

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 32 of 2021

STATE

vs.

- 1. SALESI SUKA RASOQOSOQO**
- 2. VILIAME NAMINO**
- 3. PENI NARAWA**

Counsel: Mr. S. Komaibaba for the State
Ms. L. Ratidara for the 3 Accused

Date of Ruling: 03rd February 2021

RULING

[On Jurisdiction]

1. The first accused is charged with one count of Unlawful Possession of Illicit Drugs weighting 891.77 grams of Cannabis Sativa, contrary to Section 5 (a) of the Illicit Drugs Control Act. The second accused is charged with one count of Unlawful Possession of Illicit Drugs weighting 28.11 grams of Cannabis Sativa, contrary to Section 5 (a) of the Illicit Drugs Control Act. The third accused is charged with one count of Unlawful Cultivation of 94 plants of Cannabis Sativa, weighing 21460.66 grams, contrary to Section 5 (a) of the Illicit Drugs Control Act.

2. The three accused were produced in the Magistrate's Court at Navua on the 23rd of December 2020. The learned Magistrate had transferred the matter to the High Court on the basis that the quantity of the drugs is 21400.66 grams. The transfer order of the learned Magistrate dated 26th of January 2021 states that the matter is transferred to the High Court pursuant to Section 35 and 191 of the Criminal Procedure Act.
3. The learned Counsel for the Prosecution submitted that the transfer order of the learned Magistrate is wrong; hence, the transfer of this case is invalid. He further submitted that this matter could be heard in the Magistrate's Court as the learned Magistrate has jurisdiction to hear it. The learned Counsel for the Defence concurred with the application made by the learned Counsel for the Prosecution.
4. Section 35 of the Criminal Procedure Act states that:

The High Court may inquire into and try any offence subject to its jurisdiction at any place where it holds sittings.

All criminal cases to be heard by the High Court shall be—

- a) *instituted before a Magistrates Court in accordance with this Act; and*
- b) *transferred to the High Court in accordance with this Act if the offence*

is—

- i. *an indictable offence; or*
- ii. *an indictable offence triable summarily, and the accused has indicated to the Magistrates Court that he or she wishes to be tried in the High Court.*

5. Section 35 (1) of the Criminal Procedure Act defines the power of the High Court. Section 35 (2) deals with the procedure of institution of the cases that the High Court has

jurisdiction to hear. According to Section 35 (2), (b) of the Criminal Procedure Act, the learned Magistrate has to transfer the case to the High Court if the offence is either an indictable offence or an indictable offence triable summarily and the accused opted to be tried in the High Court.

6. Section 4 (1) of the Criminal Procedure Act has stated that the High Court shall hear the indictable offences as defined under the Crimes Act. Moreover, any indictable offence triable summarily under the Crimes Act shall be heard by either the High Court or Magistrates' Court upon the election of the Accused. The Magistrates' Court shall hear all the summary offences as defined under the Crimes Act.
7. There is no mandatory requirement to transfer the case to the High Court if the offence does not fall within the meaning of Section 35 (2) (b) (i) and (ii) of the Criminal Procedure Code.
8. The offences in this matter are neither an indictable nor indictable but triable summarily. Therefore, they do not come under the purview of Section 35 (2) (b) (i) and (ii) of the Criminal Procedure Act. The three accused are charged with three separate offences under the Illicit Drugs Control Act. Accordingly, the offences in this matter have been created by an Act other than the Crimes Act. Section 5 of the Criminal Procedure Act has defined the jurisdictions of the Court in relation to the offences created under any law other than the Crimes Act. Section 5 of the Criminal Procedure Act states that:
 - (i) *Any offence under any law other than the Crimes Act 2009 shall be tried by the court that is vested by that law with jurisdiction to hear the matter.*
 - (ii) *When no court is prescribed in any law creating an offence and such offence is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Courts in accordance with any limitations placed on the jurisdiction of classes of Magistrate prescribed*

in any law dealing with the administration and jurisdiction of the Magistrates Courts.

9. The Illicit Drugs Control Act has not explicitly given the High Court jurisdiction to hear the offences under the Act. Neither the Illicit Drugs Control Act has defined the offences as indictable or summary offences. Hence, the applicable section that defines the jurisdiction to hear these three offences is Section 5 (2) of the Criminal Procedure Act. Accordingly, the learned Magistrate has the jurisdiction to hear these offences.
10. All the criminal proceedings are initially instituted before a Magistrates Court. (*vide Section 35 (2) and 56*). If the offence as charged falls under the Section 35 (2) (i) and (ii), of the Criminal Procedure Act, the Magistrate is required to transfer the matter to the High Court. If not, the Magistrate has jurisdiction to hear the matter. If the offence has been created by an Act other than the Crimes Act and the said Act has not defined the offence as an Indictable or Summary Offences, the Magistrate's Court has jurisdiction to hear the matter. Suppose the Magistrate, before or during a trial of such an offence, by his own motion or upon the application made by the Prosecution, finds that the case is one which ought to be heard by the High Court. In that case, he may then transfer such cases to the High Court under Section 188 of the Criminal Procedure Act.
11. As mentioned before, the Magistrate has jurisdiction to hear these offences under the Illicit Drugs Control Act. The Magistrate could only transfer this case to the High Court if he finds that the case is one ought to be heard by the High Court pursuant to Section 188 of the Criminal Procedure Act.
12. In this case, the learned Magistrate had transferred the matter to the High Court on the basis that the amount of Marijuana involved is 21460.66 grams. The first accused is charged with one count of possession of 891.77 grams of Cannabis Sativa. The amount involved with the second accused is 28.11 grams of Cannabis Sativa. The third accused is being charged with the cultivation of 94 plants of Cannabis Sativa weighing 21460.66 grams. Accordingly, the conclusion of the learned Magistrate that the amount of illicit

drugs involved in this matter is 21460.66 grams is wrong concerning the first and second accused.

13. It appears that the learned Magistrate's order to transfer this matter to the High Court is based on the sentencing guidelines stipulated in Sulua v State [2012] FJCA 33; AAU0093.2008 (31 May 2012). The Sulua guidelines have not defined the jurisdiction of the Court to hear the offences under the Illicit Drugs Control Act. The Sulua case (supra) had only laid down the guidelines to be followed in sentencing the offenders in cases of possession of Cannabis Sativa.
14. The Fiji Court of Appeal in Ratuyawa v State [2016] FJCA 45; AAU121.2014 (26 February 2016) had discussed the effect of the Sulua guidelines in respect of the jurisdiction of the Magistrates' Court to hear the offence under the Illicit Drugs Control Act, where Fernando JA held that:

"I am of the view that the Magistrates Court had the jurisdiction to try all offences created by the Illicit Drugs Act 2004 in view of the clear provisions in Section 5(2) of the Criminal Procedure Decree 2009 and a Court is not competent to amend the Illicit Drugs Act, prospectively or with retrospective effect. That is a matter for the Legislature and to act contrary to this would be a violation of the principle of Separation Powers ingrained in our Constitution."

15. In State v Mata [2019] FJCA 20; AAU0056.2016 (7 March 2019), the Fiji Court of Appeal found that:

"In my view, the above pronouncement in Sulua should be treated as a mere guidance and not as a binding statement of law, for the jurisdiction of the Magistrate Court to try any offence under section 5(a) and 5(b) of Illicit Drugs Control Act vested in it by the legislature in terms of section 5 of the Criminal Procedure Act cannot be taken away by a judicial

pronouncement. The decision in Sulua should not be deemed or taken to have intended such an outcome.

The tariff of 07 to 14 years of imprisonment for category 4 offences prescribed may have prompted the Court of Appeal to have come up with the above guideline in Sulua as to the appropriate court for such offences, for the Magistrates Court cannot impose any sentence above 10 years of imprisonment. However, it should be kept in mind that in terms of section 190 of the Criminal Procedure Act the Magistrate is empowered to transfer a person convicted by the Magistrates Court to the High Court for sentencing and greater punishment. Therefore, there is no reason to fear that offenders tried and convicted in the Magistrate Court for category 4 offences would go inadequately punished. Neither is there any reason to distrust good judgment of the Magistrates in the matter of sentence.

16. As a result of the above reasons, I find the learned Magistrate's transfer order is wrong and not valid in law. I accordingly remit this matter back to the Magistrate's Court to continue the proceedings according to the applicable law.



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe".

.....
Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

03rd February 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the 3 Accused.