IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 053 OF 2023

(Lautoka Magistrates Court Criminal Case No: 204 of 2020)

BETWEEN **IVAN KRISHAN PILLAY**

APPELLANT

AND

STATE

RESPONDENT

Counsel: Mr S.F. Koya for Appellant

Mr A. Singh for Respondent

Date of Hearing : 01 May 2019

Date of Judgment : 06 June 2019

JUDGMENT

(Finding of guilt without recording a conviction)

1. Mr Ivan Krishan Pillai (hereinafter referred to as the Appellant) was charged in the Magistrates Court at Lautoka with one count of Criminal Trespass contrary to section 387(4) and one count of Damaging Property contrary to section 369(1) of the Crimes Act 2009.

2. At the close of the Prosecution case, the Appellant was acquitted on the second count of Damaging Property as no credible evidence was available to prove that charge. The Learned Magistrate proceeded to hear the Defence case for Criminal Trespass for which the Appellant was found guilty by the judgment delivered on 21 July 2023. A conviction was immediately recorded in the judgment itself. On 25 August 2023, the Appellant was sentenced to a term of 4 months imprisonment, suspended for 12 months. Being aggrieved by the outcome, the Appellant filed this timely appeal against the conviction and the sentence.

3. The Counsel from both sides tendered written submissions. At the appeal hearing, the State Counsel conceded that the Learned Magistrate failed to exercise his discretion to determine whether a non-conviction should be recorded in the circumstances of the case. Considering the position of the State, the Counsel for the Appellant informed the Court that the Appellant shall not prosecute the appeal against the conviction.

4. Accordingly, the only issue to be decided in this appeal is whether the Learned Magistrate erred in law when he convicted and sentenced the Appellant to a suspended imprisonment term without taking into consideration the Appellant's submission that a non-conviction be recorded.

5. It is well settled that a sentence imposed by a court below should be varied or substituted with a different sentence on appeal only if it was shown that the sentencer had erred in exercising his/her sentencing discretion. The Fiji Court of Appeal in **Bae v State** [1] observed:

> 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

[1] [1999] FJCA 21; AAU0015u.98s (26 February 1999)

> 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).

Did the Learned Magistrate fall into error in exercising his sentencing discretion?

6. Section 16 of the Sentencing and Penalties Act 2009 provides as follows:

> In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case including:
>
> (a) the nature of the offence;
>
> (b) the character and past history of the offender; and
>
> © the impact of the conviction on the offender's economic or social well-being and on his or her employment prospects

7. The question is whether the Learned Magistrate did have regard to those considerations before the conviction was recorded. In my opinion, Section (Sec.16) requires the sentencer to pause for a while after an accused has been found guilty of an offence which warrants such considerations before proceeding to record a conviction. I say this because once a conviction has been recorded by the judicial officer who tried the matter, he/she becomes *functus officio,* thus preventing him /her from changing or retracting his/her decision. Only an appellate court has that power.

8. I have come across cases in this jurisdiction where some judicial officers have proceeded to record a non-conviction while the conviction already recorded in the judgement was still intact. In my opinion that was wrong. This issue hardly arises in case of indictable and serious offences because it is highly unthinkable that the offences of such caliber would end up in non-convictions. Therefore, it is prudent for the magistrates to hear the parties before proceeding to record a conviction and pass the sentence in cases in which they consider a non-conviction would be possible.

9. The case law guides us in forming an idea as to what type of offences should attract non-convictions. Gates CJ (as he then was) in **State v Batiratu**[2] listed the following questions that the sentencer must consider if a discharge without conviction is urged upon the court.

> (a) Whether the offender is morally blameless.
>
> (b) Whether only a technical breach in the law has occurred.
>
> (c) Whether the offence is of a trivial or minor nature.
>
> (d) Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.
>
> (e) Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.
>
> (f) Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender.

10. In **State v Navacalagilagi**[3], Goundar J considered the principles upon which the discretion under the old Section 44 of the CPC was to be exercised. His Lordship summarized the position as follows:

> Subsequent authorities have held that absolute discharge without conviction is for the morally blameless offender, or for an offender who has committed only a technical breach of the law *(State v. Nand Kumar [2001] HAA014/00L; State v Kisun Sami Krishna [2007] HAA040/07S; Land Transport Authority v Isimeli Neneboto [2002] HAA87/02. In Commissioner of Inland Revenue v Atunaisa Bani Druavesi [1997] 43 FLR 150 HAA 0012/97,* Scott J held that the discharge powers under section 44 of the Penal Code should be exercised sparingly where direct or indirect consequences of convictions are out of all proportion to the gravity of the offence and after the court has balanced all the public interest considerations.

11. Criminal Trespass is an offence of a trivial or minor nature. The maximum sentence prescribed for this offence is imprisonment of 1 year where the offence was committed in

---

[2] [2012] FJHC 864; HAR001.2012 (13 February 2012)
[3] (2009) FJHC 73; HAC165.2007 (17 March 2009)

any building used as a human dwelling. The tariff ranges from one month to 9 months imprisonment[4].

12. This offence (Criminal Trespass) is also included in the list of offences under Section 154 of the Criminal Procedure Act for which reconciliation may be considered if it was substantially of a personal or private nature and not aggravated in degree. This offence was not too serious by its nature for the matter to be settled in such a way. It was rather one substantially of a personal or private nature. The complainant in her evidence told the court how she attempted to reconcile the matter with the wife of the Appellant before going to police. Therefore, the Criminal Trespass in this case would be entirely suitable for termination by amicable settlement or non-conviction.

13. When the sentencing court is satisfied that the offence is such that it meets the qualifications that warrant a non-conviction as discussed above, it should hear the submissions of the parties in respect of the character and past history of the offender, the impact of the conviction on the offender's economic or social well-being and his or her employment prospects or other relevant factors ought to be considered under Section 16 before a final decision is made.

14. After the judgment was entered finding the Appellant guilty, the Counsel for the Appellant filed the following mitigation factors in the Magistrates Court urging for a non-conviction in lieu of conviction already recorded.

    A. The Accused Mr. Ivan Krishnan Pillai has no prior conviction and is a well-respected member of his community.
    B. Mr. Pillai is 40 years of age and is currently working at Air Terminal Service of Fiji.
    C. Mr. Pillai is married to Ms. Yvonne Catherine Fong with three children, Cayden Pillai (11 years old), Ronan (9 years old) and Ethan (6 years old).
    D. His children are dependent on him and his wife.
    E. Mr. Pillai is a devoted father to his sons and a role-model and a recorded conviction as well as imprisonment sentence would tarnish this relationship with his three sons.
    F. Mr. Pillai never intended or caused any harm to the complainant or anyone else in the house.
    G. Mr. Pillai never damaged or caused any loss to the property and house.
    H. Mr. Pillai lives with his parents both of whom are in their 70s, Krishna Pillai (78 years old) and Bimla Pillai (68 years old) who depend on him.

[4] Ruvuwai v State [2007] FJAC 55)

I. Mr. Pillai was always compliant with Court orders and was cooperative with the Police at all times.
J. Mr. Pillai intends to travel abroad and potentially also migrate with his family and a recorded conviction will be an impediment to this.
K. A record of conviction may likely result in Mr. Kumar's dismissal from his current employment. L. Mr. Pillai is willing to undertake community service as well. M. Mr. Pillai has not contacted or interfered with any Prosecution witness and has throughout this whole matter respected the Court Process. N. Mr. Pillai promises never to re-offend.

15. However, the Learned Magistrate in passing his sentence, considered only seven mitigation factors, without giving any reasons for disregarding the remaining seven. The Appellant's submission that he was an employee of the Air Terminal Services of Fiji; that the conviction recorded would result in the dismissal from his employment and that a conviction would hamper his chances to travel abroad or potential migration was not considered.

16. The Appellant was a first offender. He had maintained a good character as a well-respected member of his community for over forty years. His children and the wife were dependent on him. His socio-economic well-being would be affected if he lost his employment. Therefore, he was a fit case to be considered for a non-conviction.

17. As I said before, it would have been too late for the Learned Magistrate to have considered those mitigating factors for a non-conviction as he had already recorded a conviction in the judgment itself. However, had those factors been brought to the notice of the Learned Magistrate before the conviction was recorded, they in my opinion would have founded a reasonable basis for a non-conviction. When a discretion is given to a judicial officer, it should be exercised and it should be exercised judiciously.

18. The next question is whether the Appellant was a suitable candidate for an absolute discharge. Sections 15 and 45 of the Sentencing and Penalties Act are the sections governing discharges or releases without conviction. Section 15 leaves a sentencing court with two options when it has decided not to record a conviction. It could either order the release of the offender complying with certain conditions determined by the court (conditional discharge)[5] or order the dismissal of the charge (absolute discharge)[6]

[5] Section 15(1)(i) of the sentencing and Penalties Act
[6] Section 15(1)(j) of the sentencing and Penalties Act

19. The Section 45 provides as follows:

> (1) A court on being satisfied that a person is guilty of an offence may dismiss the charge and not record a conviction.
>
> (2) A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) adjourn the proceedings for a period of up to 5 years and release the offender upon the offender giving an undertaking to comply with the conditions applying under sub-section (2?), and any further conditions imposed by the court.
>
> (3) An undertaking under sub-section (2) shall have conditions that —
>
> > *(a)* that the offender shall appear before the court if called onto do so during the period of the adjournment, and if the court so specifies, at the time to which the further hearing is adjourned;
> >
> > *(b)* that the offender is of good behaviour during the period of the adjournment; and
> >
> > *(c)* that the offender observes any special conditions imposed by the court.
> >
> > (4) A court may make an order for restitution or compensation in accordance with Part X in addition to making an order under this section.
>
> (5) An offender who has given an undertaking under sub-section (1) may be called upon to appear before the court —
>
> > *(a)* by order of the court;
> >
> > *(b)* by notice issued by a court officer on the authority of the court.
>
> (6) If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding.

20. It was revealed in trial, the Appellant and the complainant's family had been close friends for more than a decade. The complainant had attended a birthday party with her family in Bekana Island and returned home leaving her husband behind on the island. The Appellant had also been partying with her husband on the island. With the full knowledge that her husband was away, the Appellant had entered the house of the complainant during nighttime

to 'have a talk', without her permission. I would find the conduct of the Appellant to be morally blameworthy.

21. In **The State v Nand Kumar**[7] in considering an appeal against an absolute discharge for the offence of common assault, Gates J (as he then was) observed;

> The court, in its sentencing remarks, said rightly, it was faced with "a very awkward situation" for this accused was facing dismissal from his employment if a conviction were to be entered. Nevertheless, a discharge without conviction being entered, was not an appropriate sentence here. Absolute discharges are appropriate only in a limited number of circumstances, such as where no moral blame attaches (R v O'Toole (1971) 55 Cr App p 206) or where a mere technical breach of the law has occurred, perhaps by imprudence without dishonesty (R v Kavanagh (unreported) May 16th 1972 CA)"

22. When the old Penal Code was in force, the High Court in **State -v- Chand**[8] observed:

> In discharging the Respondent without conviction, the learned Magistrate was required to exercise discretion under Section 44 of the Penal Code. In terms of the section the Court must, having regard to the circumstances including the nature of the offence and the character of the offender be of the opinion that "it is inexpedient to inflict punishment". A discharge is the most lenient sentence that can be imposed for an offence. Indeed it is recognized by the wording of the section as being no punishment at all. Even a conditional discharge only requires that the offender commits no offence during a stipulated period - something that should not be a burden as it is what a responsible citizen is expected to do. The discretion should be exercised with great care and only in "very exceptional circumstances" (Police v McCabe [1985] 1 NZLR 361). It is, for example, appropriate in such cases as where the offence is trivial or only technical (R v Kavanagh - Court of Criminal Appeal (England) 16th May 1972) where the accused is morally blameless R v O'Toole - (1971) 55 Cr App R 206) or where the accused has suffered in a manner that is wholly disproportionate to the offence committed (R v Kavanagh (supra) and Police v Roberts [1991] 1 NZLR 205) : 12 Page

23. It is clear from the decided cases that moral blameworthiness, public interest in enforcement and deterrence are of some significance when considering whether an absolute discharge should be imposed. It is my considered view that, given the circumstances of the offence, the offence committed by the Appellant does not warrant an absolute discharge. However, it is appropriate for the Court to adjourn the proceedings for 2 years and release the Appellant

---

[7] Cr. App. No. HAA014 of 2000L
[8] [1998] FJHC 247

upon him giving an undertaking to comply with the condition that he will be of good behaviour during the period of the adjournment.

Conclusion

24. The following Orders are made:

i. The conviction recorded by the Learned Magistrate is set aside.

ii. The sentence passed by the Learned Magistrate is quashed.

iii. A non-conviction is recorded.

iv. The case is adjourned for 2 years with effect from 25 August 2023 (till 25 August 2025).

v. The Appellant is ordered to give an undertaking under Section 45(2)(a) read with Section 45(3)(b) of the Sentencing and Penalties Act to comply with the condition that he will be of good behaviour during the period of the adjournment.

25. The Appellant is explained the possible consequences of breach of order for release on adjournment as prescribed in 47(1) of the SPA.

26. 30 days to appeal to the Court of Appeal.

Aruna Aluthge

Judge

HIGH COURT OF FIJI LAUTOKA

At Lautoka

06 June 2024

Solicitors:

SFK Siddiq Koya Lawyers for Appellant

Office of the Director of Public Prosecutions for Respondent