IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 19 OF 2017

IN THE MATTER of an Appeal from the decision of the Magistrate's Court Suva, in Criminal Case No. 1694 of 2015.

BETWEEN : **NISHAL ROHIT ROY**

APPELLANT

AND : **STATE**

RESPONDENT

Counsel : Ms. Vani Filipe for the Appellant
Mr. Meli Vosawale for the Respondent

Date of Hearing : 6 December 2017

Judgment : 19 March 2018

JUDGMENT

[1] The Appellant was charged before the Magistrate's Court of Suva, in Criminal Case No. 1694 of 2015, for the Possession of Illicit Drugs, contrary to Section 5 of the Illicit Drugs Act No. 9 of 2004 ("Illicit Drugs Act").

[2] The full details of the charge against the Appellant was as follows:

CHARGE

Statement of Offence

FOUND IN POSSESSION OF ILLICIT DRUGS: Contrary to Section 5 of the Illicit Drugs Act No. 9 of 2004.

Particulars of Offence

Nishal Rohit Roy, on the 1st day of September 2015, at Suva, in the Central Division, without lawful authority, possessed 1.4 grams of Cannabis Sativa, an Illicit Drug.

[3] On 14 December 2016, the Appellant pleaded guilty to the charge. On the same day, the Summary of Facts were read out and explained to the Appellant who admitted to the same. It is recorded in the proceedings of 14 December 2016, that the Appellant had waived his right to counsel.

[4] The Learned Magistrate being satisfied that the plea was made voluntarily and unequivocally, convicted the Appellant of the charge.

[5] On 18 January 2017, the Appellant was sentenced to a term of 10 months imprisonment. The Learned Magistrate had ordered that the sentence "is to be served immediately and consecutive to any present sentence that he (the Appellant) is serving."

[6] Aggrieved by this Order, the Appellant submitted an Appeal against the Sentence, which was received at the Registry of the High Court on 17 March 2017. The Appeal was filed in person and was filed more than 30 days out of time.

[7] It was submitted by Learned Counsel for the Respondent that the State makes no contention to the issue of enlargement of time to hear this appeal.

[8] On 15 June 2017, the Legal Aid Commission confirmed that they would be appearing on behalf of the Appellant, and on 13 September 2017, filed Amended Grounds of Appeal.

[9] As per the Amended Grounds of Appeal, the Appellant has filed an Appeal against his sentence on the following grounds:

(i) **GROUND 1** – The Learned Magistrate erred in law when he failed to make the sentence concurrent as provided by Section 22 of the Sentencing and Penalties Act 2009.

(ii) **GROUND 2** – The sentence imposed was very harsh and excessive in all circumstances.

[10] As could be seen from the above, the Appellant has filed the Appeal only against his sentence.

[11] Both Counsel for the Appellant and the State filed written submissions, and also referred to case authorities, which I have had the benefit of perusing.

Law and Analysis

[12] 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)."*

[13] 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."

[14] 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.

GROUND 1

[15] That the Learned Magistrate erred in law when he failed to make the sentence concurrent as provided by Section 22 of the Sentencing and Penalties Act 2009.

[16] Section 22 (1) and (2) of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") is reproduced below:

"(1) Subject to sub-section (2), ***every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.***

(2) Sub-section (1) does not apply to a term of imprisonment imposed—

(a) in default of payment of a fine or sum of money;

(b) on a prisoner in respect of a prison offence or as a result of an escape from custody;

(c) on a habitual offender under Part III;

(d) on any person for an offence committed while released on parole; or

(e) on any person for an offence committed while released on bail in relation to another offence."

[Emphasis is mine].

[17] In ***Mani v. State*** [2011] FJHC 102; HAA 54 of 2010 (2 February 2011); His Lordship Justice Priyantha Fernando while analyzing the provisions of Section 22 (1) and (2) of the Sentencing and Penalties Act held:

> ".....the Sentencing and Penalties Decree 2009 does not envisage the sentence for a subsequent offence to run consecutively with the sentence for the previous offence, unless the court directs otherwise.
>
> Section 22(1) of the Sentencing and Penalties Decree 2009 gives a discretion for the court to decide whether subsequent sentence of imprisonment should be made consecutive with any uncompleted sentence or sentences of imprisonment."

[18] In ***Vukitoga v. State*** [2013] FJCA 19; AAU 49 of 2008 (13 March 2013); the Fiji Court of Appeal discussed, inter alia, the Totality Principle and the effect of Section 22 of the Sentencing and Penalties Act.

[19] It was held (and I quote paragraphs 20-24 of the judgment):

> *"Section 22 of the Sentencing and Penalties Decree completely reverses the "default" position imposed by section 28(4) of the Penal Code. The Penal Code provision stipulated that any subsequent sentence to one being served **shall** be "executed after the expiration of the former sentence" (unless the Court otherwise directs): now the Sentencing and Penalties Decree stipulates that a new sentence **must** be served concurrently (unless the Court otherwise directs).*

Such a reversal of sentencing policy would mean that the Supreme Court decision in ***Joji Waqasawa*** *(**Joji Waqasawa v. The State** Cr. App. No. CAV 9 of 2005S) (Supra) can no longer be regarded as applicable law although it was correctly decided according to the law then pertaining.*

The situation that presents itself to the Court therefore, and a proposition advanced by Counsel for the appellant is this: there being no guidance from authorities of higher courts on concurrent or consecutive sentencing, we are left only with the legislation (Sentencing and Penalties Decree) which states that subsequent sentences must be served concurrently with existing sentences.

Guidance for this situation can still be gleaned from the earlier decision of the Supreme Court in ***Joji Waqasaqa*** *(supra) by analogy. If the Court said (and it did) that where the "default" position was consecutive, then a Court would have to give "reasoned justification" to depart from that position in making sentences concurrent, then a Court must now when the "default" position is concurrency make a reasoned justification to depart from the "default" position in making sentences consecutive or partly consecutive.*

That being this Court's view of the manner in which a sentencing Judge must now approach the sentencing of an already serving prisoner; it does not particularly help in the present situation where the Court is faced with a choice of confirming the old sentence or varying the sentence to conform with the Sentencing and Penalties Decree."

[20] It has been submitted to Court that the Appellant was sentenced previously: on 26 April 2016, by the Magistrate's Court of Suva (in Criminal Case No. 1864 of 2013), to 18 months imprisonment (9 months imprisonment with immediate effect, and 9 months imprisonment suspended for 2 years); and, on 29 August 2016, by the Magistrate's Court of Suva (in Criminal Case 612 of 2015), to 18 months imprisonment.

[21] Thus, on 18 January 2017, when the Learned Magistrate was sentencing the Appellant in the instant case, he has specifically directed that the sentence imposed on the

Appellant is to be served immediately and consecutive to any present sentence that he is serving.

[22] The Learned Magistrate has not ordered that the sentence be made concurrent with the uncompleted sentence or sentences of imprisonment that the Appellant was serving at the time. It is conceded that no specific reason has been provided by the Magistrate for not doing so and it would have been appropriate for him to have provided for reasoned justification. However, it is the opinion of this Court that, in terms of Section 22(1) of the Sentencing and Penalties Act, imposing of a consecutive sentence was well within the discretion of the Learned Magistrate. As such, Ground One fails.

GROUND 2

[23] That the sentence imposed was very harsh and excessive in all circumstances.

[24] The Appellant was charged for the possession of 1.4 grams of Cannabis Sativa, an Illicit Drug, contrary to Section 5 of the Illicit Drugs Act.

[25] In determining the tariff for this offence the Learned Magistrate has been guided by 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.*

[26] Since the Appellant was charged with the possession of 1.4 grams of Cannabis Sativa, without lawful authority, Category 1 above is what is applicable.

[27] In this case, it seems that the Learned Magistrate has decided to impose a custodial sentence on the Appellant considering the fact that the offence had taken place within the precincts of the Suva Remand Centre.

[28] In determining the starting point within a tariff, the Court of Appeal, in ***Laisiasa Koroivuki v State*** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

> *"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

[29] The Learned Magistrate has chosen 12 months imprisonment as the starting point. It must be said that this was at the high end of the tariff for Category 1 offences. However, having regard to the objective seriousness of the offence it was within his discretion to select 12 months as the starting point in this case.

[30] The Magistrate has increased the sentence by a further 12 months for the aggravating factors thereby making the sentence 24 months. 6 months has been deducted for mitigation and 6 months for the guilty plea, thereby making the sentence 12 months imprisonment. Another two months was deducted for the time spent in remand thereby ending up with a sentence of 10 months imprisonment.

[31] It is the Appellant's contention that he should have been given a 1/3 discount from his sentence for his early guilty plea.

[32] In ***Rainima v. State*** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015); His Lordship Justice Madigan took the view that:

> *"Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authorative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be valid and to be applied in all future proceedings at first instance."*

[33] However, this contention was rejected by His Lordship Justice Goundar in ***Ashwin Prasad v. The State*** (unreported) Criminal Appeal No. HAA 39 of 2016 (14 March 2017); where he held *"....Provided the sentencing court considers the guilty plea, there is no legal requirement for the discount for guilty plea to be assessed on numerical terms."*

[34] In ***Qurai v. State*** [2015] FJSC 15; CAV 24 of 2014 (20 August 2015); the Supreme Court held (per His Lordship Justice Marsoof):

> *"In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as*

appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges."

[35] Similarly, in ***Bonaseva v. State*** [2015] FJSC 12; CAV 22 of 2014 (20 August 2015); His Lordship Chief Justice Gates said:

*"Sentencing is not an exact science: **Maciu Koroicakau v The State** [2005] FJSC 5; CAV0006.2005S (4 May 2006). It is an exercise of discretion and it must remain a practiced art. The judge might have granted a discount appropriate to the mitigating factors after allowing such discount as appropriate for the guilty plea."*

[36] In ***Maciu Koroicakau v The State*** [2005] FJSC 5; CAV0006.2005S (4 May 2006) (supra) the Supreme Court had held:

".....It (the sentencing process) is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again

it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence."

[37] Having considered the relevant case authorities, it is clear that there is no legal requirement for the discount for guilty plea to be assessed on numerical terms, provided the sentencing court considers the guilty plea. In this case, the Learned Magistrate has considered the guilty plea and deducted 6 months from the sentence to be imposed on the Appellant. In actual fact, this amounts to a 1/3 reduction from the final sentence imposed on the Appellant (when calculating the discount for the guilty plea as the last component of a sentence, after additions and deductions are made for aggravating and mitigating circumstances respectively).

[38] Considering all the facts and circumstances of this case, I am of the opinion that the sentence imposed by the Learned Magistrate was just and equitable. Accordingly, I hold that Ground Two is also without merit.

Conclusion

[39] In the light of the above, this Appeal against the sentence is dismissed.

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

At Suva
This 19th Day of March 2018

Solicitors for the Appellant : **Office of the Legal Aid Commission, Suva.**
Solicitors for the Respondent : **Office of the Director of Public Prosecutions, Suva.**