IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL APPEAL JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 33 OF 2024
Sigatoka Criminal Case No: 282 of 2019

BETWEEN: **RAMIZA BANO**
Appellant

AND

STATE
Respondent

Counsel: Mr M. Anthony with Mr R. Bancod for Appellant
Mr J. Nasa with Ms M. Lomaloma for Respondent

Date of Hearing: 04 December 2024
Date of Judgment: 12 December 2024

JUDGMENT

(Possession of Illicit drugs-suspended sentence-special circumstances)

1. The Appellant was charged in the Magistrates Court at Sigatoka with one count of Unlawful Possession of Illicit Drugs contrary to Section 5 (a) of the Illicit Drugs Control Act 2004. The charge alleged that on 10 June 2019, the Appellant was found in possession of 1.407 grams of Methamphetamine, an illicit drug.

2. On 11 September 2019, she pleaded not guilty to the charge. The matter dragged on for more than five years for various reasons; most were related to system delays, not attributable to the Appellant. When the matter was eventually taken-up for hearing on 10 September 2024, the

Appellant decided to change her plea. She pleaded guilty to the charge, expecting a non-custodial sentence when she was unrepresented.

3. The following facts, as submitted by the State, were admitted by the Appellant:

> *On the 10* day of June, 2019, at about 2pm, at Sigatoka Town End WPC 5533 Loraini (Victim) 24 years, Police officer of Sigatoka arrested Ramiza Bano (Accused), 22 years, Unemployed of Nayawa, Sigatoka for being found in possession of 3 clear plastic containing 12 crystals like substances, which were believed to be drugs. On the above-mentioned date, time, and place Victim was in a parked Police vehicle when she noticed a car registration no. HX 973 parked on the opposite side. The victim saw the Accused seated inside the car on the driver's seat. The victim felt suspicious on the Accused's behaviour and got off the Police vehicle to check on the Accused. The victim saw that it was the Accused alone in the car and advised her to go with her to Sigatoka Police Station as she wished to search her car. The Victim sat in the car where the Accused drove and instead of turning towards the Police station, the Accused drove towards town. The victim stopped the Accused where she then boarded the Police vehicle which was also at the same place where they stopped. The victim escorted the Accused and at the station, the car of the Accused was searched and nothing was found. The victim then took the bag from the Accused and searched it, where the victim found 4 big clear plastics, some empty clear plastics, a plastic containing 9 memory cards, a black purse containing an inhaling apparatus, a white sock containing a syringe with orange cap and Cash of $80.50. The 4 big clear clear plastics contains small clear plastics that has the 12 pieces of crystal like substance and pink tablets. The items were shown to the Accused but she did not say anything. The Accused was then arrested and the 12 pieces of crystal like substances with the pink tablets were taken to Nasova at the Fiji Police Forensic Chemistry Lab and all 12 pieces of crystal like substances were confirmed to be methamphetamine weighing 1.407 grams. The Accused was interviewed under caution and later charged for the offence of Unlawful Possession of Illicit Drugs.*

4. The Learned Magistrate was satisfied that the guilty plea was voluntary and unequivocal and the facts satisfied the offence. A conviction was recorded accordingly. The Appellant submitted briefly for mitigation whereby the matter was adjourned to 2 p.m. for sentence. However, the sentence was delivered the following day on 25 September 2024 whereby the Appellant was sentenced to a custodial term of 17 months and 3 weeks.

5. Being aggrieved by the sentence, the Appellant, on 21 October 2024, filed a timely petition of appeal on the following grounds:

   a. The Learned Magistrate erred in law when he failed to give sufficient consideration to suspend the accused's sentence.

b. The Learned Magistrate erred in fact and law when he failed to give sufficient weight to the accused's character and exceptional circumstances of the accused's pregnancy that was informed to him on the day of sentencing.
c. The overall sentence was harsh and excessive considering the circumstances of the case.

6. The gist of the appeal is that given the mitigating circumstances submitted, the sentence was harsh and excessive in that the Learned Magistrate imposed a custodial sentence when she deserved a suspended sentence.

The Law on Appeal against Sentence

7. Section 246 (1) of the Criminal Procedure Act 2009 provides that (subject to any provision to the contrary in that Part), 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.

8. However, according to Section 247 of the Criminal Procedure Act 2009, no appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence.

9. In *Kim Nam Bae v. The State*[1], the Fiji Court of Appeal outlined the basis upon which an appellate court should intervene to disturb a sentence:

> 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 [19361 HCA 40; [19361 55 CLR 499).

[1] [1999| FJCA 21; (26 February 19991)

10. These principles were endorsed by the Fiji Supreme Court in *Naisua v. The State*[2]. Therefore, it is well established that, before this Court can interfere with a sentence passed by the Magistrate's Court, 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 considerations.

Analysis

11. All the grounds of appeal filed by the Appellant in person would boil down to a single issue, namely, whether, in the light of the mitigating circumstances of the offender, a suspended sentence should have been imposed instead of a custodial sentence. Therefore, all the grounds of appeal can be considered together.

12. Section 26 of the Sentencing and Penalties Act gives the Magistrates Court the power to suspend a sentence fully or partially if it does not exceed the imprisonment term of two years and if the court is satisfied that it is appropriate to do so in the circumstances. The sentence imposed by the Learned Magistrate has not exceeded two years imprisonment. Therefore, he had the power to suspend the sentence provided a suspended sentence was warranted in the circumstances of the case.

13. Neither under the common law nor under the Sentencing and Penalties Act (SPA) is there an automatic entitlement to a suspended sentence. The case law in Fiji suggests that a suspended sentence should be passed only when exceptional circumstances justifying such a sentence are present.

14. In *DPP v Jolame Pita*[3] Grant Acting CJ (as he was then) explained the 'special circumstances' that would justify the suspension of a sentence of imprisonment;

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[2] [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)
[3] (1974) 20 FLR 5 at p.7

> "Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

15. At the end of the day, the judicial discretion on whether to suspend a sentence should be guided by Section 4(1) of the Sentencing and Penalties Act, which prescribes the purposes for which a sentence may be imposed by a court.

16. The offence the Appellant was convicted of is considered serious in terms of the maximum sentence prescribed for the offence (life imprisonment). However, the weight of the illicit drugs she had in her possession was a little more than one gram (1.407 grams). Based on the quantity, the offence falls under category 1 of *Abourizk* Sentencing Tariff[4], attracting an imprisonment term of 2 ½ years to 4 ½ years.

17. However small the quantity of the drugs may be, the *Abourizk* tariff does not prescribe a suspended sentence. Although the sentence the Learned Magistrate imposed has fallen below the sentence range prescribed by the *Abourizk* tariff it has not exceeded two years. Therefore, Section 26 of the SPA is triggered.

18. A sentencing below the tariff range may not be obnoxious to the sentencing principles had the reasons been given by the Learned Magistrate for deviating from the standard practice. The guidelines are just guidelines and are not intended to take away the sentencing discretion of the sentencer[5]. In setting the *Abourizk* guidelines, the Court of Appeal seems to have acknowledged this at [145]:

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[4] Abourizk v State [2019] FJCA 98; AAU0054.2016 (7 June 2019)
[5] See Paragraph [74] Kumar and Another vs. The State [2022] FJCA 164; AAU 117 of 2019 (24 November, 2022)

> Having considered all the material available and judicial pronouncements in Fiji and in other jurisdictions, I set the following guidelines for tariff in sentences for all hard/major drugs (such as Cocaine, Heroin, and Methamphetamine etc.). These guidelines may apply across all acts identified under sections 5(a) and 5(b) of the Illicit Drugs Control Act 2004 **subject to relevant provisions of law, mitigating and aggravating circumstances and sentencing discretion in individual cases** [emphasis added].

19. In any event, the sentencing guidelines issued by the Courts do not supersede the statuary provision in Section 26 of the Sentencing and Penalties Act (SPA), which gives the Magistrates Court the power to suspend a sentence fully or partially if it does not exceed the imprisonment term of two years when the circumstances so warranted. Therefore, the crucial issue in this appeal would be whether the Learned Magistrate committed a sentencing error in imposing a custodial sentence on the Appellant.

20. The Appellant is a first offender of comparatively good character who, given her youth (27 years), deserved a chance for rehabilitation. She pleaded guilty to the charge, albeit not at the first available opportunity. All these count in her favour.

21. The Appellant has committed a relatively isolated offence of a moderately serious nature, given the small quantity of the drugs. However, in a drug case, the seriousness of the offence is not predicated only on the quantity of drugs involved but also on the role played by the offender. What role has the Appellant played? Has she possessed the drugs merely for her consumption or for commercial purposes? If the possession was meant only for personal consumption, was she addicted to methamphetamine? All these factors matter in sentencing.

22. If an offender is found to be addicted to methamphetamine, rehabilitation should take precedence over other sentencing purposes stated in Section 4(1) of the SPA. Given that methamphetamine is a highly addictive drug, there are certain mitigating considerations particularly germane to methamphetamine offending: (a) addiction; (b) mental health; (c) duress or undue influence; and (d) social, cultural and economic deprivation. These considerations are relevant in two ways. The first is because each can impair the rational choice made to offend and thereby diminish moral culpability. The second is that diminished opportunity to make a rational choice also diminishes the deterrent aspect of sentencing, both

general and specific. It would be appropriate to adjust the sentence to cater more effectively for offenders whose actions are driven by addiction[6].

23. However, any such concession on account of addiction should be based on persuasive evidence, as opposed to mere self-reporting. In *R v Young,*[7] South Australian Court of Criminal Appeal observed:

> It is common for offenders to claim that they are, or were, heavily addicted and that drugs found in their possession were primarily for their own use. It is necessary for Judges to carefully evaluate those claims. The indicia of commerciality are well known. When claims of addiction and own use are pressed as factors in mitigation in the face of evidence of substantial commerciality they may need to be supported by evidence on oath or other corroborative material.

24. There is another utility value in not sending offenders found in possession (for personal consumption) of small amounts of illicit drugs to correction facilities. In maintaining the correction centres and feeding the inmates, a large amount of taxpayer money is being spent. The Courts have expressed doubt that the correction centres in Fiji serve as rehabilitation centres. If the offenders can be rehabilitated through education and rehabilitation programmes whilst they are still in the family and the community, a win-win situation can be achieved. Further, if a lenient approach to sentencing is adopted in trivial possession cases, the offenders are encouraged to take responsibility and plead guilty at the early stages of the court process, thus saving a lot of resources.

25. The Supreme Court in the recent case of *Kaitani v The State*[8] appears to have acknowledged this aspect of sentencing. The Court, having updated the sentencing tariff for *cannabis sativa*, offences coming under Section 5(a) of the IDCA advocated a lenient approach in Category 1: (0 gram to 1,000 grams (1 kilogram) and observed:

> With the recent discovery of 4 tons of methamphetamine in Nadi earlier this year, there is no need for the State to waste its resources on this category. The cases can be disposed by fines, community services, 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.

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[6] Zhang v R [2019] NZCA 507 [21 October 2019]
[7] [2016] SASCFC 102,(2016) 126SASR 41 1t [69]
[8] [2024] FJSC 50; CAV011.2023 (29 October 2024)

26. The drug involved in this case, however, is methamphetamine, a hard drug. In a number of decisions of this jurisdiction, it has been suggested that possession of methamphetamine is so grave a form of offending that less weight should be given to personal circumstances at the second stage of the sentencing process. The courts have repeatedly said, and I emphasise again, in sentencing those convicted of dealing commercially in illicit drugs, such as importation, manufacture etc., the personal circumstances of the offender must be subordinated to the importance of deterrence. But this does not mean that personal circumstances can never be relevant. The personal circumstances of an offender may be relevant either because they contribute in some way to the offending or on purely compassionate grounds[9].

27. The facts admitted by the Appellant, however, do not suggest that she had methamphetamine in her possession for personal consumption. In her bag were four big clear plastics, some empty clear plastics, a plastic containing nine memory cards, a black purse containing an inhaling apparatus, a white sock containing a syringe with an orange cap and $80.50 cash. The four big clear plastics contained small clear plastics that had 12 pieces of crystal-like substance and pink tablets. When the items were shown to the Appellant, she did not say anything. In these circumstances, a custodial sentence can never be unjustified. However, that is not the end of the matter.

28. Let me now analyse the delay. According to the charge, the offence was committed way back in 2019, to be exact on 10 June 2019, and the matter dragged on for more than five years when it was finally taken up for hearing on 10 September 2024. A substantial part of the delay was not attributable to the Appellant. The case record shows that the matter was listed on several occasions for *voir dire* disclosures and *voir dire* hearings. When the matter was eventually taken-up for a *voir dire* hearing on 7 June 2023, the prosecution informed the court that there were no admissions in the caution interview, rendering the *voir dire* hearing a non-event.

29. The charge was hanging over the Appellant's head like the '*Sword of Damocles*' for more than five years. Although the delay factor was not included in the mitigation submitted by the

[9] Zhang v R [2019] NZCA 507 [21 October 2019]

Appellant, given that she was unrepresented, the Learned Magistrate should have considered the delay as a mitigating factor in his sentence.

30. Upon being convicted, the Appellant, being unrepresented, submitted the following in mitigation:

> *27 years; married but baby passed away, and I feel I've been punished and now residing in Nadi; unemployed; seeking forgiveness for wasting time and scared of being jailed; guilty plea; promise not to reoffend; I have changed myself and have begun a new life.*

31. The Learned Magistrate in his Sentence Ruling provided the following justification for custodial sentence:

> *I do not see any special circumstance to suspend this sentence as being in possession of hard drugs such as methamphetamine continues to be on the rise in our communities and so there needs to be a message of deterrence to would be offenders.*

32. The Appellant, in her affidavit in support, deposes that:

> *The Learned Magistrate had not considered one of my mitigating factors that I was undergoing depression due to the loss of my baby daughter who died during childbirth due to pregnancy complications. She has annexed the Medical Cause of Death certificate of Rahi Singh.*

33. The Counsel for the Appellant argues that the Learned Magistrate failed to consider the Appellant's depressed condition aftermath of the loss of her child at birth, under which she forced herself to change her plea.

34. The Appellant further deposes in paragraphs (7) and (9) of her affidavit thus:

> *on the day of my sentencing, I sought to inform the Court of my special circumstances that I recently found that I was pregnant again but the Resident Magistrate refused to accept my medical from my doctor; that I had also attempted to change my plea to not guilty on the day of the sentencing but the Magistrate refused my application. (paragraph 9)*

35. The Magistrates Court Copy Record does not indicate that the Learned Magistrate was informed of her pregnancy, that he refused to accept the Appellant's medical form or that he refused the application of the Appellant to change her plea to one of not guilty. However, the facts remain

that the Appellant was pregnant at the time of the sentence, and that she was unrepresented. Her pregnancy at the time of the sentence is substantiated by the medical report submitted to this Court. The medical certificate dated 18 September 2024, which has recommended a follow-up scan in 3-4 weeks' time to confirm/ exclude fatal viability, is attached to the affidavit.

36. On behalf of the Appellant, it was contended that the Learned Magistrate had no opportunity to consider the full impact of a custodial sentence on the pregnant mother and her unborn child, as she, being unrepresented, could not make a full mitigation submission and tender the medical form.

37. When submitted in mitigation, the Appellant did not specifically mention that she was depressed after a child's mortality. However, she did say that her baby passed away and felt being punished (by God). She may not have been able to make an effective mitigation submission to convince the Learned Magistrate that a custodial sentence would not only be detrimental to her health but, given the history of her previous child's death at birth, also to that of the unborn child.

38. The facts remain that the Appellant had had a recent child death due to pregnancy complications, that she was again pregnant at the time of the sentence and that she maintained a not guilty plea for a long time and finally appearing in person decided to change her plea after five years, expecting a non-custodial sentence.

39. The State submitted that there have been serving women inmates who have been in the same situation as the Appellant and that the Corrections Facility have historically afforded adequate medical care and facilities to ensure women requiring medical care are properly assisted and attended to by medical professionals. It was further argued that by including pregnancy as a special circumstance justifying a suspended sentence, the court is likely to open 'floodgates'.

40. The statistics show that the child mortality rate at birth and maternal mortality rate are comparatively high in Fiji despite the availability of a free health system in government hospitals. I doubt that the Appellant, who is already under medical supervision to verify the

fatal viability, could be provided the medical care and attention at the correction facility that she badly needed.

41. In *State v Borba*[10], Goundar J acknowledged the pregnancy, in combination with other mitigating factors of the offender, as constituting a special circumstance that justifies a suspended sentence. His Lordship at [14] observed:

> After taking into account your prompt guilty plea, age, good character, pregnancy, no previous history of drug use, and the quantity and purpose of drugs, I sentence you to 9 months imprisonment suspended for 2 years. I find your **young age, previous good character and pregnancy constitute special circumstances to justify the suspension of your imprisonment sentence**. If within the next two years you commit another offence, you may have to serve your sentence of 9 months imprisonment in addition to any sentence for the other offence [Emphasis added]

42. In the present case, the Appellant was not only pregnant but also had a history of a child death at birth. As the Appellant is now in an advanced stage of pregnancy, if this appeal is not allowed, she will give birth to the child in the correction centre, and the child will most likely be detained with her mother for no fault on his or her part. Section 41(2) of the Constitution dictates that the best interests of a child are the primary consideration in every matter concerning the child. Section 41(1) (e) further emphasises that every child has the right not to be detained except as a measure of last resort. The courts from the magistracy to the Supreme Court are bound to give effect to these provisions.

43. In his Sentence Ruling, the Learned Magistrate did not consider the Appellant had had recent child mortality. He, of course, had no opportunity to consider the full impact of a custodial sentence on the pregnant Appellant and the unborn child because the Appellant was unrepresented. The inordinate delay in prosecuting the matter was not considered in the sentence. This is a case, where, if judicial mind was properly directed to, exceptional circumstances are present justifying a suspended sentence.

[10] [2008] FJHC 26; HAC023S.2008 (29 February 2008)

44. For the above reasons, the appeal should be allowed. This judgment is not to be regarded as setting a precedent for all future cases in which pregnant offenders are involved. It is the unique circumstances of this case which have been alluded to above have led to this outcome.

45. The Appellant has already served approximately two months in the correction facility. The rest of the period of her sentence should be suspended for a period of three years.

46. The following Orders are made:

I. The Appeal is allowed.

II. The remaining portion of the imprisonment term is suspended for three years. The consequences of breaching a suspended sentence are explained.

III. The Appellant is released forthwith.

Arun Aluthge

Judge

At Lautoka

12 December 2024

Counsel: Millbrook Hills Law Partners for Appellant

Office of the Director of Public Prosecution for Respondent