stateIN THE HIGH COURT OF FIJI AT SUVA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 22 of 2024

IN THE MATTER OF an Appeal against Conviction and Sentence from the decision of the Magistrate's Court of Fiji at Navua in Criminal Case No. CF 240/17

BETWEEN: **SEMI BAINIVESI**

Appellant

AND: **THE STATE**

Respondent

For the Appellant: **In person**

For the Respondent: **Ms. Dugan. K**

Date of Hearing: **3rd October 2024**

Date of Judgment: **7th November 2024**

APPEAL AGAINST CONVICTION AND SENTENCE

1. The Appellant was charged with one count of Unlawful Cultivation of Illicit Drugs contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

2. The allegation was that on the 13th of September 2017, at Dakunikoro Settlement Semi Bainivesi, unlawfully cultivated 15 Cannabis Sativa plants weighing 166.9 grams.

3. After Trial in the Navua Magistrate's Court, the Appellant was convicted on the 26th of January 2024 for the offence of Unlawful Cultivation of Illicit Drugs.

4. The Appellant was sentenced on the 29th of February 2024 to 3 year's imprisonment, with a non-parole period of 2 years.

5. He filed a Petition of Appeal on the 20th day of March 2024, on the following grounds of appeal.

Grounds of Appeal

i. The Learned Trial Magistrate erred in law and also in fact when he convicted the appellant and sentenced him to 3 years' imprisonment with a non-parole period of 2 years after the same Magistrate had found the Accused **"Not Guilty"** as per paragraph 44 of the judgment signed by Magistrate Yogesh Prasad dated at Navua on the 26th day of January 2024 stamped with the Navua Magistrate's Court stamp.

ii. The learned Magistrate erred in law and also erred in fact by not directing himself to the contradictory statements by the witnesses as to the number of pot plants that were found in the vicinity of where the Appellant lives e.g. PW1, who was the leader of the raid team and the most senior person there stated that there were 15 pot plants whereas PW3, PW6, and PW7 all stated in their statements that there were 11 pot plants.

iii. The learned Magistrate erred in law and in fact to direct himself as to all the contradictions in the statement of all of the 9 witnesses in as far as to the place where the drugs were found and even the weight of the drugs, some say it is 166.9 grams and some 166.6 grams. We cannot afford to make such mistakes and 3grams can make a big contributing factor to the severity of the sentence to be imposed.

iv. The Appellant maintains that the drugs were not found in his compound but on another property as specifically stated in PW1's statement, lines 5 and 6 "the plants believed to be marijuana were not planted from where the accused resided." PW1 is an ASP in the Police Force and was the leader of the raid team and his statement is termed as truthful and can be relied upon.

v. The appellant maintains that he did not take the team to show them the place where the marijuana was planted, away from the accused's house/property but they went there by themselves.

vi. In cross examination PW1 was asked hat during the search of the accused, police could not find any plants believed to be marijuana and to this the witness refuted and stated that they found the plants believed to be marijuana not far from the accused's house. The statement not far from the accused's house does not mean that the marijuana was his or he planted them, unless they were found in his person or on him. So generally speaking, the accused has the idea that the accused has no idea at all as to whom does the marijuana belong to as he (accused) only agreed that the marijuana was his after he was repeatedly assaulted and threatened by the raid team although all the prosecution witnesses denied the allegation by the appellant that he was assaulted by the team. A lone appellant against 8 police

officers is a big off balance and they (Police) will always be on the winning side even though they telling lies in order to get their case through.

vii. The learned magistrate erred in law and in fact in not directing the raid team (Police) to produce in court the photos taken at the crime scene which clearly indicates the exact place where the marijuana was found which is not in the accused's property.

viii. The learned magistrate was bias and unfair in conducting the Trial as he found the Accused not guilty and yet he went ahead to convict him and sentence him.

ix. The Appellant reserves the right to add further grounds of appeal upon receipt of the Court record.

6. The appeal was first called on the 21st day of May 2024 and directions were made for the compilation of the records and the matter was ultimately fixed for hearing on the 3rd of October 2024.

7. The parties have filed appeal submissions and the matter is now adjourned for ruling.

Submissions for the Appellant

8. The Appellant submits that the Magistrate erred in law and demonstrated his bias by finding him Not Guilty in paragraph 44 of the written judgment yet proceeding to sentence him later, on the 29th of February.

9. The other grounds relate to discrepancies and inconsistencies between the statements disclosed by the State witnesses where they contradicted each other. He submits that the conviction relying on such evidence is unsafe and must be set aside.

10. The Appellant also submits that the State has failed to account for the drugs in their possession and to fully account for the same at all of the times that these drugs were in their custody. He therefore submits that the conviction must be set aside.

11. The Appellant submits that the handling of the evidence in this case raises significant concerns regarding the integrity of the chain of custody.

12. 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.

13. The Learned Magistrate erred in law by not adequately addressing the Defence's argument on the possibility of the drugs being cultivated by another person.

14. 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.

15. 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 5 years imprisonment.

16. The Appellant therefore submits that the sentence is excessive and must be set aside.

Respondent's Submissions

17. The State in responding to the first ground of appeal, submits that the judgment should be read as a whole and in context. In doing so, one can only conclude that paragraph 44 is a mistake, a typographical error on the part of the learned Magistrate.

18. The court properly analysed the evidence and found that the State had established the charge beyond a reasonable doubt and his error was typographical and not deliberate, therefore Ground 1 has not been made out and must be dismissed.

19. In response to grounds 2 and 3, the State submits the authority of Sivoinatoto vs State [2018] FJCA68; AAU 0049 of 2014 (1 June 2018). The State submits that to impeach a witnesses' evidence, they needed to obtain their explanation for the contradictory statement and then point out that the explanation given is not true or unsatisfactory. The evidence given by the State witnesses was that there were 11 pot plants and another white bucket with some green plants. The contradiction

raised by the Appellant related to these witnesses' out of court statements, not their evidence in Court. These grounds are also not made out and must be dismissed.

20. For grounds 4 and 5, the State submits that the State had established beyond a reasonable doubt that the plants were planted in pots and the Appellant led the police officers to where they were and pointed them out. The State submits that there is no merit to these grounds.

21. For ground 6, the State submits that the drugs were found at the appellant's porch and there was only one residence at the place where the drugs were seized. There is no merit to this ground of appeal that the drugs did not belong to him. The State has established this through the evidence and this ground of appeal fails.

22. For ground 7, the State maintains that the search at the appellant's home was prima facie lawful, the drugs were seized and accounted for at the crime scene and the Court was satisfied that these were the same drugs that were seized from the appellant's home, despite the fact that the photos were not exhibited at the Trial.

23. The State therefore submits that the conviction should stand as none of the appeal grounds have been made out

24. The Respondent therefore submits that the appeal should be dismissed and the conviction and sentence should be affirmed.

Analysis

25. 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."*

26. Section 256 (2) of the Criminal Procedure Act sets out the powers of the High Court on appeal. The relevant section provides: -

"Powers of High Court

256 (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 a 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."

27. 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."*

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

29. 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."*

30. In this case the main grounds of appeal revolve around paragraph 44 of the learned Magistrate's judgment, wherein he found the Accused not guilty, despite finding on the previous paragraph (43) that the State had discharged its burden of establishing all of the elements of the offence beyond a reasonable doubt.

31. Section 141 of the Criminal Procedure Act sets out the mode of delivering judgment after the Trial. Section 141 (2) provides that the Judge or Magistrate shall read out the whole of the judgment upon request by the parties.

32. The contents of the judgment are provided for at section 142, which provides as follows: -

> **"Contents of judgment**
>
> **142 (1)** Subject to subsection (2), every such judgment shall, except as otherwise expressly provided by this Act, be written by the Judge or Magistrate in English, and shall contain—
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> (a) the point or points for determination;
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> (b) the decision and the reasons for the decision; and
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> (c) shall be dated and signed by the Judge or Magistrate in open court at the time of pronouncing it."

33. In this case, the judgment was in the form prescribed by the above provisions, and it was pronounced in open Court. The only glaring issue here is that there is an obvious mistake in paragraph 44. I state this because it is so at odds with the rest of the judgment that it could only have been a mistake. This is reinforced by the fact that the learned Magistrate then proceeded to pronounce sentence on the appellant later.

34. I therefore find that paragraph 44 was an error and pursuant to section 256 (2) (e) of the Act, I correct paragraph 44 of the judgment and substitute the following – "In these circumstances, I find the accused guilty to one count of Unlawful Cultivation of Illicit Drugs contrary to section 5 (a) of the Illicit Drugs Control Act."

35. I find that the verdict is supported by the evidence led in Court and the State has established beyond a reasonable doubt that the appellant unlawfully cultivated

166.9 grams of cannabis sativa at Dakunikoro Settlement in pot plants and a white bucket.

36. The Learned Magistrate found no material break in the chain of custody after the drugs were seized and sent for analysis and he accordingly convicted the Appellant. I find that he was entitled to make these conclusions.

37. With respect to the other grounds of appeal, the appellant raises the inconsistencies between the recorded statements of the Police officers. These are out of court statements and they carry little probative value except on cross examination, with the inconsistent statements being put to the witness to impeach their testimony. From the records, this was never done during the cross examination of each state witness. I find that these grounds of appeal have not been made out.

38. 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 before him at the Trial.

39. I find that the conviction shall stand and the appeal against conviction is dismissed in its entirety.

40. With respect to the appeal against sentence, although it is a moot point now nevertheless it will be addressed.

41. The final sentence was 3 years imprisonment with a non-parole period of 2 years. The Magistrate applied the tariff set by the Court of Appeal for the offence of Unlawful Cultivation of Illicit Drugs – ***Seru vs State*** [2023] FJCA 67; AAU 115 of 2017 (25 May 2023).

42. He found that the Appellant fell within Category 3 of offenders and found that he played a significant role therefore he took a starting point from the middle of the tariff (5 years) 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 (3 years'' imprisonment with a non-parole period of 2 years).

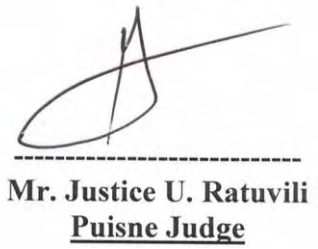
43. The current sentence is therefore well within the tariff and the Magistrate was entitled to pronounce that sentence.

44. I find that the appeal both against conviction and sentence is dismissed, the conviction and sentence are both affirmed.

<u>This is the Ruling of the Court</u>: -

1. **The conviction entered by the Navua Magistrate's Court on the 26th January 2024 and the sentence handed down on the 29th February 2024 are hereby both affirmed.**

2. **The appeal is dismissed in its entirety.**



Mr. Justice U. Ratuvili
<u>Puisne Judge</u>

cc: - ***Office of the Director of Public Prosecutions***
- ***Mr. Bainivesi***