, Temo J (as he then was) observed:

Now I move on to discussing counts no. 2 and 4. In my 11 years serving as a High Court Judge, I have heard numerous cases of “unlawful cultivation of Illicit drugs”, contrary to section 5 (a) of the Illicit Drugs Control Act 2004. In these type of cases, it was always essential to prove the drugs involved in the allegation, by the actual production of the drugs involved in the courtroom, during the trial process. The drugs must be produced in court as a prosecution exhibit. This will show that the chain of custody of the alleged illicit drug had not been broken from it being uprooted from the alleged marijuana farm, to the relevant police station, and into the trial courtroom. If the chain of the custody of the alleged drug was broken from where it was obtained by the police to the trial courtroom, the effect of the same is far-reaching. It could have the effect of casting a reasonable doubt on any alleged confessions made to the police.

82. His Lordship qualified the above statement by adding paragraph 13 where he stated:

Of course, there are legal ways to avoid the problems mentioned above, if the drugs had been destroyed under section 30 of the Illicit Drugs Control Act 2004. A certificate or report prepared in accordance with section 30 (6) of the Illicit Drugs Control Act 2004 must be produced in court. None was done in this case, and that was fatal to the prosecution’s case.

83. It is clear that in these types of cases, to prove the chain of custody, it is not always essential the actual production of the drugs in the courtroom during the trial process if other sufficient evidence was available. What is essential is that all stakeholders involved in the process must come and give evidence as to the role each one of them played from the seizure to the courthouse with sufficient credibility.
84. In this case, the Learned Magistrate had a reasonable basis to believe that the consignment was not opened and tampered with by a biosecurity officer before it came into contact with PW1 and PW2. Therefore, the evidence of an unknown biosecurity officer and DHL officer was not required to establish the chain of custody. The sequence of movements of the consignment and the circumstances under which storage took place warranted the Learned Magistrate to believe that the consignment was not tampered with or contaminated after it was seized from the Appellant even in the absence of the evidence of Venti at the lab or Bulou and Shobna at the exhibit room.
85. In view of these findings, the grounds raised by the Appellant in respect of the chain of custody must fail.

86. Following Orders are made:

- (1). Appeal against the conviction is dismissed.
- (2). The Judgment of the Learned Magistrate at Nadi is affirmed.



Aruna Anuthge

Judge

28 July 2023

At Lautoka

Solicitors:

M.Y. Law for Appellant

Office of the Director of Public Prosecution for Respondent