IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 04 OF 2019

IN THE MATTER of an Appeal from the decision of the Magistrate's Court of Suva in Criminal Case No. 1395 of 2017.

BETWEEN : **ASAELI VUKITOGA**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Appellant appears in person
Ms. Shirley Tivao for the Respondent

Date of Hearing : 31 January 2020

Judgment : 3 March 2020

JUDGMENT

[1] This is an Appeal made by the Appellant against his sentence imposed by the Magistrate's Court of Suva.

[2] The Appellant was charged in the Magistrate's Court of Suva with one count of Unlawful Possession of Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.

[3] The Charge Sheet filed against the Appellant had the following Charge:

Statement of Offence (a)

UNLAWFUL POSSESSION OF ILLICIT DRUGS: Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.

Particulars of Offence (b)

ASAELI VUKITOGA, on the 21st day of September 2017, at Suva, in the Central Division, without lawful authority, possessed **4.399 Kilograms of Cannabis Sativa**, an illicit Drug.

[4] In the proceedings before the Magistrate's Court the Appellant was represented by Counsel from the Legal Aid Commission (LAC).

[5] On 9 April 2018, the Appellant pleaded guilty to the charge. The Learned Resident Magistrate had been satisfied that the Appellant pleaded guilty voluntarily and on his own free will. On the same day the Summary of Facts had been read over and explained to the Appellant. Having understood same the Appellant admitted to the said Summary of Facts. Accordingly, he had been convicted of the charge on his own plea.

[6] On 13 June 2018, the Learned Resident Magistrate sentenced the Appellant to a term of imprisonment of 6 years and 8 months. In terms of Section 18(1) of the Sentencing and Penalties Act No. 42 of 2009, the non-parole period fixed was 4 years and 8 months.

[7] Aggrieved by this Order the Appellant filed a Notice of Appeal against his sentence on 31 January 2019. The said appeal was received in the Registry of the High Court of Suva on 1 February 2019, and as such was over 6 months out of time.

[8] The Learned Counsel for the State objects to the enlargement of time been granted to the Appellant in respect of this appeal.

[9] During the hearing of this matter both the Appellant and the Learned State Counsel were heard. The Respondent also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

GROUNDS OF APPEAL

[10] The Grounds of Appeal against sentence, which was filed by the Appellant, are as follows (the Grounds of Appeal stated below are as framed by the Appellant):

Grounds of Sentence Appeal

1. That the Appellant appeals against sentence being manifestly harsh and excessive when compared to the case authorities of State v. Jovesa Tawake where Justice Temo sentenced him to 3 years imprisonment as a first offender to illicit drugs offence who pleaded guilty to the charge [Case No. 440/2014] [Also see State v. Iliesa Tuituba Case No. 322/12].

2. That the learned sentencing Magistrate erred in law and in fact when he seem to consider the Appellant's previous conviction that had been already served to guide him [Magistrate] in his sentence in order to conclude that the Appellant still desire the consequences of his PC rather than the 10 years of good behavior before committing this drugs offences, for the first time. Therefore, there was a substantial grave miscarriage of justice miscarried in a court of law.

3. That the learned Magistrate erred in law and in fact when he sentenced the Appellant without considering the disparity of the Appellant 10 years of good behavior which justified a reasonable discount of 1/3 of the sentence. Therefore, failure to deduct 1/3 as the advantages towards the Appellant's good behavior caused a substantial miscarriage of justice as justice is justice according to the law.

PRINCIPLES RELATING TO ENLARGEMENT OF TIME FOR FILING OF APPEALS

[11] It has now been well established that there are several factors that a Court needs to take into consideration when dealing with such applications.

[12] In ***Kamlesh Kumar v. State; Mesake Sinu v. State*** [2012] FJSC 17, CAV0001.2009 (21 August 2012), His Lordship Chief Justice Anthony Gates has elaborated on the

principles to be applied or considered by the appellate courts when exercising its discretion in such matters. These factors are:

(i) The reasons for the failure to file within time;

(ii) The length of the delay;

(iii) Whether there is a ground of merit justifying the appellate court's consideration?

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the respondent be unfairly prejudiced?

[13] The Appellant submitted that he was represented by the Legal Aid Commission during the proceedings in the Magistrate's Court. After he was sentenced, his Counsel had undertaken to visit him at the Suva Prison to assist him in filing of his Appeal. However, he states that the Counsel had failed to do so.

[14] This Court cannot accept this as a valid reason for the failure to file this Appeal within time. In any event, the length of the delay, which is over 6 months, is unjustifiable.

[15] However, as stated in ***Kumar v. State; Sinu v. State*** (supra), even where there has been substantial delay in filing of the appeal, nonetheless Court has to consider whether there is a ground of appeal that will probably succeed.

[16] Accordingly, this Court will have to consider the merits of the Grounds of Appeal against Sentence.

<u>THE LAW AND ANALYSIS</u>

[17] Section 246 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

> *"(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 judgement and sentence.*

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.

[18] Section 247 of the Criminal Procedure Act, which is relevant as the Appellant has pleaded guilty to the charge against him, stipulates that *"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[19] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"(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 any 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.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

THE GROUNDS OF APPEAL AGAINST SENTENCE

[20] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

*"...It is well established law that before this Court can disturb the sentence, the Appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v. The King** [1936] HCA 40; [1936] 55 CLR 499)."*

[21] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*"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. AAU 0015 of 1998. 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."

[22] Therefore, it is well established law that before this Court can interfere with the sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(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.

[23] In ***Sharma v. State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

> *"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*
>
> *" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."*
>
> *[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:*
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> *"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating*

factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability _ _ _."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

....

[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court 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. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."

[24] It must be emphasized that the principles enumerated in the above case authorities should be considered in the light of Section 247 of the Criminal Procedure Act which provides that *"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[25] The Appellant states that the sentence imposed on him was manifestly harsh and excessive, when compared with two similar cases which he has referred to:

State v Iliesa Tuituba [2016] FJHC 341; HAC23.2015 (29 April 2016); and

State v Jovesa Tawake HAC 128 of 2017S (12 April 2018).

[26] In Tuituba's case, the accused pleaded guilty to unlawful possession of 16.5 grams of *cannabis sativa* and for cultivation of 7.6 kilograms of *cannabis sativa*. He was sentenced to a term of 4 years imprisonment, with a non-parole period of 2 years and 9 months. In arriving at the said sentence, the Learned Trial Judge had granted him a discount of 2 years and 3 months for the guilty plea.

[27] It is important to note that the accused Tuituba, had no previous convictions and as such was a person of previous good character. The Learned Trial Judge, had granted him a concession of 2 years for his previous good character and other relevant mitigating factors.

[28] Furthermore, the accused Tuituba had spent 9 months in remand custody prior to his sentence. The Learned Trial Judge had duly considered the period of 9 months as a period of imprisonment already served thereby arriving at his final sentence of 4 years imprisonment, with a non-parole period of 2 years and 9 months.

[29] In Tawake's case, the accused pleaded guilty to unlawful possession of 8.1 kilograms of *cannabis sativa*. The Learned Trial Judge had imposed on him a sentence of 3 years imprisonment. A non-parole period had not been imposed. In arriving at the said sentence, the Learned Trial Judge had granted him a discount of 2 years for the early guilty plea.

[30] In Tawake's case too, the accused Tawake had no previous convictions and as such was a person of previous good character. The Learned Trial Judge, had granted him a concession of 1 year and 5 months for his previous good character and a further 1 year for cooperating with Police during the investigations.

[31] Furthermore, the accused Tawake had spent 7 months in remand custody prior to his sentence. The Learned Trial Judge had duly considered the period of 7 months as a period of imprisonment already served thereby arriving at his final sentence of 3 years imprisonment.

[32] However, in the instant case, it has been noted by the Learned Magistrate that the Appellant was not a first offender. There were nine convictions recorded against him, three of which were within 10 years of committing the offence he is now charged with. Therefore, no discount could have been given to the Appellant for his previous good character.

[33] The Appellant argues that none of his previous convictions related to a drug offence. He submitted that "I am a first offender in drugs". Although, I concede that the Appellant has not been convicted of any previous drug offence, he has been convicted of several property offences. As such, the Learned Magistrate was justified in not treating him as a first offender and thereby granting the Appellant no concession in lieu of this factor.

[34] It was submitted by the Learned State Counsel that the Appellant was in remand custody for only 7 days for the instant case. Therefore, it is justified that the Learned Magistrate had given the Appellant no concession for period of imprisonment already served.

[35] In the instant case, since the quantity of cannabis found unlawfully in the possession of the Appellant exceeded 4 kilograms, the Learned Magistrate has correctly considered the tariff as 7-14 years imprisonment, in terms of ***Sulua v State*** [2012] FJCA 33; AAU0093.2008 (31 May 2012). Accordingly, the Learned Magistrate has taken a starting point of 8 years imprisonment. He has added 2 years for aggravating factors bringing the sentence to 10 years imprisonment. The Learned Magistrate has granted a 1/3 discount to the Appellant for his guilty plea, arriving at a final sentence of 6 years and 8 months imprisonment.

[36] Considering all the facts and circumstances of this case the sentence imposed on the Appellant cannot be said to be harsh or excessive. Therefore, I see no reason to interfere with the final sentence imposed on the Appellant by the Learned Magistrate.

[37] For the aforesaid reasons, I am of the opinion that the Grounds of Appeal against sentence are without merit.

[38] Therefore, I conclude that no extension of time should be granted for filing of this Appeal out of time and that this Appeal should stand dismissed.

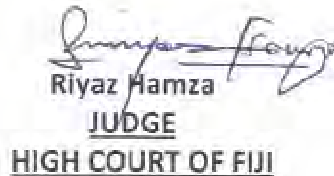
CONCLUSION

[39] In light of the above, the final orders of this Court are as follows:

1. Extension of time for filing of this Appeal is refused.

2. The Appeal is accordingly dismissed.

3. The sentence imposed by the Learned Magistrate, Magistrate's Court of Suva is affirmed.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva
This 3rd Day of March 2020

Solicitors for the Appellant : **Appellant in Person.**
Solicitors for the Respondent: **Office of the Director of Public Prosecutions, Suva.**