

IN THE HIGH COURT OF FIJI AT SUVA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 26 of 2023

IN THE MATTER OF an Appeal against
Conviction and Sentence from the decision
of the Magistrate's Court of Fiji at Nausori
in Criminal Case No. CF 696 of 2018

BETWEEN: **RAKESH CHAND**

Appellant

AND: **THE STATE**

Respondent

For the Appellant: **Mr. K. Singh**
For the Respondent: **Mr. Z. Zunaid**

Date of Hearing: **5th August 2024**
Date of Ruling: **16th August 2024**

APPEAL AGAINST CONVICTION AND SENTENCE

1. The Appellant and one Jioji Tuivuna were jointly charged with one count of Unlawful Possession of Illicit Drugs contrary to section 5 (a) of the Illicit Drugs Control Act 2004.
2. The allegation was that they were travelling in a rental vehicle, which the Appellant was driving and in control of. The Police received reliable information that the Appellant and his accomplice were transporting illicit drugs at night from the Western Division. The Police set up a road block, intercepted the said vehicle at Kasavu bridge and searched the said vehicle with the assistance of the K9 dog unit of the Fiji Police Force where illicit drugs namely Methamphetamine was seized

from the vehicle dash board compartment. Afterwards the Appellant and his accomplice were arrested and charged.

3. After Trial in the Nausori Magistrate's Court, the Appellant was convicted on the 3rd of July 2023 for the offence of Found in Possession of Illicit Drugs, while the accomplice Jioji Tuivuna was acquitted of the said charge.
4. The Appellant was sentenced on the 17th of July 2023 to 52 months of imprisonment with a non-parole period of 40 months i.e. 4 years 3 months imprisonment with a non-parole period of 3 years and 3 months.
5. He filed a Petition of Appeal on the 14th of August 2023, relying initially on 9 grounds of appeal against conviction and 2 grounds of appeal against sentence.
6. Later he filed Amended Grounds of Appeal on the 5th of October 2023, relying on 18 grounds of appeal against conviction and 4 grounds of appeal against sentence.
7. The appeal was first called on the 23rd of August 2023 and directions were made for the compilation of the records and the matter was ultimately fixed for hearing on the 5th of August 2023.
8. The parties have filed appeal submissions and the matter is now adjourned for ruling.

Submissions for the Appellant

9. The Appellant submits that the Magistrate erred in law by implying that the Appellant had to prove that he did not possess the drugs, shifting the burden of proof from the prosecution to the Accused (Appellant). This is contrary to section 57 and 59 of the Crimes Act, thereby causing a miscarriage of justice, as the Prosecution has the onus of proof.
10. This is contrary to section 14 (2) (a) (j) of the Constitution of Fiji. He submits that the reversal of the onus of proof that imposes a legal/persuasive burden on the accused is prima facie inconsistent with the entrenched presumption of innocence in section 14 (2) (a) of the Constitution because it allows an accused to be convicted

of failing to discharge the reverse onus, even though the prosecution fails to prove all elements of the offence beyond a reasonable doubt – Lata vs State [2017] FJCA 56; AAU 37 of 2013 (26 May 2017).

11. The Magistrate also erred by failing to properly apply the test for circumstantial evidence. In this case, the State's case relied on the assumption that the Appellant had knowledge of the illegal substance within the vehicle. No direct evidence was presented to substantiate this claim – the Appellant relies on the authority of State vs Rahman [2021] FJHC 287; HAC 63 of 2019 (16 April 2021).
12. The Appellant also submit that the handling of the evidence in this case raises significant concerns regarding the integrity of the chain of custody.
13. The Appellant also submits that the Learned Magistrate erred in law and in fact in failing to properly consider the totality of evidence presented by the Defence and the Prosecution during the Trial.
14. The Learned Magistrate erred in law in failing to consider that the Appellant had no knowledge or intention to possess the illicit drugs found in the vehicle.
15. The Learned Magistrate erred in law by failing to give sufficient weight to the Defence's argument regarding the lack of exclusive control over the vehicle referencing the case of Abourzik vs State [2019] FJCA 98; AAU 54 of 2016 (7 June 2019.)
16. The Learned Magistrate erred in law by not adequately addressing the Defence's argument on the possibility of the drugs being placed in the vehicle by another person Lata vs State [2017] FJCA 56.
17. The Learned Magistrate also erred in law and in fact when he failed to hold that the search conducted at the Accused's car was unlawful and in breach of the Appellant's rights under the Constitution at section 98 of the Criminal Procedure Act 2009.
18. The Learned Magistrate erred in law and in fact by not providing adequate consideration to the Defendant's lack of direct evidence linking the Appellant to the drugs.

19. With respect to the appeal against sentence, the Appellant submits that the Learned Magistrate erred in law and in principle in taking on an excessive starting point of 6 years for 104.3 grams under Category 2 as set down in Abourzik vs State (supra).
20. The Learned Magistrate erred in law when he acted upon a wrong principle. He acted upon a wrong principle, he allowed extraneous or irrelevant matters to guide or affect him, he mistook the facts, and he failed to take into account some relevant considerations.
21. The Learned Magistrate erred in law and in principle by allowing only 6 month's deductions from the Appellant's sentence for the delays caused beyond the control of the Appellant in bringing the case to Trial when in fact the delays caused entitled the Appellant to a more appropriate deduction of 12 months from the sentence.
22. The Learned Magistrate erred in law and in principle by imposing an excessive non parole period of 40 months against the Appellant without giving cogent reasons to do so.
23. The Appellant therefore submits that the conviction is fundamentally flawed due to the erroneous application of the law and misinterpretation of the facts and the appeal should be granted.

Respondent's Submissions

24. The Respondent respectfully disagrees with the Appellant's submissions and states that at paragraph 27 of the Judgment, the Magistrate stated "to apply this presumption, the prosecution had to prove beyond a reasonable doubt the drugs were found in the vehicle on 28th September 2018 and both the Accused were in control of the said vehicle at that time."
25. The Respondent submits that section 32 of the Illicit Drugs Control Act stipulates that the Prosecution needs to prove in this case only that both the Accused were in control of LR 3661 and the drugs were found inside the vehicle.

26. The Respondent submits that the burden imposed by section 32 of the Illicit Drugs Control Act on the Appellant was an evidentiary burden and in no way reverses the burden from the prosecution to the Appellant.
27. The Respondent also submits that the Magistrate has correctly applied the test for guilt where the Learned Magistrate was satisfied that the prosecution had proved the charge beyond a reasonable doubt.
28. The Learned Magistrate properly considered the evidence and found that there was no break in the chain of custody.
29. With respect to the appeal against sentence, the Magistrate correctly identified the tariff as set by Abourzik vs State (supra) and also correctly identified the offending in this case as falling into Category 2 and the final sentence in this case is well within the tariff.
30. The Respondent therefore submits that the appeal should be dismissed and the conviction and sentence should be affirmed.

Analysis

31. Appeals from the Magistrate's Court are provided for at section 246 of the Criminal Procedure Act 2009, which states: -

“246 (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 judgment and sentence.”

32. Section 248 provides for how the appeal must be lodged and the procedure for the same. The relevant section provides: -

“248 (1) Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against—

(a) it shall be filed at the Registry of the High Court;

(b) a copy of the petition shall be served on the Magistrates Court from the decision of which the appeal is lodged; and

(c) a copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.”

33. In the case of *laisa Sousou Cava v State* [2011] CAV 7/10 14 November 2011 the Court of Appeal stated as follows: -

“The avenue of appeal against conviction by a MC is by way of rehearing to a High Court Judge. Rehearing means the witnesses do not give their evidence all over again but the appellate Judge takes evidence and process at trial from the record in the MC, assisted by written rulings and judgments made by the Magistrate: per Marshall, J.”

34. This is a timely appeal against conviction and sentence and the principles for determining appeals against conviction and sentence are well settled.

35. The Supreme Court stated the following in the case of *Naisua –v- The State* [2013] FJSC 14; CAV 10 of 2013 (20th November 2013) as follows: -

“[19] 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) 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.

[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in *Chirk King Yam v The State* Criminal Appeal No. AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of *Kim Nam Bae's* case.”

36. In this case the main grounds of appeal revolve around the interpretation of section 32 of the Illicit Drugs Control Act 2004, which provides

“Factual presumption relating to possession of illicit drugs

32. Where in any prosecution under this Act it is proved that any illicit drug, controlled chemical or controlled equipment was on or in any premises, craft, vehicle or animal under the control of the accused, it shall be presumed, until the contrary is proved, that the accused was in possession of such illicit drug, controlled chemical or controlled equipment.”

37. The Crimes Act provides at section 57 that for every Criminal case, the prosecution bears the legal burden of establishing all of the elements of the offence. The legal burden is also defined as follows - “legal burden” in relation to a matter, means the burden of proving the existence of the matter.

38. Section 58 sets out that the standard of proof is – proof beyond a reasonable doubt.

39. In instances where the statute provides for a statutory defence to an offence, section 59 provides that the Accused bears an evidential burden of establishing the statutory defence, “evidential burden”, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

40. In his judgment the Learned Magistrate correctly held firstly, that the prosecution has established beyond a reasonable doubt that the Appellant was in control of the motor vehicle where the illicit drugs were found.

41. Once he had made that finding, the Learned Magistrate then found that the Appellant had failed to discharge his evidential burden of establishing on a balance of probabilities that he was not in control of the vehicle where the drugs were discovered or that he was in possession of the drugs.

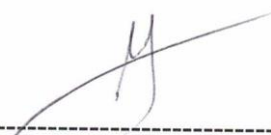
42. The Learned Magistrate also found no material break in the chain of custody after the drugs were seized and sent for analysis and he accordingly convicted the Appellant and acquitted the accomplice.

43. I find that the Magistrate was entitled to arrive at the findings that he made in the Court below. I am satisfied that he did not act upon a wrong principle or that he allowed extraneous or irrelevant matters to guide or affect him. I also find that he took into account all of the relevant facts and he did take into account all of the relevant facts before him at the Trial.
44. With respect to the appeal against sentence, the Court properly identified that the quantity of methamphetamine found on the Appellant put him into Category 2 of drug offending – more than 5 grams and up to 250 grams, a tariff of 3 1/2 years to 10 years imprisonment.
45. The final sentence was 52 months imprisonment with a non-parole period of 40 months. The Magistrate took a starting point from the middle of the tariff and making the necessary adjustments for mitigating and aggravating factors as well as any pre-sentencing period in remand, the Court arrived a final sentence that was within the tariff, in fact, from the lower end of the tariff.
46. I therefore find that the appeal both against conviction and sentence is dismissed, the conviction and sentence are both affirmed.
47. So ordered.

This is the Ruling of the Court: -

- 1. The appeal against conviction and sentence is hereby dismissed – the conviction entered by the Nausori Magistrate’s Court on the 3rd of July 2023 and the sentence handed down on the 17th of July 2023 are hereby both affirmed.**
- 2. The appeal is dismissed**





Mr. Justice U. Ratuville
Puisne Judge

cc: - Office of the Director of Public Prosecutions
- Chand and Young Lawyers