IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

NAUSHAD ALI

Appellant

CASE NO: HAA. 08 of 2022 **Vs.**
[Navua Magistrate's Court Criminal. Case No. 137 of 2019]

STATE

Respondent

Counsel : Mr. K. Skiba for the Appellant
Ms. M. Konrote for the Respondent

Hearing on : 31st January, 2023
Judgment on : 21st April, 2023

JUDGMENT

Introduction

1. The appellant was tried in the Magistrates Court of Navua with one count of unlawful possession of an illicit drug contrary to section 5(a) of the Illicit Drugs Control Act 2004. On 19th of April, 2021 he was convicted and then on 4th February 2022 sentenced to 5 years imprisonment with a non-parole period of 3 years. The Appellant is seeking enlargement of time to file notice of appeal and grounds of Appeal against both the conviction and the sentence.

2. The Appellant filed his written submissions in support of the Petition of appeal as well as seeking enlargement of time on 24.11.2022 and the respondent filed their submissions on 6.09.2022 and further submissions on 11.4.2023. Matter was taken up for argument on 31st January 2023 and12th of April 2023.

3. The grounds of appeal urged by the Appellant are as follows:

Against Conviction

1. *The Learned Magistrate failed to consider the fact that the methamphetamine was not found on me but was instead found inside my vehicle.*
2. *The Learned Magistrate failed to consider the fact that Appellant was not present at the scene during the time the vehicle was searched by the arresting officers, and*
3. *The Learned Magistrate erred in law when he convicted me for possession of methamphetamine for commercial purposes in which the prosecution failed to establish that the methamphetamine found my vehicle was intended for commercial purposes.*

Against Sentence:

1. *The learned Magistrate erred in law when he sentenced me to 5 years imprisonment with a non-parole period of 3 years and 6 months by failing to consider my strong mitigation factors such as being a first offender, and I was a businessman with good relationships within my community having employed several community members in my mechanical business; and*
2. *The Learned Magistrate erred in determining that possession of methamphetamine of commercial purposes as an aggravating factor in which the prosecution failed to establish that the methamphetamine found inside my vehicle was intended for commercial purposes.*

Facts

4. The Appellant was apprehended on the 5th of June, 2019 at Wainadoi at Navua. He was travelling in his car with his son when the police stopped his vehicle and requested him to step-out. Thereafter, with the assistance of (K9) sniffer dog the vehicle was searched and a parcel containing methamphetamine, a small scale and glass smoking apparatus were found inside a box in the rear of the vehicle. Upon examination by a government analyst it revealed that the substance contained 17.4 grams of methamphetamine which is an illicit drug. The police witnesses' evidence confirmed the search and this detection and according to them the Accused was standing near the vehicle when the search was in progress.

5. The Accused took up the position that he was in the police post and was not present when the vehicle was searched. Secondly, he in his caution interview had said that the vehicle was also used by his customers and workmen at his vehicle repair garage. He appears to be a motor mechanic by profession. The Learned Magistrate after considering the evidence rejected the Accused's position and accepted the prosecution version as true. In this appeal the Appellant is challenging the convicting on the basis that he did not have the knowledge of the existence of the drug in his vehicle (lack of knowledge).

6. The Appellant has raised 3 grounds of appeal against the conviction and a fresh ground was raised by Mr. Skiba during the hearing of oral that the learned Magistrate has failed to consider '***Liberato principles***' meaning that he failed to consider the Accused evidence and moved that the same be considered as an additional ground of appeal. As there was no objection by the Respondent I am inclined to consider this ground as ground '***3B***' even though it was not a ground raised in the Petition of appeal or written submissions.

Ground 3B

7. As for the ***Liberato*** principles as laid down in ***Liberato V. The Queen*** *(1985) HCA 66: 159 CLR 507 (17 October 1985) and* then modified in the case of **Anderson** [2001] 127 [A] Crime R 116 Act 121 para 26, simply means the trial Judge should consider and evaluate the evidence of the Accused in the following lines; [i] if you believe the Accused's evidence or his account he must be acquitted; [ii] If you do not accept the evidence of the Accused but you consider that it might be true you must acquit; and [iii] If you do not believe the Accused's evidence you should put that evidence to one side and should consider the evidence that is accepted as true and determine if the Prosecution has successfully proved the guilt of the Accused beyond reasonable doubt.

8. In this matter the learned Magistrate in the judgement has summarized the evidence of the Accused and has highlighted the contradictory positions of the Accused which appears as follows;

> "*He admitted that he signed the search list prepared by the Police Officers but denied that the scale was found inside his vehicle". Later he agreed that*

the said scale was found from his vehicle and admitted that he lied to court (at paragraph 23 of the judgement)."

Then at paragraph 29 the learned Magistrate adverted to the said evidence as follows;

> "*29.In cross examination, the Accused admitted that the electronic scale was found inside his vehicle and he admitted that it was his vehicle. He agreed that he signed the search list at Wainadoi Police Post. Further, the Accused admitted that he lied to this court during his evidence. The Prosecution paid* [sic.] *the Accused persons attention to question 76 of the caution interview.*
>
> ***Q.76****: have a look at this electronic weighing machine which was found by Police inside your vehicle.*
> ***A.76****: It is used in my garage to balance equally all the cylinders.*
>
> ***PRO:*** *No, but that which was shown to you by Police was the same scale which was tendered in court today and you had confirmed that it was your scale.*
> ***ACC****: Yes I agree to the answer for Q76.*
>
> ***PRO****: Are you lying to this court?*
> ***ACC****: Yes, I lied."*

9. It's true that the Magistrate had not in so many words evaluated the Accused's evidence in line with the ***Liberator*** principles but has certainly adverted to the contradictory nature of the Appellant's evidence and not accepted the same. Thus let's consider if such implied rejection of the Accused's evidence is lawful and correct.

10. As seen above there is a denial of the ownership and the presence of the scale by the Appellant when he initially gave evidence. However, when the relevant portions/answers of the caution interview were put to him and contradicted the Appellant changes his position admits the said answer to Q. 76 and admits that the scale belongs to him and also that it was found in the vehicle. This initial denial in my view cannot be due to a faulty memory or the lapse of time. In the caution interview the Appellant clearly admits the ownership of the scale and also explains that it was an instrument used by him in the repair of vehicle engines. If that be so the Appellant certainly cannot have forgotten. Therefore, this contradiction has arisen not due to forgetfulness but clearly due to utterance of a deliberate falsehood.

11. I also observe that the Accused in his evidence-in-chief has highlighted and brought into the record certain contradictory positions in his caution interview. They are;

question 37, he was asked what happened after they stopped your vehicle? Appellant answered, that *they told me they will search my vehicle and I agree with them* [sic]; question 38, it was asked what happened after they searched your vehicle. The Appellant answered; *they told me that something behind my vehicle*; to question 39 the Accused states that *"when the search they found a piece of blue cloth inside was a white small clear plastic containing white crystals sealed in a black tape*."

12. These questions and answers were elicited in evidence by the Appellant himself which contradict his evidence in court. In evidence the Appellant denies being present when his vehicle was searched and the finding of any substance in the vehicle. Having elicited the said contradictory positions he does not challenge the contents of the caution interview nor does he explain the same. Neither does the Appellant say that what was recorded is not what he said. The Defence also did not make any such suggestion either. To that extent I find that the Accused himself has elicited contradictory positions and left it without any explanation or plausible reason. To that extent the Appellant's evidence is certainly contradictory and is in all probabilities false.

13. In the above circumstances the Magistrate correct in disregarding the Appellant's evidence and it was lawful to have done so. It is obvious and apparent that even if the Magistrate has applied the Liberato principles it would not have made any difference, as to the final outcome. No reasonable tribunal can come to a finding other than that the Appellant's evidence is false. In these circumstances the failure to expressly consider the Appellant's evidence in lines of ***Liberato*** principles has not caused any substantial miscarriage of justice.

14. That being so, I am satisfied that no substantial miscarriage of justice had actually occurred though then be some degree of a non-direction. Thus in the circumstances it is clear that there is no real possibility that justice has miscarried by reason of that misdirection or non-direction. This ground of appeal thus lacks merit.

Grounds 1 and 2

15. These ground of appeal are presented on the basis that the exhibits were not found in the appellant's person but in his vehicle and he was not present when the vehicle was searched. It was submitted that, the Learned Magistrate failed to consider the fact that

the methamphetamine was not found on the Appellant's person, instead found inside the Appellant's vehicle and the Learned Magistrate did not consider that other people used his vehicle and that the drugs may have belonged to one, or more, of said other people and that the Appellant's son was also in the vehicle.

16. The second ground of appeal against the conviction is that the Learned Magistrate failed to consider the fact that the Appellant was not present at the scene during the time his vehicle was searched by the arresting officers. No station diary was produced to show when and how the vehicle or the Appellant was searched. In this sense, and because all the officers' version matched, even though there was station diary was not available to prove the arrest and search, the Learned Magistrate put weight on the officers' testimony instead of the Appellant's.

17. There is no definition given to the word "possession" in the Statute, in the case of *Laisiasa Koroivuki v The State*; (AAU 18 of 2010; 5 March 2013) [2013] FJCA 15, it was held (per Goundar JA) that:

> *"In absence of a statutory definition, the court can be guided by the English Common Law definition of the word "possession". "Possession" is proven if the accused intentionally had the **drugs** in his **physical** custody or **control** to the exclusion of others, except anyone who was acting in concert with him in the alleged offence (Lambert [2001] UKHL 37; [2002] 2 AC 545). Possession is also proven if the accused intentionally had the substance in some place to which he either alone or jointly with some other person acting in concert with him had access and might go to get physically or control it, (Lambert, Supra.)"*

18. Then there is Section 32 of the Illicit Drugs Control Act 2004. The learned Magistrate had relied on Section 32 of the Illicit Drug Control Act 2004, in imputing criminal liability on the Appellant which is as follows,

> *"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" (emphasis added)*

19. Gamlath JA., in **Mohammed v State** [2014] FJCA 216; AAU0092.2011 (12 December 2014) held that this section lays down certain preconditions to be satisfied

by the prosecution, before triggering the force of the presumption and is proved it places a burden upon the Appellant to rebut the evidence of the prosecution.

20. Keith JA, in Abourizk v State [2022] FJSC 9; CAV0013.2019 (28 April 2022) opined that that the presumption would arise if the prosecution proves that

- the bags were in the car
- one or more of the bags contained illicit drugs
- the car was under the petitioners' control.

That if the prosecution proved those matters beyond reasonable doubt, it would then be for the petitioner (Appellant) to prove that the drugs were not in his possession.

21. All these three matters were proved and not in dispute in that sense at the trial. The Appellant was the owner, driver and was in control of the vehicle. The Appellant attempts to deny knowledge as well as avoid exclusive possession that others used this vehicle and his son too was present in the vehicle when arrested. As held in **Abourizk v State** *"it was then for the Appellant to disapply the presumption, by proving – on a balance of probabilities, of course, not beyond reasonable doubt – that they had not been in possession of the drugs………… In cases of possession of illicit drugs, the* ***mens rea*** *consists of* ***knowledge*** *that what you have in your possession are illicit drugs. It is well established that you do not have to know what kind of drugs they are. But you do have to know that they are illicit drugs of some kind. All of that is settled law: see Warner v Metropolitan Police Commissioner [1969] 2 AC 256 and R v Boyesen [1982] AC 768."*

22. With the presumption coming in to operation the burden of proving that the Appellant had not been in possession of the drugs shifted to the Appellant. If this burden is a legal or evidential one; **Abourizk v State** keeps it open, but Gamlath JA., in **Mohammed v State** said there is a burden upon the Appellant to rebut the evidence of the prosecution; and Prematileke JA., in **Abourizk v State** (in the court of Appeal matter) was of the view that the burden was a legal one.

23. Be that as it may in the present case the Appellant denies knowing the presence of the substance. However, the fact that it was found in the vehicle and the presence of the Appellant are proved. In view of the analysis at paragraph 15 above, it is apparent that

the Appellant's evidence is contradictory and is in all probabilities false. The Appellant was clearly untruthful on the ownership and the presence of the scale found along with the illicit drugs. Subsequently he admits that it was his scale which was found amongst the items in the brake pad box. Considering the falsity and inconsistent and contradictory nature, the Applicant's evidence certainly it is not sufficient to create any doubt and to displace the presumption that has arisen by virtue of section 32.

24. It was submitted that his explanation in the caution interview of the vehicle being used by others should be considered in determining this issue. No doubt the Appellant had said so in the caution interview. The said interview was led in evidence though there appears to be no significant admissions. When an explanation in favour of the Accused arises in a mixed statement it should be considered.

25. Where a "mixed" statement is under consideration in a case where the defendant has not given evidence, the method most likely to produce a just result, is for the whole statement, both the incriminating parts and the excuses or explanations, be considered in deciding where the truth lies. (House of Lords in *R. v. Sharp*, [1988] 1 W.L.R. 7, and more recently in *R. v. Aziz*, [1995] 2 Cr. App. R. 478.)

26. Thus the Court should consider all of the denials and explanations when deciding whether the statements were true along the lines of *Duncan* in the following terms: The exculpatory statements or denials which tend to exonerate the Accused must be considered if it occurs in a statements of an incriminating nature. Though, excuses for one's own behaviour do not necessarily carry the same persuasive weight nevertheless, a denial or other exculpatory statement may raise a reasonable doubt. That is so because any statement or part of a statement allegedly made by an accused that is exculpatory, in the sense that it denies that he committed the offence, or provides an innocent explanation, is evidence in favour of that accused and if the evidence indicates that the Appellant could reasonably have made the exculpatory statement and it is reasonable to believe that the exculpatory statement could be true, then it may raise a reasonable doubt in favour of the Appellant.

27. However, when the Accused himself has given evidence and is silent on a particular exculpatory issue in this statement, such matter becomes inconsistent and is devoid of credibility. As regards the use of the vehicle by third parties the Appellant had been silent and not said so in his evidence. As such this fact lacks consistency and is not credible and is not sufficient to displace the presumption or create a reasonable doubt.

28. Possession consists not only of physical custody but also of the added mental element required to transform custody into possession: R v Warner [1969] 2 AC 256; [1968] 2 All ER 356. In the present case the appellant cannot deny that he was aware of the brake pad box. It contained the scale which he admits to be his. But the question was whether the appellant was also aware that the brake pad box contained the illegal drug. In these circumstances the inference of knowledge of the character of the entire contents of the brake pad was to my mind possible to find beyond reasonable doubt that the appellant was aware that the box contained prohibited drugs.

29. But under the Illicit Drugs Act, the combination of physical custody and *animus possidendi* which creates legal possession is not in itself sufficient to establish liability. There must also be guilty knowledge on the part of the possessor. The mere proof of possession of a prohibited drug will be prima facie evidence of possession with guilty knowledge, the presumptive inference being liable to displacement if the accused person can point to any evidence tending to raise a doubt as to the existence of the requisite guilty knowledge. The presumption of knowledge of the contents of the brake pad box constituted not only the mental element necessary to transform custody into possession but also constituted prima facie proof of guilty knowledge because all the contents of the vehicle were the property of the Appellant. In the present case, the appellant was in control and the owner of the vehicle the contents of the box were thus presumptively in his possession. Guilty knowledge was prima facie established by proof of such possession in these circumstances. Thus these grounds of appeal have no merit.

<u>Ground 3</u>

30. The conviction was for the unlawful possession of illicit drugs and there is no finding or conviction for possession of methamphetamine ***for commercial purposes.*** The

commercial purpose was considered in sentencing and this ground is thus misconceived and has no merit.

31. The Grounds of appeal against the sentence are;

    1. *The learned Magistrate erred in law when he sentenced me to 5 years imprisonment with a non-parole period of 3 years and 6 months by failing to consider my strong mitigation factors such as being a first offender, and I was a businessman with good relationships within my community having employed several community members in my mechanical business; and*
    2. *The Learned Magistrate erred in determining that possession of methamphetamine of commercial purposes as an aggravating factor in which the prosecution failed to establish that the methamphetamine found inside my vehicle was intended for commercial purposes.*

Ground 1

32. The complaint is that he being a first offender and his good character and his relationship with the community were not considered as a mitigating factor. The Learned Magistrate at paragraph 7 of the sentencing ruling has specifically considered that he is a first offender as his last conviction was in 1988. However, according to the previous convictions report in the copy report I find that there are 6 previous convictions all before 1988 for different offences. Accordingly, the Appellant is by no means is a first offender. The Learned Magistrate has totally disregarded all these and given him the benefit of being a person of previous good character. This ground has no merit.

Ground 2

33. The learned Magistrate did consider as the aggravating factor that the appellant possessed the controlled drug methamphetamine ***for commercial purposes***. This factor certainly was used as the aggravating factor to enhance the Appellant's sentence. The appellant contends that this was an error because the prosecution failed to establish that methamphetamine was intended for commercial purposes. It is settled law and an accepted principle that in determining the sentence all the circumstances of the offence and the offending may be taken in to consideration but should be punished for an offence of which he has not been convicted for. A judge, in considering the sentence, is entitled to consider any and all conduct of the accused, including that which would aggravate an offence that is relevant, but cannot take into account

circumstances of aggravation which would have warranted a conviction for a more serious offence. (**The King v Bright** [1916] 2 KB 441 at 444-5).

34. However the Illicit Drugs Control Act 2004 does not provide for an aggravated form of possession with intention to use for a commercial purpose. There exists only the offence of possession only and does not provide for any form of aggravation based on the intention of the possessor. So, whatever may be the intended purpose of possession there is no aggravated offence to charge. Thus the Magistrate was lawfully entitled to draw an inference on the proved facts as to the intended purpose of possession and to consider the same as an aggravating circumstance in sentencing.

35. Thus, the evidence led by the prosecution on the presence of a scale and apparatus for consumption in conjunction with the quantity becomes relevant. If the drug was of a small quantity, then it may be inferred that it was intended for personal use. Similarly, the presence of a substantial quantity in conjunction with the presence of scale it can reasonably be inferred that it was intended for commercial purposes. Thus a higher aggravation can follow and be imputed.

36. In the circumstances of the present case it was certainly possible on the evidence to impute the commercial purpose as an aggravating factor to enhance the sentence. Thus no error of law or fact has been thus caused in assessing the sentence. This ground lacks merit and thus fails.

Conclusion

37. It is now well established that an appellate court may not re-visit and substitute its opinion as to sentencing for that of the sentencing judge merely because it would have exercised the discretion in a different manner. However, an appellate court may intervene where the appellant can establish that the trial judge made an express or implied material error of law or fact. That is when a sentencing judge acts upon a wrong principle, considers extraneous or irrelevant matters or fails to consider relevant facts in the determination of the sentence. In such a case, the sentencing judge's discretion has miscarried. It is the appellate court's duty to exercise the discretion afresh, subject to the applicable criminal appeals statute, the provisions of

the applicable sentencing legislation and any other statute or rule of law, as required or permitted. (**Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999; House v The King [1936] HCA 40; (1936) 55 CLR 499 and Kentwell v R).

38. An Appellate court is required to intervene if the trial judge has erred in principle in a way that impacted the sentence or if the sentence was demonstrably unfit. Thus firstly this court must consider the fitness of the sentence appealed against and if the sentence is demonstrably unfit then it is empowered to intervene and vary the sentence. Secondly it is also to ensure that sentencing courts state the law and guidelines correctly and apply them consistently. This Court's intervention in this matter is therefore is not appropriate. In ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), the Supreme Court held that:

> "*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*."

39. The Sentence imposed is within the tariff and commensurate with the offence committed and lawful, and I see no reason to interfere with the sentence.

40. In **Ram v. State** Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12**]** where the Supreme Court held *inter alia* that *'an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case'*. To my mind the finding of guilt against the Appellant is neither unsafe nor dangerous. I have no doubt that on the available evidence the charge of possession against the Appellant has been proved beyond reasonable doubt and on the whole of the facts not withstanding some non-directions of in the judgement, the only reasonable and proper conclusion on this evidence is one of guilty of charge against the Appellant. No substantial miscarriage of justice has occurred. Having regard to the evidence led the Appellant could have been convicted

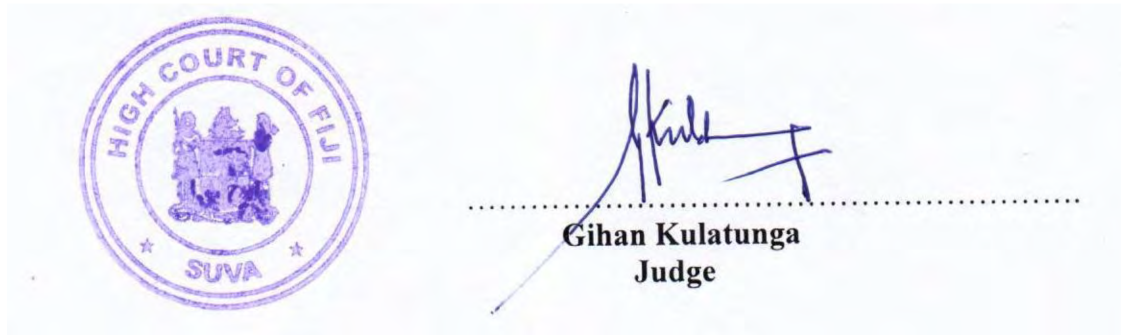
of count of unlawful possession of the illicit drugs levelled against him and therefore the finding of guilt and the conviction in respect of the said count against the Appellant is well founded, lawful and supported by evidence and the sentence is lawful and reasonable.

41. Therefore, I conclude that the appeal should stand dismissed and the conviction and sentence be affirmed.

42. In the aforesaid circumstances as there is no reasonable prospect of success with regard to the Appellant's Appeal against the conviction and the appeal against the sentence leave for extension of time should be refused. As this court has now fully considered the Appellant's appeal against the conviction and sentence, both the appeals against the conviction and sentence should be dismissed.

Orders of Court

1. Enlargement of time is refused.
2. Appeal against the conviction is refused.
3. Appeal against the sentence is refused.



Gihan Kulatunga
Judge

At Suva

21st April, 2023

Solicitors;
Legal Aid Commission for the Appellant.
Office of the Director of Public Prosecutions for the State