

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 17 of 2024**

**BETWEEN** : **KRISHNEEL DASS**  
**APPELLANT**

**A N D** : **THE STATE**  
**RESPONDENT**

**Counsel** : Appellant in person.  
: Ms. E. Cabemaiwai for the Respondent.

**Date of Submissions** : 09 September, 2024

**Date of Hearing** : 19 September, 2024

**Date of Judgment** : 26 September, 2024

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**JUDGMENT**

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**BACKGROUND INFORMATION**

1. The appellant was charged for one count of unlawful possession of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act 2004. It was alleged that on 13<sup>th</sup> March, 2024 the appellant without lawful authority had in his possession 0.098 grams of Methamphetamine an illicit drug.
2. On 15<sup>th</sup> March, 2024, the appellant appeared in the Magistrate's Court at Nadi. His plea was deferred and he was kept in remand. On 28<sup>th</sup> March, 2024 the appellant appeared in court and pleaded guilty. Thereafter the appellant

admitted the summary of facts read to him in his preferred language. The learned Magistrate upon being satisfied that the appellant had entered an unequivocal plea of guilty found the appellant guilty and convicted him as charged.

3. The brief summary of facts was as follows:

*a. On 13<sup>th</sup> March, 2024 at about 0050 hours at Sagayam road, Nadi town P.C Elia whilst on mobile patrol saw the accused walking in a suspicious manner. P.C Elia approached the accused and arrested him. A search was conducted on the accused, P.C Elia found 1 x clear zip lock plastic containing white-like crystal substance believed to be illicit drugs in the accused right palm.*

*b. P.C Elia seized the suspected drugs and escorted the accused to Nadi Police Station. The contents of the seized item were taken for analysis at the Forensics Lab which was found to contain methamphetamine weighing 0.098 grams.*

*c. The accused was caution interviewed in which he admitted to the allegations at Q. & A. 105 -115. The accused was charged and produced in court for the offence of unlawful possession of Illicit Drugs.*

4. The appellant presented his mitigation and on 2<sup>nd</sup> April, 2024 the appellant was sentenced to 29 months and 13 days imprisonment with a non-parole period of 18 months.

### **APPEAL TO THE HIGH COURT**

5. The appellant being aggrieved by the sentence filed his appeal against sentence. The appeal was received by the High Court registry on 27<sup>th</sup> May, 2024 which is late by 27 days. The appellant is in person and the fact that the

delay is not long and there is no objection raised by the state counsel this court treats this appeal as within time. The following eight grounds of appeal has been submitted by the appellant:

- i. That the applicant noted the honourable Magistrate during sentenced made reference that he could either suspend the applicants sentence whether in part or whole pursuant to section 26(1) and (2) (b) of the Sentencing and Penalties Act 2009. Yet the applicants early plead guilty was not considered by the honourable Magistrate.*
- ii. That the honourable Magistrate did not consider the good track record (Criminal Jurisdiction). The applicant was a first offender and is remorseful for what happened and won't happen again.*
- iii. That the learned Magistrate erred in law extending the sentencing period of 20 months for the aggravating factor whereas the offence was void of aggravating factor.*
- iv. That the learned Magistrate erred in law in giving a higher effect of deterrence which is miscarriage of justice to the applicant.*
- v. That the learned Magistrate erred in law when he totally denied the effect of Rehabilitation whereas the applicant was a first offender as compared to other cases. The gates of prison are not shown to offenders with more amount of possession.*
- vi. That the learned Magistrate erred in law interact by not properly setting the guidelines which apply across all Acts identified under section 5(a) and 5(b) of the Illicit Drug Control Act 2004.*
- vii. That the learned Magistrate erred in law by wrongly balancing deterrence Denegation Accountability and Rehabilitation.*

*viii. That the learned Magistrate erred in law by not applying section 26 of the Sentencing and Penalties Act (2009).*

6. The appellant and the state counsel filed their written submissions and also made oral submissions during the hearing for which this court is grateful.

### **APPEAL AGAINST SENTENCE**

7. All the appeal grounds will be dealt with together. The primary complaint raised by the appellant is that the sentence is excessive. The appellant states that his remand period of 17 days was not deducted from his sentence. The learned Magistrate did not take into account section 26 of the Sentencing and Penalties Act to consider suspending his imprisonment term.
8. The appellant further stated that in his case there were no aggravating factors. The summary of facts does not indicate anything adverse at the time of his arrest in fact it shows cooperation by the appellant. He had pleaded guilty at the earliest opportunity and he was a first offender are strong mitigating factors in his favour. The weight of the illicit drugs is very minimum not even 1 gram.
9. Finally, the appellant submits that considering the current tariff for such offending his mitigating factors particularly being a first offender, cooperation with the police during the investigations and pleading guilty at the earliest opportunity showed genuine remorse hence he should have been given a suspended sentence.

## **LAW**

10. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.
11. 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.”*

12. The maximum penalty for the offence is life imprisonment or a fine of \$1,000,000.00 or both.

## **DETERMINATION**

13. At paragraph 16 of his sentence the learned Magistrate stated the following:

*Taking into consideration the seriousness of the offence of Found in Possession of illicit drug, the court takes the starting point of 30 months imprisonment. The court adds 20 months for the aggravating factors. For your mitigation 6 months is deducted; so the interim sentence comes to 44 months imprisonment. Considering your early guilty plea, your sentence is reduced to 30 months imprisonment. You have spent about 17 days in remand and I take that as time served. Final term of imprisonment is 29 months and 13 days imprisonment.*

14. The Supreme Court in *Ainars Kreimanis vs. The State*, criminal petition no. CAV 13 of 2020 (29 June, 2023) upheld the guideline tariff for all hard/major drugs sentences in *Joseph Abourizk vs. The State*, criminal appeal no. AAU 0054 of 2016 (7 June, 2019). In *Abourizk's* case (supra) the Court of Appeal stated the tariff at paragraph 145 as follows:

*Having considered all the material available and judicial pronouncements in Fiji and in other jurisdictions, I set the following guidelines for 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 ½ years to 04 ½ years' imprisonment.*

*Category 02 - More than 05g up to 250g – 03 ½ 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.*

15. In this case the learned Magistrate identified the correct tariff, and he took the lower range of the tariff of 30 months (2 ½ years) imprisonment. To this he added 20 months for the aggravating factor (possession in public place). There was another aggravating factor which the learned Magistrate did not take into account such as prevalence of the offending. In my considered judgment 20 months was a reasonable addition to the starting point.
16. Prematilaka JA sitting as a single judge of the Court of Appeal in *Alfred Ajay Palani vs. State*, AAU 111 of 2020 (16 December, 2021) made a pertinent observation in respect of the importance of the final sentence rather than the reasoning process leading to the final sentence at paragraph 37 which is applicable to the current appeal:

*However, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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 (Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015). However, not every sentence within the range would be necessarily an appropriate sentence that fits the crime.*

17. The final sentence was over 2 years imprisonment hence under section 26 (2) (b) of the Sentencing and Penalties Act the learned Magistrate had no powers to suspend the sentence. The sentence in this case is neither harsh nor excessive in fact the sentence is below the accepted tariff which is an appropriate sentence that fits the crime.
18. The appellant strongly argued and relied on the case of *State vs. Intiaz Nizar, criminal case no. 172 of 2019 (29<sup>th</sup> September, 2023 Lautoka Magistrate's Court)* where he said the accused was sentenced to six months imprisonment and *State vs. Malakai Lidinalagi criminal case no. 645 of 2023 (2<sup>nd</sup> April, 2024, Nadi Magistrate's Court)* where the accused was sentenced to seven months imprisonment. The appellant stated that these accused persons were found in possession of hard drugs yet they were given such lenient sentences.
19. In the interest of justice I have perused both the sentences, with respect to the lower courts this court has some reservations about the sentences imposed. I shall desist from making any further comments in case there is an appeal pending.
20. The learned Magistrate correctly and properly exercised his sentence discretion. All the grounds of appeal against sentence are dismissed due to lack of merits.

### **ORDERS**

1. The appeal against sentence is dismissed due to lack of merits.
2. The sentence of the Magistrate's Court is affirmed.



3. 30 days to appeal to the Court of Appeal.



**Sunil Sharma**  
**Judge**



**At Lautoka**

26 September, 2024

**Solicitors**

**Appellant in person.**

**Office of the Director of Public Prosecutions for the Respondent.**