

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

Crim. Case No: HAC 143 of 2024

STATE

vs.

MANASA SALABULA

Counsel: Ms. M. Konrote with Ms. A. Lal for the State
Accused In Person

Date of Ruling: 07th June 2024

RULING

[Transfer under Section 188 of the Criminal Procedure Act]

- The Accused is charged with one count of Unlawful Possession of Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Control Act. It is alleged in the charge that the Accused was found in possession of loose material of Indian hemp known as Cannabis Sativa, weighing 7390 grams. According to the record of the proceedings in the Magistrate's Court, he was produced in the Magistrate's Court on the 25th of July 2022. Subsequent to several adjournments, the learned Magistrate, on the 6th of May 2024, transferred this matter to the High Court on the ground that this matter involved a substantial amount of

Cannabis Sativa. I will reproduce the order made by the learned Magistrate on the 6th of May 2024 below:

“Given the substantial amount of Cannabis Sativa alleged in the charge this matter is now transfer to the High Court of Fiji on the 20th of May 2024.”

2. The matter was mentioned before this Court on the 27th of May 2024, where I directed the learned Counsel for the Prosecution to present their submissions on the transfer order made on the 6th of May 2024 and adjourned the matter, giving the learned Counsel for the Prosecution to consider the relevant legal provisions under the Criminal Procedure Act and Illicit Drugs Control Act on this issue. Subsequently, the learned Counsel for the Prosecution submitted to the Court that the transfer order was defective and the Magistrates’ Court had jurisdiction to hear this matter.
3. Before delving into the specifics of the case, it is necessary to establish the legislative framework that governs the jurisdiction of the High Court and Magistrate’s Court. This framework is stipulated under the Criminal Procedure Act.
4. Section 4 of the Criminal Procedure Act defines the jurisdiction of the High Courts and the Magistrate’s Courts in relation to the offences under the Crimes Act. Accordingly, Section 4 (1) of the Criminal Procedure Act states that the High Court shall hear the indictable offences defined under the Crimes Act. Moreover, any indictable offence triable summarily under the Crimes Act shall be heard by either the High Court or Magistrate’s Court upon the election of the Accused. The Magistrate’s Court has been given the jurisdiction to hear all the summary offences defined under the Crimes Act.
5. Section 5 of the Criminal Procedure Act has defined the jurisdictions of the Court in relation to the offences created under laws 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 Court 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.

6. The Illicit Drugs Control Act has not explicitly conferred the High Court jurisdiction to hear the offences under the Act. Neither the offences under the Illicit Drugs Control Act have been defined as indictable or summary offences. Hence, the applicable section that defines the jurisdiction to hear offences under the Illicit Drugs Control Act is Section 5 (2) of the Criminal Procedure Act.
7. In this matter, the Accused is charged with one count of Unlawful Possession of Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Control Act. Accordingly, the Magistrate's Court has jurisdiction to hear this offence pursuant to Section 5 (2) of the Criminal Procedure Act.
8. I now turn to discuss the legislative framework for the institution of Criminal Proceedings and the transfer of the hearing of summary offences to the High Court under the Criminal Procedure Act.
9. All criminal proceedings are initially instituted before a Magistrate's Court. (*vide Sections 35 (2) and 56*). If the offence as charged is an indictable offence and comes under Section 35 (2) (b) (i) and (ii) of the Criminal Procedure Act, the Magistrate must transfer the matter to the High Court. If not, the Magistrate has jurisdiction to hear the matter.
10. As discussed above, an offence 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. Under such circumstances, the learned Magistrate has no jurisdiction to transfer the hearing of such offences to the High Court, except according to the procedure set forth under section 188 of the Criminal Procedure Act. Section 188 of the Criminal Procedure Act states that:

“(1) If before or during the course of a trial before a Magistrates Court it appears to the Magistrate that the case is one which ought to be tried by the High Court the Magistrate may transfer the case to the High Court under Division 3.

(2) Before the calling of evidence at trial, an application may be made by a public prosecutor or police prosecutor that the case is one which should be tried by the High Court, and upon such an application the Magistrate shall—

a) hear and consider the reasons for the application;

b) hear and consider any submissions made on behalf of the accused person as to the most appropriate court to hear and determine the charges; and

c) otherwise determine matters relevant to the grounds for the application,

and may continue to hear the case (unless the charges are of a nature that may be tried only by the High Court) or transfer the case to the High Court under Division 3.

11. In view of Section 188 of the Act, the Magistrate is allowed to transfer a summary hearing to the High Court only on two instances. The first instance is where the learned Magistrate on *ex mero motu*, before or during the trial, could consider whether the case is one which

ought to be tried in the High Court. The other occasion is on the application made by the Prosecution pursuant to Section 188 (2). Unlike 188 (1) of the Act, the Prosecution could make this application only before the calling of the evidence at the trial. Upon such an application, the learned Magistrate must hear the Prosecution and the Defence to determine whether the case is one which should be tried in the High Court. I do not find any striking significance in the use of two different model verbs (ought to be and should be) under Sections 188 (1) and 188 (2).

12. Section 190 of the Criminal Procedure Act confers the Magistrate's Court a discretionary power to transfer the Accused, after convicting, to the High Court for the purpose of sentencing.
13. The Criminal Procedure Act has not provided any guidelines or factors that should be considered in exercising the Magistrate's discretionary power under Section 188 of the Act. The Act has left it to the judicial interpretation to define the scope and the boundaries of the power given under Section 188 of the Act.
14. The New Zealand Court of Appeal in Donselaar v Donselaar, [1982] 1 NZLR 97 adverted the applicable approach in understanding the legislative purpose of a Statute, where Somers J observed that:

"The function of the Court in relation to a statute is to discover the intention of the legislature. That intent is to be ascertained from the words it has used. But the richness of the English language is such that the same words or phrases may convey different ideas depending upon the context and circumstances in which they are used. So it is that the words used in an enactment are to be considered in the light of the objects which the statute as a whole is intended to achieve. In modern legal parlance that is called a "purposive" construction. But it has still to be stressed that the inquiry is not as to what the legislature meant to say but as to what it means by what it has in fact said in the framework of the Act as a whole"
(emphasis added)

15. Accordingly, the Court must consider the whole statutory framework to properly comprehend the legislature's intention with respect to Section 188 of the Act. In doing so, the learned Magistrate should not defeat the object and the purpose of the legislature in demarcating the jurisdiction of the High Court and Magistrate Courts based on the categorization of offences. Another factor that should be taken into consideration is the purpose of Section 190 of the Act, which effectively indicates that the duration or the length of the possible sentence, if convicted, alone should not be a factor to be considered under Section 188.
16. I shall now briefly consider the previous judicial precedence on this issue. Kularunga J in **State v Narayan [2022] FJHC 129; HAC250.2021 (22 March 2022)** outlined the duty of the learned Magistrate in exercising the discretion under Section 188 of the Act, where His Lordship held:

“22. When the statute has specifically prescribed two specific grounds for the exercise of that power it is circumscribed and limited to those grounds only. The Magistrate must also advert the judicial mind and form the view that the case is one that ought to be tried by the High Court or that should be tried by the High Court. The Learned Magistrate though vested with a discretionary power to transfer a summary case has by simply acceding to an application made by the Defence and ordering the transfer of this case to the High Court without addressing her mind has flawed both in law and procedure. In the above circumstances I am of the considered view that impugned decision is a nullity on that score alone....”

17. Kularunga J in **State v Narayan (supra)** then explained the factors that should be considered in exercising the discretionary power under Section 188.

“In terms of section 4(1) (a) of the Criminal Procedure Act 2009 the Magistrate is empowered to take cognizance and try the present case summarily. Thus, to my mind, though not exhaustive, it is only in extremely

serious and complex cases where in the nature of the interpretation of a new offence is involved or there exists conflicting interpretations on some important issue requiring the determination that a Magistrate should resort to section 188 and use his powers under section 191 of the Criminal Procedure Act 2009 to transfer summary cases to the High Court. It is important to be mindful that under section 188 of the Criminal Procedure Act 2009 neither does the accused have the right to make an application nor can the prosecution demand as of a right a High Court trial in respect of a summary offence but the final discretion is with the Magistrate.

18. Moreover, Kulatunga J referred to **State v. Josaia Murimuri Criminal Case No. HAC 064 OF 2010S (4th June 2010)** in **State v Narayan** (supra), where Temo J (as he then was) had observed that;

"The prosecutor did not object to that. In terms of section 5(2) of the Criminal Procedure Decree 2009, and even section 5(1) of the same Decree, the Magistrate is empowered to deal with the matter summarily. Only in extremely serious and complex cases, should the Magistrate use his powers under section 191 of the Criminal Procedure Decree 2009 to transfer cases, outside the Crimes Decree 2009, to the High Court. Note that the powers of the accused and/or the prosecutor to demand a High Court trial, as previously available before the 1st February 2010, no longer exist. An application by the prosecutor is now subject to the Magistrate's decision, pursuant to section 188(2) of the Criminal Procedure Decree 2009." (emphasis added).

19. According to the forgoing judicial precedents, it has been strongly recommended that the learned Magistrate must exercise his discretionary power under Section 188 of the Act only on extremely serious and complex cases. Hence, given the discussed judicial precedents and the legislative framework of the Criminal Procedure Act, the matters relating to logistic issues and the possible sentence if convicted should not be the determinative factors in

exercising such power under Section 188 of the Act. It is the duty of the learned Magistrate to provide the reasons and the factors that he had considered in exercising his discretionary power under Section 188 (1) or (2). I am not suggesting a lengthy and detailed ruling, but a brief and concise ruling outlining those factors and reasons would be appropriate.

20. In this matter, the learned Magistrate had not provided any reasons but merely stated that this offence involved a substantial amount of Cannabis Sativa. Hence, the matter is being transferred to the High Court. It appears that the learned Magistrate was under a misconceived view that he lacks the jurisdiction to hear this matter per the sentencing guidelines expounded in **Sulua v State [2012] FJCA 33; AAU0093.2008 (31 May 2012)**.

21. Section 3 (2) (a) of the Criminal Procedure Act states that:

"The provisions of this Act shall be subordinate to, and shall be read and applied subject to any provisions of another Act making specific provision in relation to—

a) the jurisdiction of any court to hear any criminal proceeding.

22. Accordingly, the jurisdiction of the Court, as defined under the Criminal Procedure Act, to hear any criminal proceedings is only subject to any other Act if it makes any specific provision to the contrary.

23. The Fiji Court of Appeal in **Ratuyawa v State [2016] FJCA 45; AAU121.2014 (26 February 2016)** elaborately emphasized that the Sulua guidelines cannot define 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, where the Court of Appeal 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."

24. The Court of Appeal in **State v Mata [2019] FJCA 20; AAU0056.2016 (7 March 2019)**, *in extenso*, discussed the effect of Sulua sentencing guidelines and its impact on the jurisdiction of the Magistrate's Court in hearing the offences under the Illicit Drugs Control Act. The Court of Appeal in **State v Mata (supra)** held 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".

25. The Court of Appeal in **State v Mata (supra)** went further and intimated that if the amount of drugs involved in the matter exceeds the sentencing limit of the Magistrate's Court, the learned Magistrate could espouse Section 190 of the Act, transferring the Accused to the High Court for sentencing. The Fiji Court of Appeal observed that:

[19] 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.

26. It is incorrect in law to assert that the learned Magistrate lacks jurisdiction to hear this matter, as per the Kini Sulua sentencing guidelines. Furthermore, it is evident that the learned Magistrate has not properly considered Section 188 (1) of the Act to determine whether this is a case that ought to be tried in the High Court.
27. In conclusion, I find the transfer order dated 06.05.2024 is not valid in law; hence, it is null and void *ab initio*. Accordingly, this Court is not in a position to assume jurisdiction to hear this matter pursuant to Sections 188 and 191 of the Criminal Procedure Act. Accordingly, I order that this matter be returned to Magistrate Court Suva and direct the learned Magistrate to hear this matter according to the law expediently without further delay.



A handwritten signature in blue ink, appearing to read 'R.D.R.T. Rajasinghe'.

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

At Suva

07th June 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Accused In Person.