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

CRIMINAL APPEAL NO. HAA 54 OF 2020

IN THE MATTER of an Appeal from the decision of the Magistrate's Court of Nasinu, in Traffic Case No. 107 of 2020.

BETWEEN : **RICHARD LLWELLYN ACRAMAN**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : Mr. T. Cagilaba for the Appellant
Ms. Shirley Tivao for the Respondent

Date of Hearing : 7 April 2021

Judgment : 4 August 2021

JUDGMENT

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

[2] The Appellant was charged in the Magistrate's Court of Nasinu with the following offence:

CHARGE

Statement of Offence [a]

DRIVING MOTOR VEHICLE WHILST THERE IS PRESENT IN THE BLOOD A CONCENTRATION OF ALCOHOL IN EXCESS OF THE PRESCRIBED LIMIT: Contrary to Section 103 (1) (a) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence [b]

Richard Llwellyn Acraman, on the 23rd day of May 2020, at about 21.15 hours, at Nasinu, in the Central Division, drove a Motor Vehicle, Registration Number FA 656, along Laucala Beach, whilst there was present in 100 millilitres of blood a concentration of 147.4 milligrams of alcohol, which was in excess of the prescribed limit.

[3] The Appellant was first produced in the Magistrate's Court of Nasinu for this matter, on 25 May 2020. On 29 September 2020, he was ready to take his plea. Accordingly, 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 5 October 2020, the Summary of Facts had been read over to the Appellant, who having understood had admitted to same. Thereafter, the Appellant had been found guilty and convicted of the charge on his own plea and the matter was fixed for sentencing.

[4] On 7 October 2020, the Learned Resident Magistrate passed sentence on the Appellant. He was imposed a fine of $300.00, to be paid by the 21 October 2020 (in default 15 days imprisonment), and issued a compulsory disqualification of his driving license for a period of 12 months.

[5] Aggrieved by the said Order, on 30 November 2020, the Appellant filed a Notice of Motion for Leave to Appeal Out of Time. The said Notice of Motion was supported by an Affidavit deposed to by the Appellant. This Application was only in respect of his sentence.

[6] The Learned Counsel for the State submitted that she was not objecting to the Notice of Motion for Leave to Appeal Out of Time. Accordingly, this Court granted Leave to the Appellant to file his Petition of Appeal out of time.

[7] This matter was taken up for hearing before me on 7 April 2021. The Counsel for the Appellant and the State were heard. The parties also filed written submissions, making reference to case authorities, which I have had the benefit of perusing.

[8] The Grounds of Appeal against the sentence filed by the Appellant are as follows:

GROUNDS OF APPEAL AGAINST SENTENCE

[a] That the Learned Magistrate erred in law and in fact in failing to give sufficient weight to the mitigating factors submitted by the Counsel for the Appellant.

[b] That the Learned Magistrate erred in law and in fact in failing to give due consideration to the proposed sentence in the Appellants' submissions on mitigation and sentencing.

[c] That the Learned Magistrate erred in law by failing to consider sentences issued in precedents related to the charge of "Driving Motor Vehicle whilst there is present in the blood a concentration of alcohol in excess of the prescribed limit contrary to Section 103 (1) (a) and 114 of the Land Transport Act 35 of 1998."

[d] That the compulsory disqualification of driving license for 12 months imposed by the Learned Magistrate was manifestly excessive and harsh and wrong in principal having regards to all the circumstances of the case.

The Law

[9] 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."

[10] 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."*

[11] 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

[12] 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)."*

[13] 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."

[14] 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.

[15] In this case, the Learned Resident Magistrate has imposed on the Appellant a fine of $300.00, to be paid by the 21 October 2020 (in default 15 days imprisonment), and issued a compulsory disqualification of his driving license for a period of 12 months. During the hearing of this appeal, the Counsel for the Appellant submitted to Court that the Appellant has paid the fine of $300.00 within the stipulated time [This is confirmed when reference is made to the Magistrate's Court Case Record]. Therefore, it was submitted that the Appellant is not appealing against the fine imposed on him by the Learned Resident Magistrate, but only in respect of the compulsory disqualification of his driving license for a period of 12 months.

Ground 1

[16] The first Ground of Appeal against sentence is that the Learned Magistrate had erred in law and in fact in failing to give sufficient weight to the mitigating factors submitted by the Counsel for the Appellant.

[17] In sentencing the Appellant in this case it is clear that the Learned Resident Magistrate has not adopted the 'two-tiered process' of reasoning, but instead seems to have adopted the 'instinctive synthesis' approach.

[18] In ***Solomone Qurai v. The State*** [2015] FJSC 15; CAV 24 of 2014 (20 August 2015); the Fiji Supreme Court held:

> *"[47] Guidelines for sentencing contained in the Sentencing and Penalties Decree of 2009 require a sentencing court to have regard to, amongst other things, the current sentencing practice and the terms of any applicable guideline judgment (section 4(2)(b) of the Decree), 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 (section 4(2)(f) of the Decree), the conduct of the offender during the trial as an indication of remorse or the lack of remorse (section 4(2)(g) of the Decree) and the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence (section 4(2)(j) of the Decree).

[48] The Sentencing and Penalties Decree does not provide any specific guideline 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.

[49] In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate 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. This is the methodology adopted by the High Court in this case.

[50] It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.

[51] In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of

approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges."

[19] 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:*
>
> *"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."

[20] As outlined in ***Qurai v. The State (Supra) and Sharma v. State (Supra)*** the Sentencing and Penalties Act No 42 of 2009 (Sentencing and Penalties Act) does not limit a sentencing judge to the 'two-tiered process' of reasoning and leaves it open for the sentencing judge to adopt a different approach, such as 'instinctive synthesis' approach, which is what the Learned Resident Magistrate has adopted in this case. The 'instinctive synthesis' approach is described as a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.

[21] It is a fact that the Appellant filed written mitigation and sentencing submissions through his Counsel in the Magistrate's Court. At paragraph 6 of the Sentence the Learned Resident Magistrate has made due reference to the personal circumstances

submitted by the Appellant and all the mitigating circumstances, which are his previous good character (that he is a first time offender), that he is remorseful of his actions and that he is seeking forgiveness from Court, that he fully co-operated with the Police in this matter and also the fact that the Appellant entered an early guilty plea. It is after having taken into account all the above factors that the Learned Resident Magistrate arrived at the final sentence.

[22] Therefore, this ground of appeal is without merit.

Ground 2

[23] That the Learned Magistrate erred in law and in fact in failing to give due consideration to the proposed sentence in the Appellants' submissions on mitigation and sentencing.

[24] In terms of Section 103 (1) of the Land Transport Act 35 of 1998 (Land Transport Act),

A person who -

(a) drives or attempts to drive a motor vehicle or is in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in his blood; or

(b) fails or refuses to undergo a breath test or breath analysis when required to do so by a police officer,

commits an offence.

[25] Any person who is convicted of an offence under Section 103 (1) is liable to the prescribed penalty as stipulated in Section 114 of the Land Transport Act. Section 114 provides that the prescribed penalty for an offence under Section 103 (1) (a) [For a first offence/offender] is a fine not exceeding $2000.00 and/or imprisonment not exceeding 2 years and a mandatory disqualification of the driving license from 3 months to 2 years.

[26] In the written mitigation and sentencing submissions filed on behalf of the Appellant in the Magistrate's Court it is recorded as follows: "In light of the mitigating factors which have been raised above, our client is seeking a fine of $150.00 with a 3 months disqualification from driving. Our client is also seeking one (1) month to pay his fine

and in the event a custodial sentence is issued, our client is also seeking for a suspension to be granted".

[27] It is well established that the Sentencing Judge or Magistrate has a wide discretion in arriving at an appropriate sentence considering all the facts and circumstances of a particular case. Although submissions maybe made by Counsel for the State and the Appellant relating to the sentence to be imposed, the Sentencing Judge or Magistrate is not required to confine himself to the said submissions made by parties.

[28] In the instant case the Learned Resident Magistrate has imposed on the Appellant a fine of $300.00, to be paid within two weeks (in default 15 days imprisonment), and issued a compulsory disqualification of his driving license for a period of 12 months. This sentence was well within the prescribed penalty as specified in Section 114 of the Land Transport Act.

[29] Therefore, this ground of appeal has no merit.

Grounds 3 and 4

[30] The third Ground of Appeal against sentence is that the Learned Magistrate erred in law by failing to consider sentences issued in precedents related to the charge of "Driving Motor Vehicle whilst there is present in the blood a concentration of alcohol in excess of the prescribed limit contrary to Section 103 (1) (a) and 114 of the Land Transport Act 35 of 1998." The fourth Ground of Appeal against sentence is that compulsory disqualification of driving license for 12 months imposed by the Learned Magistrate was manifestly excessive and harsh and wrong in principal having regards to all the circumstances of the case.

[31] In my opinion, both these Grounds of Appeal against sentence are inter-connected and can be dealt with together.

[32] In ***State v. Joel Sahai*** [2017] FJHC 634; HAR002.2017 (29 August 2017); His Lordship Justice Vinsent Perera held:

> *"9. Given the above provisions in the LTA Act, it is manifestly clear that disqualification is a mandatory penalty for the offence under section 103(1)(a) of the LTA Act and a sentencing court does not have a discretion to refrain*

from imposing a disqualification under any circumstances. According to the LTA Act, 'disqualification' means disqualification from holding or obtaining a driver's licence.

.....

15. According to the applicable prescribed penalty, the defendant should be disqualified from holding or obtaining a driver's licence for a period from 3 months to 2 years.

16. In the case of ***State v Prasad*** *[2003] FJHC 146; HAA0038J.2003S (16 October 2003), the Learned High Court Judge [Her Ladyship Madam Justice Nazhat Shameem listed the following as factors to be taken into account in deciding the length of disqualification.*

a. The standard of driving shown in the offending.
b. Any previous convictions for traffic offences.
c. The need to protect the public from dangerous/careless/drunk drivers.
d. Good character.
e. Serious hardship to the family.
f. Driving providing the source of livelihood for the offender.

17. It is pertinent to note that the Learned Magistrate had considered the fact that the defendant was working as a Referee of the small claims tribunal as an aggravating factor. I cannot agree that this is an aggravating factor. In my view, the position held by an accused at the time of offending can be considered as an aggravating factor for the purpose of sentencing only if the accused used the relevant privileged or the trusted position in any manner to commit the offence.

18. In my opinion, the only aggravating factor revealed in the summary of facts is the concentration of alcohol that was present in the blood above the prescribed limit. The prescribed limit of alcohol concentration as provided in the Land Transport (Breath Tests and Analyses) Regulations 2000 is 80 milligrams of alcohol in 100 millilitres of blood. The alcohol concentration found in the defendant's blood was 90.2 milligrams in 100 millilitres.

19. Considering all the circumstances, including the fact that the defendant was a first offender; that he is the only person in the family with a driver's licence; and the fact that he had taken responsibility for his actions by pleading guilty, I am of the view that it is appropriate to disqualify the defendant from holding or obtaining a driver's licence for the minimum period prescribed for the relevant offence which is 3 months."

[33] In ***State v. Ratu Semi Kabakaba Degei*** [2019] FJHC 478; HAC333.2018 (24 May 2019); the accused was convicted on his own plea of the following charges:

1. Manslaughter, contrary to Section 239 (a) & (b) (c) (ii) of the Crimes Act No 44 of 2009;

2. Dangerous Driving Occasioning Grievous Bodily Harm, contrary to Section 97 (4) (c) & 114 of the Land Transport Act; and

3. Driving a Motor Vehicle whilst there is Present in the Blood a Concentration of Alcohol in Excess of the Prescribed Limit, contrary to Sections 103 (1) (a) & 114 of the Land Transport Act.

His Lordship Justice Daniel Goundar imposed a term of 4 years' imprisonment for count 1, 12 months' imprisonment and 6 months disqualification from driving for count 2 and 3 months' imprisonment and 12 months disqualification from driving for count 3. All sentences were made concurrent.

[34] In ***Jessica Hill v. The State*** [2018] FJCA 123; AAU109.2015 (10 August 2018); it was held by the Fiji Court of Appeal:

"[29] In any reckless driving case, the number of people being put at the risk of being killed or injured is often a matter of chance. However, there are cases where the offender has knowingly put more than one person at risk, or where the occurrence of multiple deaths was reasonably foreseeable. A person who takes the control of the steering wheel under the influence of alcohol or drugs knowingly puts more than one person at risk of being killed and this is one of such cases although only one person succumbed to injuries."

[35] In the instant case, I concede that the Learned Resident Magistrate has not made reference to any case authorities in her sentence. However, it is also a fact that there is no established tariff for the offence of Driving a Motor Vehicle whilst there is Present in the Blood a Concentration of Alcohol in Excess of the Prescribed Limit. If there was an established tariff and the Learned Resident Magistrate had failed to make reference or take into consideration such tariff, it may have amounted to an error of law. However, that is clearly not the position in this case.

[36] It must also be emphasized that the prescribed limit of alcohol concentration as provided in the Land Transport (Breath Tests and Analyses) Regulations 2000 is 80 milligrams of alcohol in 100 millilitres of blood. However, the Appellant has been

convicted for having an alcohol concentration in his blood of 147.4 milligrams in 100 millilitres. This is 67.4 milligrams in 100 millilitres above the prescribed limit.

[37] Taking into consideration all the above factors, I am of the opinion that the compulsory disqualification of the Appellant's driving license for 12 months cannot be considered as a manifestly excessive or harsh sentence imposed by the Learned Magistrate.

[38] Considering the aforesaid, I am of the opinion that Grounds 3 and 4 of the Grounds of Appeal against sentence are also without merit.

Conclusion

[39] Accordingly, I conclude that this Appeal should stand dismissed and the sentence be affirmed.

FINAL ORDERS

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

1. Appeal is dismissed.
2. The sentence imposed by the Learned Resident Magistrate of the Magistrate's Court of Nasinu in Traffic Case No. 107 of 2020 is affirmed.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA
This 4th Day of August 2021

Solicitors for the Appellant : Toganivalu Legal, Barristers and Solicitors, Suva.
Solicitors for the Respondent: Office of the Director of Public Prosecutions, Suva.