IN THE HIGH COURT OF FIJI
AT SUVA
REVISIONAL JURISDICTION

CRIMINAL REVIEW NO.: HAR 03 OF 2017

BETWEEN: **STATE**

Applicant

A N D: **NAVNIT SAHAI NAND**

Respondent

Counsel: Ms. W. Elo for the Applicant
Mr A. Liverpool for Respondent

Date of Hearing: 23rd March 2018
Judgment: 12th June 2018

JUDGMENT

Introduction

1. The Respondent was charged in the Magistrate's Court at Suva on the 24th of July 2017, for one count of Unlawful Importation of Illicit Drugs, contrary to Section 4 (1) of the Illicit Drugs Control Act, which carries a maximum penalty of life imprisonment or a fine not exceeding $1,000,000 and one count of Unlawful Possession of Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Control Act, which carries a maximum penalty of life imprisonment or a fine not exceeding &1,000,000. The particulars of the offences are that:

Count One

"Navnit Sahai Nand, on the 20th day of July 2017, at Suva, in the Central Division without lawful authority imported 110.6 grams of illicit Drugs namely Methamphetamine."

Count Two,

"Navnit Sahai Nand on the 20th day of July 2017, at Suva, in the Central Division without lawful authority was found in possession of 110.6 grams of illicit drugs namely Methamphetamine."

2. According to the summary of facts, which was admitted by the respondent in the Magistrate's Court, this consignment of illicit drugs came into the country *via* airfreight. The illicit drugs were concealed in a package that was addressed to the Respondent. The package contained some dry food, toiletries and a bottle of Olay shampoo. Inside the bottle of shampoo, it was found three packages of 2x balloons. Inside these two balloons, it was found a plastic zip locked bag, containing crystal like powder. Subsequent to the testing of the said crystal like power, it was confirmed that it was Methamphetamine.

3. On the 28th of November 2017, the Respondent pleaded guilty for the both counts. The learned Magistrate then convicted and sentenced the Respondent on the 21st of December 2017, for a period of fifteen (15) months imprisonment for each count and suspended it for a period of three (3) years. Moreover, the Respondent was ordered to serve community work for fifty (50) hours under the supervision of the Commissioner of Police or Delegate.

4. The above sentence was referred to this Court in order to review the correctness, legality or the propriety of the sentence pursuant to Section 260 (1) of the Criminal Procedure Act.

5. Upon being served with the notice of this review, the State and the Respondent appeared in court on the 9th of January 2018. On the 21st of January 2018, the State and the Respondent were directed to file their respective written submissions, which they filed as per the directions. Subsequently, the matter proceeded to hearing on the 19th of February 2018, where the learned counsel for the State and the Respondent made their respective oral arguments and submissions. Unfortunately, due to various reasons, the court had to adjourn the judgment of this matter on several occasions, for which I apologise.

The Law on Review

6. Section 260 (1) of the Criminal Procedure Act states that:

i) The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to —

a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and

b) the regularity of any proceedings of any Magistrates Court.

7. The power of the High Court under this revisionary jurisdiction has been stipulated under Section 262 of the Criminal Procedure Act, where it states that:

i) In the case of any proceedings in a Magistrates Court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may —

a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 256 and 257; and

b) in the case of any order other than an order of acquittal, alter or reversesuch order.

ii) No order under this section shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by a lawyer in his or her defence.

iii) The High Court shall not impose a greater punishment for the offence, which in the opinion of the High Court the accused has committed, than might have been imposed by the court which imposed the original sentence.

iv) Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction.

8. Hon Chief Justice Gates in **State v Baitratu (2012) FJHC 864:HAR001.2012 (13 February 2013),** has outlined the jurisdiction of the High Court under Section 262 of the Criminal Procedure Act, where his Lordship has found that:

> *"A power of revision is provided by Section 262(1) for High Court in the case of any order other than an order to acquittal, to alter or reverse such order."*

9. Justice Goundar in **State v Sorovanalagi (2012) FJHC 1135:HAR006.12. (31 May 2012)** held that:

> *"The yardstick for review in this case is the correctness of the sentences imposed on the respondents."*

10. The scope of the revisionary jurisdiction of the High Court under Section 260 (1) is not only limited to determine the legality of the order under review, but also the court can review the correctness and the propriety of the said order. Accordingly, the High Court is allowed to intervene in order to alter or reverse such sentence on the ground of legality, correctness or propriety, pursuant to Section 260 (1) of the Criminal Procedure Act.

Community Work Order

11. I first take my attention to the correctness of the community work order imposed by the learned Magistrate.

12. According to Sections 3 (1) and 4 (a) of the Community Work Act 1994, court shall not sentence a person for community work unless that person consents. Section 3 (1) of the Community Work Act states that:

> *"Where a person is convicted of an offence punishable by imprisonment, a court may, with the consent of the offender, sentence the offender to*

community work in accordance with Sections 4 and 5 of this Act, for the prescribed number of hours."

13. Section 4 (a) of the Community Works Act states that:

i) A court shall not sentence a person to perform community work unless-
a) that person consents; and
b) the court is satisfied that-
i. the person is a suitable person to perform community work; and
ii. suitable work is available for that person to perform for the purpose of the sentence; and
iii. there exist satisfactory arrangements for the supervision of that person's performance of the work.

14. In view of the section 4 (a) of the Community Work Act, the court has no jurisdiction to sentence a person for community work, unless the said person consents for such an order. If the sentencing Magistrate contemplates to impose a sentence of community work, he or she first needs to obtain the consent of the accused pursuant to Section 4(a) of the Community Work Act. Therefore, it is mandatory for the sentencing court to obtain the consent of the accused, before it imposes a sentence of community work.

15. Having carefully perused the record of the proceedings in the Magistrate's Court and the sentence, I find that the learned Magistrate has, neither sought nor obtained such a consent of the Respondent. Hence, it is my opinion, that the learned Magistrate had no jurisdiction to impose a sentence of community work pursuant to Section 4 (a) of the Community Work Act. Nevertheless, the learned Magistrate had imposed a sentence of community work for fifty hours against the Respondent. Accordingly, I find the said sentence of community work imposed by the learned Magistrate is wrong in law.

The Supervising Officer under the Community Work Act

16. The learned Magistrate in her sentence has appointed the Commissioner of Police or his delegate to supervise the implementation of this community work order.

17. Section 7 (1) of the Community Work Act has stipulated that an offender who is sentenced for a community work order shall perform his community work under the supervision of a probation officer or a person, who has been appointed by the Minister, from the categories specified in schedule of the Community Work Act as supervising officer.

18. Section 2 of the Community Work Act has defined the supervising officer as:

> *"Supervising officer means the probation officer, or a person specified in the schedule, who is for the time being supervising that person in accordance with section 7; and "*

19. Moreover, Section 2 of the Community Works Act has stated that the probation officer means, the officers who have been appointed under the Probation of Offenders Act.

20. Section 7(1) of the Community Work Act stats that:

> *"An offender who is subject to a sentence of community work shall, during the currency of the sentence, be under the supervision of a probation officer, or a person appointed under subsection (3), in whose district the offender resides for the time being."*

21. Section 7 (3) of the Community Work Act states that:

> *"The Minister may in writing appoint any person who comes into one of the categories specified in the schedule as a supervising officer."*

22. The Schedule of the Community Work Act has specified the persons, who can be appointed by the Minister as supervising officer under the Section 7 (3) of the Community Work Act, where it states that:

i) Ministers or priests of a religion,

ii) *The following community development workers:*

a) *Roko,*

b) *Village headmen (Turaga ni Koro),*

c) *Advisory or Provisional Councillors,*

ii) *The following public servants:*

a) *Women's Interest Officers,*

b) *Youth Officers,*

c) *District officers,*

d) *Agricultural Officers,*

e) *Medical Officers.*

23. In view of above discussed provisions of the Community Work Act, the learned Magistrate is only allowed to appoint either a probation officer, or a person, who has been listed under the schedule, and also being appointed by the Minister, as the supervising officer. The Commissioner of Police or any of his delegates has not been listed in the schedule to the Community Work Act. Therefore, the learned Magistrate has no jurisdiction to appoint the Commissioner of Police or his delegate as a supervising officer to supervise the community order imposed against the Respondent pursuant to Section 7 of the Community Work Act. Therefore, the sentence of community work imposed by the learned Magistrate is wrong in law.

Sentence of imprisonment period of Fifteen (15) months

24. I now draw my attention to determine the legality, correctness or the propriety of the sentence of fifteen months of imprisonment period, which was suspended for three years.

25. Section 4 (2) of the Sentencing and Penalties Act has provided the factors that the sentencing court must take into consideration when sentencing an offender, where it states that:

i) *In sentencing offenders a court must have regard to —*

a) *the maximum penalty prescribed for the offence;*

b) *current sentencing practice and the terms of any applicable guideline judgment;*

c) *the nature and gravity of the particular offence;*

d) *the offender's culpability and degree of responsibility for the offence;*

e) *the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;*

f) *whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;*

g) *the conduct of the offender during the trial as an indication of remorse or the lack of remorse;*

h) *any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;*

i) *the offender's previous character;*

j) *the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and*

k) *any matter stated in this Decree as being grounds for applying a particular sentencing option.*

26. Accordingly, the sentencing court must take into consideration the sentencing practices of the court pertaining to the offence that the court is sentencing.

27. The learned Magistrate in her sentence, has stated, that there are no tariff for the importation of illicit drugs such as methamphetamine at the moment. The learned Magistrate has then taken into consideration the tariff limits imposed by His Lordship Justice De Silva in **State v Kreimanis [2013] FJHC 536; HAC225.2011 (15 October 2013)** and **State v Stires - Sentence [2014] FJHC 556; HAC13.2014 (30 July 2014)** for the possession of methamphetamine. Moreover, the learned Magistrate has considered the sentencing remarks made in **R v Fatu (2006) NZLR 72 (CA)**.

28. In **State v Kreimanis (supra),** the accused had been charged with one count of possession of illicit drugs, namely methamphetamine, weighing 5,627.9 grams or 5.6279 Kilograms. Justice De Silva in his sentencing remarks, found that:

> *"There is no tariff in Fiji set out for the possession of Methamphetamines. However considering all above authorities, I am of the view that tariff of 10 to 16 years imprisonment is justified for quantity of more than 5 kg."*

29. Having concluded that the acceptable tariff for the possession of more than 5 k.g. of methamphetamines is ten (10) to sixteen (16) years imprisonment, his Lordship Justice De Silva has sentenced the accused for a period of thirteen years and one month imprisonment.

30. The Accused had appealed to the Fiji Court of Appeal. Gounder JA in his ruling in **Kreimanis v State [2015] FJCA 13; AAU109.2013 (16 January 2015)** has refused the leave to appeal against the sentence, where his Lordship held that:

> *"In his sentencing remarks, the trial judge said there was no set tariff for the possession of Methamphetamines. However, after considering overseas and local cases, the trial judge concluded that the tariff of 10 to 16 years' imprisonment was appropriate for more than 5kg of Methamphetamines. The trial judge used 14 years as a starting point, added 2 years to reflect the aggravating factors and deducted 1 year for the mitigating factors. A further reduction of 23 months was made to reflect the appellant's remand period. The final sentence arrived at was 13 years and 1 month imprisonment."*

31. In **State v Stires (supra)** the accused had been found in possession of 3.8 k.g. of methamphetamine. His Lordship Justice De Silva found that the tariff for 2 to 5 k.g. of methamphetamine should be 8 to 14 years of imprisonment.

> *"The only tariff in Fiji set out for the possession of Methamphetamines is 10 to 16 years imprisonment for quantity of more than 5 kg by this Court, I am*

of the view that acceptable tariff for 2-5 kg should be 8 to 14 years imprisonment."

32. Justice Temo in **State v Vakula (Criminal Case No HAC 247 of 2016s)** has found that the sentencing guidelines expounded by the Court of Appeal in New Zealand in **R v Fatu (supra)** in respect of methamphetamine should be applied in Fiji as it provides much assistance. His Lordship Justice Temo has found that:

> *"In R v Fatu (supra), the New Zealand Court of Appeal said the guidelines mentioned in paragraphs 6, 7, and 8 hereof, apply only to offending involving methamphetamine. Both counsel for the State and the accused in this case appear to be submitting that, we follow the sentencing guidelines laid down in R v Fatu (supra), pending a review of the same by the Fiji Court of Appeal and/ or the Supreme Court of Fiji in future. I agree with both counsels. In State v Aniars Kreimanis, Criminal Case No HAC 225 of 2011L, High Court, Lautoka, His Lordship Mr. Justice S. De. Silva, on 15 October 2013, said, there was no tariff for possession of methamphetamines in Fiji. In that case, His Lordship sentenced the accused to 13 years imprisonment, with a non- parole period of 12 years, for possessing 5.6. kilograms of methamphetamine.*
>
> *In my view, given the above, as an interim measure, we need to adopt the sentencing guidelines expounded in R v Fatu (supra) above. Methamphetamine, as an illicit drugs, is new to Fiji. However, the New Zealand Courts had been dealing with this problem for a while, and it was only fair in the public interest, that we learn from their experiences and adopt their sentencing guidelines in Fiji, pending a review in the future by our Superior Courts."*

33. Justice Temo, then went on discussing the tariff limits expounded in **R v Fatu (supra),** where his Lordship said that:

I. "The New Zealand Court of Appeal came up with the following sentence guidelines after much discussion on previous New Zealand sentencing

guidelines. For cases involving the sale or supply of methamphetamine, the sentence guideline were as follows:

i) *Band one – low-level supply (less than 5 g) – two years' to four years' imprisonment.*
ii) *Band two – supplying commercial quantities (5 g to 250 g) – three years' to nine years' imprisonment.*
iii) *Band three – supplying large commercial quantities (250 g to 500 g) – eight years' to 11 years' imprisonment.*
iv) *Band four – supplying very large commercial quantities (500g or more) – ten years' to life imprisonment.*

We emphasise that these are starting points, before taking into account aggravating and mitigating factors relating to the offender (as opposed to the offending). We also note that supply in small quantities where there is no commerciality and no other aggravating features may call for starting points less than those indicated as appropriate for band one..." (page 80)

II. *In cases involving the importation of methamphetamine, the sentence guidelines were as follows:*

i) *Band one – low level importing (less than 5 g) – two years six months' to four years six months' imprisonment.*
ii) *Band two – importing commercial quantities (5 g to 250 g) –three years six months' to ten years' imprisonment.*
iii) *Band three – importing large commercial quantities (250 g to 500 g) – nine years' to 13 years' imprisonment.*
iv) *Band four – importing very large commercial quantities (500g or more) – 12 years' to life imprisonment.*

As indicated, in cases where small quantities of methamphetamine have been imported for personal consumption, it is open to sentencing Judges to treat band one as not applicable. We emphasise that these bands are otherwise applicable

to all who import methamphetamine, including those whose roles are as "mules". Obviously the more significant the role of the offender in any importation, the closer the appropriate sentence will be to the top end of the relevant sentencing band..." (page 81)

In cases involving the manufacturing of methamphetamine, the sentence guidelines were as follows:-

Band one – not applicable for reasons given in para [42].
Band two – manufacturing up to 250 g – four years' to 11 years' imprisonment.
Band three – manufacturing large commercial quantities (250 g to 500 g) = ten years' to 15 years' imprisonment.
Band four – manufacturing very large commercial quantities (500 g or more) – 13 years' of life imprisonment.
The sentence imposed must reflect not only the quantity of the drug involved, but also the role of the particular offender in the manufacturing ring in question..." Page 82)."

34. In view of the above discussed judicial precedents, I find that the conclusion made by the learned Magistrate in her sentence, stating, that there are no tariff for importation of illicit drugs such as methamphetamine is wrong.

35. In view of the sentencing guideline enunciated in **State v Vakula (supra),** the applicable tariff limit for an offence of importation of 110.6 g of methamphetamine is three years and six months to ten years.

36. The Fiji Court of Appeal in **Kini Sulua v Michael Ashley Chandra (2012) Fiji Law Report, Volume 2, Pages 111)** held that all the verbs stipulated under Section 5 of the Illicit Drugs Control Act must be treated equally. Hence, it is my opinion that the tariff limit expounded in **R v Fatu (supra)** in respect of sales and supply of methamphetamine would appropriately apply to the offence of possession of methamphetamine as stipulated under the illicit Drug Control Act.

37. Accordingly, I find that the sentence of imprisonment period of fifteen (15) months is not within the applicable tariff limit. Hence, I find that the above sentence of imprisonment period of fifteen (15) months is not founded on the current sentencing practices. I accordingly find this is an appropriate case for the High Court to intervene and alter the sentence pursuant to Section 260 and 262 of the Criminal Procedure Act.

Alternative Sentence

38. I now take my attention to determine an appropriate sentence for this matter.

39. Justice Goundar in **State v Balaggan [2012] FJHC 1147; HAC049.11 (4 June 2012)** said that offenders who deal with hard drugs in substantial quantities, must be given harsh punishment.

40. Methamphetamine is one of the most serious drug problems that the country faces at present. Perhaps, it could be more dangerous and destructive than any other drugs in the local market. It is a destructive drugs for users as it is highly addictive with myriad of adverse psychological and physical consequences. Hence, I find, offences involved with such a destructive drugs as methamphetamine, are serious offences, which should be dealt with harsh and custodial punishment.

41. It is the duty of the Judiciary, in sentencing process, to contribute constructively and effectively to prevent offenders of this nature in committing such crimes or deterring offenders and other persons from committing offence in this nature in Fiji, before it becomes a complicated social disarray. Therefore, it is a judicial responsibility in sentencing offenders of this nature to demonstrate that the society denounces and condemns this type of offending without any reservation.

42. Having considered the reasons discussed above, and Section 4 (1) of the Sentencing and Penalties Act, the main purpose of this sentence is founded on the principle of deterrence and protection of the community. I am mindful of the principle of

rehabilitation; however, it is my opinion that the need of deterrence outweighs the principle of rehabilitation.

43. The Respondent is the receiver of these illicit drugs in Fiji. Therefore, he has involved in the supply or transportation network of illicit drugs. The level of culpability of those, who engage at any level, in any drug supply or transportation networks, is significantly high and deterrence sentence are necessary, because the involvements of such carriers or receivers in the network, are fundamentally important to carry out the operations of these drug transportation networks. Therefore, I find the level of culpability in this offence is substantially high.

44. Having considered the seriousness of this offence, the impact of such illicit drugs on the society as well as on individuals, I find the level of harm in this offending is also significantly high.

45. Having considered the seriousness, the level of culpability, and harm of this offending, it is appropriate to start this sentence with four (4) years of imprisonment period for each of these counts.

46. The learned Magistrate has correctly taken into consideration the manner in which these illicit substances were concealed in the package as an aggravating ground. For that I add one (1) year, making the interim imprisonment period as five (5) years.

47. I find that the learned Magistrate has considered the family and personal circumstances of the Respondent as mitigating grounds. The Respondent is a first offender. However, the good character of an offender in this nature is not a strong mitigatory value. Justice Goundar in **State v Balaggan (Supra)** held that:

> *"In Aramah (1983) 76 Cr.App.R.190, the English Court of Appeal remarked that the good character of a courier, as he usually was, is of less importance than the good character of an accused in other cases. The Court took the view that drug-smuggling organizers deliberately recruit persons who will exercise the sympathy of the court. The point*

the Court makes is that the personal circumstances of an accused are secondary because of the deterrent element to sentences imposed in respect of drug-smuggling offences."

48. Accordingly, for your personal and family circumstances and unblemished character, I reduce one year, reaching a period of four (4) years of imprisonment.

49. You have pleaded guilty at the early stages of the proceedings. Therefore, you are entitled for a substantive discount. For that I reduce one more (1) year, making three (3) years of imprisonment as your final sentence.

50. Having considered the purpose of this sentence and the delay in this review proceedings, I find 20 months of non-parole period would serve the said purpose, while preserving the opportunity for the Respondent to rehabilitate himself as a law abiding individual.

Final Period of Imprisonment

51. Accordingly, I revise the sentence imposed by the learned Magistrate on the 21st December 2017 and sentence the Respondent for a period of **three (3) years** for each of these two counts as charged with non-parole period of **twenty (20) months**. Moreover, both sentences to be served concurrently.

52. Having considered the seriousness of the offence and the purpose of the sentence, I do not find this is an appropriate case to suspend the sentence pursuant to Section 26 of the Sentencing and Penalties Act.

Actual period of Imprisonment

53. The State submitted that you have already completed forty-five (45) hours of community works. Therefore, I consider that the period of community work which you have already been completed as the period that has already been served by you. In doing that, I find Section 3 (2) (a) of the Community Works Act could provide an

assistance in order to determine the corresponding period of imprisonment for the 45 hours of community works. Section 3 (2) (a) of the Act states that:

> *"For the purpose of subsection (1) the prescribed number of hours means, where the offence is punishable by a term of imprisonment-*
> *a) not exceeding 6 months - not less than 20 hours, nor more than 50 hours; or*

54. Accordingly, I consider a period of six (6) months as the period that have already been served by you.

55. Moreover, you have been in remand custody for this matter for a period of thirteen (13) days. I consider further one month (1) as the period that have already been served by you pursuant to Section 24 of the Sentencing and Penalties Act.

56. Accordingly, the actual period of imprisonment is **two (2) years and five (5) months** with **thirteen (13) months** of non-parole period.

57. Thirty (30) days to appeal to the Fiji Court of Appeal.

R.D.R.T. Rajasinghe
Judge

At Suva
12th June 2018

Solicitors
Office of the Director of Public Prosecutions for the Applicant.
Reddy & Nandan Lawyers for the Respondent.