**IN THE HIGH COURT OF FIJI**
**AT LAUTOKA**
**[APPELLATE JURISDICTION]**

**CRIMINAL APPEAL NO. HAA 35 OF 2022**

**IN THE MATTER** of an Appeal from the Decision of the Resident Magistrate, Magistrate's Court of Lautoka, in Criminal Case No. 431 of 2008.

**BETWEEN** : **ROHIT SHALENDRA SINGH**

**APPELLANT**

**AND** : **THE STATE**

**RESPONDENT**

**Counsel** : Mr. Filimoni Daveta for the Appellant
Ms. Alvin Singh for the Respondent

**Date of Hearing** : 1 December 2022

**Judgment** : 17 January 2023

# JUDGMENT

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

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

[3] The full details of the Charge filed in the Magistrate's Court of Lautoka read as follows [As found at page 4 of the Magistrate's Court Record]:

**CHARGE**

***Statement of Offence (a)***

**POSSESSION OF ILLICIT DRUGS**: Contrary to Section 5 (a) of the Illicit Drugs Control Act 2004.

***Particulars of Offence (b)***

**Rohit Shalendra Singh s/o Ramendra Singh,** on the 3rd day of June 2008, at Lautoka, in the Western Division, without lawful authority had in his possession 130.5 grams of cannabis or Indian hemp, an illicit drug.

[4] From the Magistrate's Court Record it can be ascertained that the Appellant was first produced in the Magistrate's Court, on 5 June 2008, and granted bail on the same day.

[5] The Appellant had pleaded not guilty to the charge and the matter had proceeded to trial. On 19 August 2014, he had been found guilty of the charge and convicted [Pages 43-47 of the Magistrate's Court Record].

[6] On 21 August 2014, the Appellant had been imposed a sentence of 2 years and 6 months imprisonment [Pages 48-50 of the Magistrate's Court Record].

[7] Aggrieved by the said Order the Appellant filed an appeal in the High Court. On 11 December 2014, the High Court set aside the conviction and sentence and ordered a re-trial before a different Magistrate [Pages 40-42 of the Magistrate's Court Record]. The basis for this order was that the Learned Resident Magistrate had failed to hold a voir-dire inquiry prior to admitting the caution interview statement made by the Appellant.

[8] Accordingly, a re-trial was held. On 24 June 2022, the Appellant had been found guilty of the charge and convicted [Pages 9-16 of the Magistrate's Court Record]. On 26 August 2022, the Appellant had been imposed a sentence of 18 months imprisonment. He was ordered to serve 8 months imprisonment immediately. The balance period of 10 months imprisonment was suspended for 3 years, effective forthwith [Pages 5-8 of the Magistrate's Court Record].

[9] Aggrieved by the said Order, on 13 September 2022, the Appellant filed a timely appeal in the High Court. On 22 September 2022, an Amended Petition of Appeal was filed with the Leave of Court. The Amended Petition of Appeal is in respect of both his conviction and sentence.

[10] This matter was taken up for hearing before me on 1 December 2022. The Learned Counsel for the Appellant and the State Counsel for the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[11] The Appellant had also filed a Notice of Motion seeking bail pending appeal (Criminal Miscellaneous Case No. HAM 142 of 2022). The said Notice of Motion was supported by an Affidavit in Support filed by the Appellant. This Court decided that it would be best that the merits of this appeal be first gone into prior to making a determination on the Notice of Motion seeking bail pending appeal.

[12] As per the Amended Petition of Appeal filed the Grounds of Appeal taken up by the Appellant are as follows:

**Grounds of Appeal against Conviction**

1. That the Learned Magistrate had erred in law and in fact by accepting into evidence under paragraphs 22 and 23 of her Judgment an important element of the offence in that the accused (Appellant) was charged under although such evidence (of proof of ownership of the property) was not tendered or proved by the prosecution.
2. That under paragraph 23 of her said Judgment the Learned Magistrate had accepted such evidence since it was not being rebutted by the defense even though a doubt was created therein.

**Grounds of Appeal against Sentence**

1. That the sentence was harsh and excessive in that the Learned Magistrate had stated in her sentence that the accused person (Appellant) did not spend any time

in remand when the re-trial was ordered and therefore imposed a custodial sentence of eight (8) months imprisonment whilst suspending the other portion of 10 months.

2. That the Learned Magistrate had failed to consider that the Appellant was legally a first offender.
3. That the Learned Magistrate had also failed to consider that there were no/nil aggravating factors in the case which was also mentioned in her sentence.
4. That the Learned Magistrate had also failed to consider that the Appellant had served about three months and three weeks before a retrial was ordered.

**[13]** As can be observed there are two Grounds of Appeal against conviction; and four Grounds of Appeal against sentence.

**The Law and Analysis**

**[14]** 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."*

**[15]** 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 Conviction**

**[16]** The first Ground of Appeal against conviction is that the Learned Resident Magistrate erred in law and in fact in convicting the Appellant by accepting into evidence proof of ownership of the property although no such evidence was tendered or proved by the

prosecution. The second Ground of Appeal against conviction is that Learned Magistrate had accepted such evidence since it was not rebutted by the defense even though a doubt was created therein.

**[17]** I find that both the above Grounds of Appeal against conviction are inter-related. As such, they will be addressed together.

**[18]** Section 5 of the Illicit Drugs Control Act is re-produced below:

*Any person who without lawful authority-*

*(a) acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or*

*(b) engages in any dealings with any other person for the transfer, transport, supply, use, manufacture, offer, sale, import or export of an illicit drug;*

*commits an offence and is liable on conviction to a fine not exceeding $1,000,000 or imprisonment for life or both.*

**[19]** In this case, the Appellant has been charged for possession of 130.5 grams of cannabis or Indian hemp, an illicit drug, without lawful authority.

**[20]** The Judgment of the Learned Resident Magistrate is found at pages 9 to 16 of the Magistrate's Court Record. I find that the Learned Resident Magistrate has outlined the elements of the offence of Possession of Illicit Drugs [At page 11 of the Magistrate's Court Record]. She has duly summarized all the evidence led in the trial [From pages 11-13 of the Magistrate's Court Record]. She has then analysed the evidence in relation to the said elements of the offence. Accordingly, the Learned Resident Magistrate has found the Appellant guilty of the charge and convicted him.

**[21]** The Learned Resident Magistrate has also relied on Section 32 of the Illicit Drugs Control Act in finding the Appellant guilty. Section 32 makes reference to a factual presumption relating to the possession of illicit drugs in the following manner:

*Where in any prosecution under this Act it is proved that any illicit drug, controlled chemical or controlled equipment was on or in any premises, craft, vehicle or animal under the control of the accused, it shall be presumed, until the contrary is proved, that*

*the accused was in possession of such illicit drug, controlled chemical or controlled equipment.*

**[22]** The Learned Resident Magistrate has also relied on the admissions made by the Appellant in his caution interview statement, which was held admissible by the Court.

**[23]** In the circumstances, I see no reason or justification to interfere with the Learned Magistrate's Order convicting the Appellant in this matter.

**[24]** For the aforesaid reasons, I find that the Grounds of Appeal against the Conviction are without merit.

**The Grounds of Appeal against Sentence**

**[25]** 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)."*

**[26]** 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."*

**[27]** 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.

**[28]** 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."*

**[29]** The first Ground of Appeal against sentence is that the sentence is harsh and excessive. As stated before, the Appellant has been charged for possession of 130.5 grams of cannabis or Indian hemp, an illicit drug, without lawful authority, contrary to Section 5(a) of the Illicit Drugs Control Act.

**[30]** The maximum penalty for this offence is a fine not exceeding $1,000,000 or imprisonment for life or both fine and imprisonment. In her endeavour to determine the tariff for this offence the Learned Resident Magistrate has considered the authority of ***Sulua v. State*** [2012] FJCA 33; AAU 93 of 2008 (31 May 2012), where the Fiji Court of Appeal laid out the following tariffs for the possession of *cannabis sativa*:

*(i)* ***Category 1:*** *possession of 0 to 100 grams of cannabis sativa - a non-custodial sentence to be given, for example, fines, community service, counselling, discharge with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.*

*(ii)* ***Category 2****: possession of 100 to 1,000 gram of cannabis sativa. Tariff should be a sentence between 1 to 3 years imprisonment, with those possessing below 500 grams, being sentenced to less than 2 years, and those possessing more than 500 grams, be sentenced to more than 2 years imprisonment.*

*(iii)* ***Category 3:*** *possessing 1,000 to 4,000 grams of cannabis sativa. Tariff should be a sentence between 3 to 7 years, with those possessing less than 2,500 grams, be sentenced to less than 4 years imprisonment, and those possessing more than 2,500 grams, be sentenced to more than 4 years.*

*(iv)* ***Category 4:*** *possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment.*

**[31]** Since the Appellant was in possession of 130.5 grams of cannabis, the Learned Resident Magistrate has correctly stated that this is a category 2 offence. Accordingly, she has selected a starting point of 24 months imprisonment. She has conceded that there are no apparent aggravating factors available on the evidence. The Learned Resident Magistrate has deemed the Appellant as a first offender and given him a discount of 6 months in lieu of the said mitigating factor, arriving at the sentence of 18 months imprisonment.

**[32]** Thereafter, the Learned Resident Magistrate has given much thought to whether she should act in terms of Section 26 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act) and suspend the sentence or not. The Section provides as follows:

> (1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*
>
> (2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*
>
> *(a) does not exceed 3 years in the case of the High Court; or*
>
> *(b) does not exceed 2 years in the case of the Magistrate's Court.*

**[33]** From a reading of the above Section it is manifest that imposing a suspended sentence is purely at the discretion of the sentencing Court. If Court is satisfied that it is appropriate to do so in the circumstances, the Court can suspend the whole of the sentence or only part of the sentence.

**[34]** I am of the opinion that the Learned Resident Magistrate has duly provided her reasons as to why she was suspending only part of the sentence imposed on the Appellant and not the whole sentence. Accordingly, the Appellant was ordered to serve 8 months imprisonment immediately. The balance period of 10 months imprisonment was suspended for 3 years, effective forthwith.

**[35]** For the aforesaid reasons, it cannot be said that the sentence imposed by the Learned Magistrate is harsh and excessive. As such, this Ground of Appeal against sentence is without merit.

**[36]** The second Ground of Appeal against sentence is that the Learned Resident Magistrate had failed to consider that the Appellant was legally a first offender. This is clearly incorrect. At paragraph 3 of her sentence the Learned Resident Magistrate has stated that the prosecution has tendered the Appellant's previous convictions. Although the Appellant has a history of previous convictions none were said to be within the operational period (10 years). Therefore, the Learned Resident Magistrate has stated that she deems the Appellant as a first offender.

**[37]** She has further highlighted that the Appellant is deemed a first offender at paragraph 10 of her sentence. Based on the said mitigating factor she has given a discount of 6 months to the Appellant.

**[38]** Therefore, this Ground of Appeal against sentence is without merit.

**[39]** The third Ground of Appeal against sentence is that the Learned Resident Magistrate had failed to consider that there were no aggravating factors in the case. This too is clearly erroneous. In fact, at paragraph 7 of her sentence the Learned Resident Magistrate makes specific reference to this fact. Thus no additional sentence has been added to the starting point of 24 months in lieu of aggravating factors.

**[40]** Therefore, this Ground of Appeal against sentence has no merit.

**[41]** The final Ground of Appeal against sentence is that the Learned Resident Magistrate had failed to consider that the Appellant had served about three months and three weeks before a retrial was ordered. The Learned Resident Magistrate has stated that when this matter was ruled for re-trial, that the Appellant did not spend any time in remand for this matter (At paragraph 4 of the sentence). It is contended that the time the Appellant spent in custody after he was first convicted and before a retrial was ordered, should have been deducted in terms of Section 24 of the Sentencing and Penalties Act.

**[42]** Section 24 of the Sentencing and Penalties Act reads thus:

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

**[43]** I concede that in terms of Section 24 of the Sentencing and Penalties Act the Learned Resident Magistrate should have deducted the time the Appellant spent in custody after he was first convicted and before a retrial was ordered from his sentence.

**[44]** However, considering the fact that the Learned Resident Magistrate has after careful consideration decided to suspend a major part of the sentence imposed on the Appellant (10 months imprisonment of the 18 months imprisonment), and also since

the period the Appellant was ordered to serve in custody will be coming to an end by early February 2023, I am not inclined to interfere with the sentence imposed by the Learned Resident Magistrate at this point in time.

**[45]** Considering the aforesaid, I am of the opinion that the Grounds of Appeal against sentence are without merit.

**Conclusion**

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

**FINAL ORDERS**

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

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Lautoka in Criminal Case No. 431 of 2008 is affirmed.

**Riyaz Hamza**
**JUDGE**
**HIGH COURT OF FIJI**

**AT SUVA**
**This 17th Day of January 2023**

**Solicitors for the Appellant:** **Pillai Naidu & Associates, Barristers and Solicitors, Lautoka.**
**Solicitors for the Respondent:** **Office of the Director of Public Prosecutions, Lautoka.**