IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL NO : HAA 02 OF 2018

BETWEEN : TIMOTHY JOYCE

Appelant

AND : CIVIL AVIATION AUTHORITY OF FIJI

Respondent

Counsel : Mr A. K. Narayan For Appelant

Ms T. Colati For Respondent

Date of Hearing : 15th October, 2018

Date of Judgment : 13th February, 2019

JUDGMENT

Background

1. This appeal was brought by the Appellant on 4th January, 2018 against the sentence passed by the Magistrates Court at Nadi on 8th December, 2017.

2. The Appellant was charged with twenty-nine counts of Failure to Comply with Safety Aircraft Operation Requirements contrary to Section 70 (1) of the Air Navigation Regulation (ANR) 1981 of 26th February, 2016. The Appellant pleaded not guilty to the charges on 8th April, 2016. An amended charge dated 21st July, 2016 was filed by the Respondent. The Appellant changed his plea to a guilty plea to all twenty-nine counts on 4th November, 2016.

3. On 30th October, 2017, the Summary of Facts was read to the Appellant. The Appellant agreed to the facts and was convicted as charged. The Appellant was sentenced to pay a fine of $29,000.00 within 3 months in default 2,900 days' imprisonment.

4. The Appellant made an application for oral hearing in the Appellant's mitigation submissions. On 9th December, 2016, the matter was called for mitigation hearing at which the Respondent's counsel objected to the Appellant calling the Chief Executive of the Respondent pursuant to Summons to Witness issued by the Court. The ruling on the preliminary issue was pronounced on 10th July, 2017 upholding the Respondent's objection.

5. However, the Court directed that written Mitigation and Sentencing Submissions be filed. This was filed in Court on 17th November, 2017. The Court delivered its ruling on sentence on 8th December, 2017.

6. The Petition of Appeal was filed within time and an Amended Grounds of Appeal was filed on 13th June, 2018. Parties were directed by this Court to file their respective submissions.

Grounds of Appeal

7. The following is the amended grounds of appeal.

The sentencing Magistrate acted upon a wrong principle.

1. The Learned Magistrate erred in law in holding that the Appellant was not entitled to subpoena and call the Chief Executive Officer of CAAF to produce records of similar past contraventions and sentences that had been imposed on other pilots.

2. The Learned Magistrate erred in law by failing to allow the Appellant to call evidence at the sentencing hearing.

3. The Learned Magistrate contradicted himself by not refusing to accept the list of breaches tendered in the prosecution's sentencing submissions after holding that ***Sunflower Aviation Limited & Air Fiji Limited v Civil Aviation Authority of the Fiji Islands, Airports Fiji Limited & Hot Springs Hire Services Limited*** HBC 250 of 2008 is binding.

4. The Learned Magistrate erred in law in choosing to rely on the tariff from New and Australia from cases which were not relevant to the charges against the Appellant.

5. The Learned Magistrate erred in law and in fact in choosing to rely on the prosecution's sentencing recommendation in the prosecution's submissions.

6. The Learned Magistrate erred in law in not recusing himself to view of allegations made by the Prosecutor as to conversation had between him and the Learned Magistrate which gave rise to a reasonable perception of bias.

The sentencing Magistrate allowed extraneous or irrelevant matters to guide or affect him.

7. The Learned Magistrate failed to take into consideration relevant mitigatory factors and relying on unsubstantial and irrelevant matters.

The sentencing Magistrate mistook the facts.

8. The Learned Magistrate erred in fact by holding that the Appellant *"was immediately suspended pending a complete investigation, after which he was charged"* when there was evidence lead by the Appellant showing that investigation, was completed on 27th July, 2016.

9. The Learned Magistrate erred in fact by failing to hold that the flights were private.

10. The Learned Magistrate erred in fact by accepting the date of breaches between 6th to 11th April, and from 21st July to 14th September as there were no official charges for these dates nor evidence lead by the Civil Aviation Authority of Fiji.

11. The Learned Magistrate erred in fact by holding that *"the aggravating factor are the inherent dangers from flying with a licence and subjecting passengers the same dangers and level of recklessness..."* in the absence of any evidence before the Court that there were passengers and by ignoring that the Appellant was otherwise highly qualified and entitled to renewal.

The sentencing Magistrate failed to take into account some relevant consideration.

12. The Learned Magistrate failed to give any and/or sufficient weight to the fact that the Appellant is a first offender.

13. The Learned Magistrate erred in fact, by failing to consider that the Appellant is also a Fijian citizen.

14. The Learned Magistrate failed to properly evaluate all the evidence and submissions presented and made on behalf of the Appellant and most significantly failed to consider that

the Appellant had valid medical certificate, recency and renewal fees could have been deducted by CAAF from his companies' account with CAAF at the material times who was aware that he possessed two pilot licences and that both would require renewal.

15. The Learned Magistrate failed to consider the penalties previously imposed by CAAF for breach of Section 70 (1) of the ANR 1981.

16. The Learned Magistrate failed to hold that the offence was a technical breach of the law and the Appellant was otherwise competent and qualified to be a pilot.

17. The Learned Magistrate failed to give any weight or consider the evidence tendered by Appellant wherein he provided list of breaches of Section 70 (1) of the Air Navigation Regulation from his knowledge and evidence of penalties imposed by Civil Aviation Authority of Fiji on other offenders for the same offence.

18. The Learned Magistrate failed to give weight to the evidence lead showing that Civil Aviation Authority of Fiji was willing to trade off this case with Consolidated Judicial Review Action Nos. 8 & 9 of 2015.

19. The sentence is otherwise harsh and excessive.

The Law

Appeal against sentence

8. Section 247 of the Criminal Procedure Act sets out the law in respect of appeals arising out of convictions recorded upon a guilty plea. The section states;

> *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. It is well settled that sentence imposed by a lower court should be varied or substituted with a different sentence on appeal only if it is shown that the sentencing judge had erred in principle or where the sentence imposed is excessive in all the circumstances.

10. The Fiji Court of Appeal in ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) 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 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)".

Discharge without conviction entered

11. The Appellant in the Magistrates Court had asked for a discharge without conviction being recorded.

12. In exercising its discretion whether or not to record a conviction, a court under Section 16(1) of the Sentencing and Penalties Act (SPA), must 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;

(c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.

13. The SPA provides for discharges in general terms. It does so under the chapter heading "Dismissals, Discharges and Adjournments". It encapsulates much of the common law and case law of the last 30 years or so. (***State v Batiratu*** HAR 001/2012 (13 February, 2012).

14. Section 43 of the SPA provides:

(1) An order may be made under this Part

(a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;

(b) to take account of the trivial, technical or minor nature of the offence committed;

(c) to allow for circumstances in which it is inappropriate to inflict any punishment other than nominal punishment;

(d) to allow for circumstances in which it is inappropriate to record a conviction;

(e) to allow for the existence of other extenuating or exceptional circumstances that justify a court showing mercy to an offender."

15. Section 45 of the SPA specifically deals with discharges or releases without conviction.

In ***State v Nayacalagilagi*** (2009) FJHC 73; HAC165.2007 (17th March 2009) 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:

"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."

16. In ***Batiratu*** (supra) the court observed:

"It is clear from the cases that the public interest in enforcement and deterrence is of some significance when considering whether a discharge can be imposed. Because of the need to enforce safety and public health or tax legislation, the public interest lies in imposing a penalty and not a discharge in such cases. Penalties, whether fines or terms of imprisonment may override mitigating factors such as previous good character or other personal issues: Foster v The State (supra); Commissioner of Inland Revenue v George Rubine [1995] HAC79 OF 1993; Tebbutt v Commissioner of Inland Revenue Cr. App. 108 of 1998S; LTA v Lochan Cr. App. HAA88.2002S (22nd November 2002)".

17. Having considered the above case law and the purport of the more detailed provisions of the SPA with regard to discharges without conviction, the Court in ***Batiratu*** (supra) elaborated the questions a sentencer must address. They are, whether:

(a) 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?

18. **Summary of Facts**

The accused is 62 years old and holds a dual Australian and Fijian citizenship. He is a Shareholder, Director and the Accountable Manager of Joyce Aviation (Fiji) Limited, which is a group of aviation companies, namely Sunflower Aviation Limited, Pacific Flying School, Heli Tours (Fiji) Limited and Tandem Skydive (Fiji) Limited. He holds both Australian Air Transport Pilot Licence

(ATPL) and Fiji Commercial Pilots Licences (CPL) for Aeroplanes and Helicopters. The companies are managed by the Accused and they operate out of the Sunflower Hanger at London Avenue, Nadi International Airport. The company collectively employs a total of 75 employees which includes the administration staff, the technical personnel and pilots.

The accused is actively involved with all the businesses and is usually involved in the flight operations pertaining to both aeroplanes and helicopters, where he is the Chief Pilot.

On the 14th of September, 2015, the Accused went to renew his Medical Certificate for his CPL (Helicopter) Licence No. 200928H at the CAAF Head Office. Whilst it was being processed, the Licensing officials noted that his second Licence, the CPL (Aeroplane) Licence No. 200928A had expired about 05 months earlier, on the 06th of April, 2015. This initiated an investigation and evidence indicated that he had flown with an expired Licence on 29 different occasions, i.e. from the 11th of April to the 20th of July, 2015. He was immediately suspended pending a complete investigation, after which he was charged.

The evidence indicated that the Accused, Mr Timothy John Joyce had piloted an aircraft with an expired license *(CPL [Aeroplane] Licence No. 200928A)* on twenty nine (29) different flights between the date his licence had expired – on the 06th of April, 2015 to the date the infringements were reported, the 14th of September, 2015, as outlined in detail in the Official Charges he has been charged with, which are the following days:

(1) 03 times on 11th April, 2015

(2) 05 times on 19th April, 2015

(3) 07 times on 15th June, 2015

(4) 04 times on 22nd June, 2015

(5) 01 time on 26th June, 2015

(6) 01 time on 30th June, 2015

(7) 04 times on 12th July, 2015

(8) 02 times on 14th July 2015

The Accused has voluntarily pleaded guilty to all the 29 counts as charged.

Analysis

The Sentencing Magistrate Acted Upon a Wrong Principle

19. Grounds 1 and 2 can conevniently be dealt together under this heading.

Ground 1

The learned Magistrate erred in law in holding that the Appellant was not entitled to subpoena and call the Chief Executive Officer of CAAF to produce records of similar past contraventions and sentences that had been imposed on other pilots.

Ground 2

The Learned Magistrate erred in law by failing to allow the Appellant to call evidence at the sentencing hearing.

20. The Appellant filed a Summons to a Witness requiring the Respondent's Chief Executive to produce records of breaches of Section 70 (1) of the ANR and sentences it imposed. The Respondent raised an objection to the use of the summons on four grounds.

21. The Learned Magistrate held the following in his ruling on the preliminary issue:-

> *"12. Therefore, Section 210 of the Criminal Procedure Act does not come into play when plea is taken. From here, Court is seized of the matter and the Defence does not have powers to summon witnesses. Mindful of the High Court decision of Sunflower Aviation Limited & Air Fiji Limited v Civil Aviation Authority of the Fiji Islands, Airports Fiji Limited & Hot Springs Hire Services Limited HBC 250 of 2008, Master Tuilevuka [as he then was] discussed the history of the legislation and refused specific disclosures under Section 23 (1) of the Civil Aviation Authority of Fiji Act.*
>
> *13. This Court is binded (sic) by this authority and on the same basis, I find no meaningful reason to admit the summons to witness. Furthermore, the Court has not directed for any witness to be called."*

22. The Learned Magistrate relied on ***Sunflower Aviation Ltd v Civil Aviation Authority of the Fiji Islands*** (supra) and did not allow the witness to be called. In his ruling the Learned Magistrate stated *"this is a private action filed by the prosecuting authority* and *"...Defence does not have powers to summon witnesses"*.

23. ***Sunflower Aviation*** *(supra)* was a private civil action where the plaintiff had sought specific discovery of documents. It appears that *Sunflower* case is irrelevant to the matter before the Learned Magistrate in that the documents sought in the Summons to a Witness in that case are records of pilots who had infringed Section 70 (1) of the ANR and the penalties the Respondent had imposed in similar cases.

24. Under the Constituition and the existing laws, a court has power to allow an application to call a witness and through him tender documents in appropriate cases. Specially in a criminal case, the law does not prevent witnesses being called to support mitigation of sentence after a conviction has been recorded. However, a court has a wide discretion to regulate its proceedings to prevent unnecessary and irrelevant evidence being brought in by a party to the proceedings.

25. Section 4(2) of the Sentencing and Penalties Act provides that the court should consider *'the current sentencing practice and the terms of any applicable judgment'*. The intended purpose of the summons was to assist the Learned Mgistrtae to set an appropriate tariff or to inform the court about current sentencing practice in Fiji in relation to Section 70 (1) of the ANR.

26. There is no dispute that the case filed against the Appellant was the first ever prosecution filed by the CAFF in a court of law under Section 70(1) of ANR. It is obvious therefore that the documents sought by the Respondent would not have contained any information pertaining to penalties or sentences imposed by a court in similar cases.

27. The penalties or sanctions imposed by the Respondent as a regulator do not form a body of case law upon which a Magistrate's Court can rely in determining a tariff in a similar case. Nor they reflect the current 'sentencing practice' in Fiji.

28. In the submission filed in the Magistrates Court, the Respondent had made it clear as to why it was forced to institute criminal proceedings against the Appellant in the Magistrates Court:

> *"The Accused's record though of breaching Fiji's aviation laws is appalling. He has been operating outside our laws for a long time without any serious consequences. His actions indicated that he was operating under a different set of rules from those of his peers and CAFF Inspectors have in the past, had a difficult time dealing with him regarding his constant breaches"*

29. It is obvious that the Respondent has resorted to criminal proceedings in the Magistrates Court when it found the sanctions or penalties imposed by

the Respondent ineffective. Under these circumstances, seeking guidance from CAFF sanctions regime in order to determine a tariff for the offence would seem futile.

30. By dismissing the application of the Appellant to call the witness from the CAFF and produce through him the documents sought in the summons, the Learned Magistrate did not lose the opportunity to set a proper tariff befitting the offence.

31. The Learned Magistrate was justified in his determination although he was not technically correct in his reasoning. No prejudice was caused to the Appellant. Therefore, grounds one and two should fail.

Ground 3

The Learned Magistrate contradicted himself by not refusing to accept the list of breaches tendered in the Prosecution's sentencing submissions after holding that *Sunflower Aviation Limited & Air Fiji Limited v Civil Aviation Authority of the Fiji Islands, Airports Fiji Limited & Hot Springs Hire Services Limited HBC 250 of 2008* is binding.

32. The Respondent in its sentencing submission had annexed from its records a list of breaches allegedly committed by the Appellant in the past (Appendix 01). This appendix was one of the matters in respect of which the Appellant had issued the Summons to Witness that was filed on his behalf and served on the Respondent's Chief Executive Officer. This

Appendix filed by the Respondent relates to the Appellant and his group of companies only. The Appellant's contention is that he was prejudiced by the list of breaches in the appendix.

33. Nowhere in the sentencing Ruling the Learned Magistrate has stated that he had accepted the list of breaches tendered in the Prosecution's sentencing submissions. The Learned Magistrate has quite clearly treated the Appellant as a first offender. However, he has not specifically stated that he had ignored the appendix and the sanctions/ penalties imposed on the Appellant by the Respondent.

34. Even if it were assumed that the Learned Magistrate's mind was swayed by the list of previous breaches tendered by the Prosecution, it cannot be said that he had contradicted himself because the purpose for which the Learned Magistrate may have used it is quite different from the intended purpose of the Appellant in calling the Chief Executive of CAFF. The Appellant's intended purpose in calling the Chief Executive was to place evidence of other pilots' breaches as well to assist court to set an appropriate tariff whereas the Respondent's intention was to place evidence of previous character of the Appellant.

35. The Appellant in his written submission has conceded that the list of alleged previous breaches that the Respondent relied on in its sentencing submissions includes matters which were determined by this court in a judicial review matter. Therefore it carries a greater weight for sentencing purposes than what a mere submission from the bar table would have

carried. Although there was no evidence that the Appellant was tried or convicted for any of the alleged breaches in a court of law, the list of breaches has been extracted from the record with the CAAF, which can be considered as an official record of which judicial notice could have been taken.

36. The said list had been annexed to the sentencing submission filed in court by the Respondent and therefore it cannot be said that it was never put to the Appellant, for his verification. The Appellant had the very opportunity to contest the record of breaches at the sentencing hearing if he wished to do so. He has not denied any of the braches and the actions taken thereto by the CAAF. Under these circumstances, the Learned Magistrate could have taken those breaches into consideration in determining the previous character of the Appellant.

37. Therefore, by not specifically stating that the list of breaches in Appendix 01 was not considered, the Learned Magistrate did not act upon a wrong principle. This ground fails.

Ground 4

The Learned Magistrate erred in law in choosing to rely on the tariff from New Zealand and Australia from cases which were not relevant to the charges against the Appellant.

38. It is evident from the Sentence Ruling that the Learned Magistrate had considered the Respondent's sentencing submission on the cases from other jurisdictions when he stated at paragraph [13] *"Tariff from New Zealand and Australia is a fine and community service."* However, the Learned Magistrate has not applied the said tariff or imposed a community service on the Appellant.

39. Although some of the foreign cases cited were not directly relevant to Appellant's charges as they pertained to other offences and the facts of those cases are not similar to the present case, they were capable of shedding some light on the matter at hand because all the foreign cases cited concern the safety of civil aviation and matters incidental thereto. The Learned Magistrate at paragraph 11 of his Sentencing Ruling has stressed that *the court will rely solely on the documents relevant to the charge*. It is evident from the charge sheet that the purpose of the present case was also to deal with failures to comply with safety of aircraft operation requirements.

40. Furthermore, ***Brian Hunter v CAA*** NZ [2014] NZHC 147 is directly relevant to the case before the Learned Magistrate. In that case, Mr. Hunter pleaded guilty to one charge of operating an aircraft without a pilot's licence, knowing one was required to fly. He was sentenced to 300 hours' community work. On appeal, the High Court affirmed the decision given by the Tribunal and sentenced the Appellant to 300 hours community work.

41. The learned Magistrate took into consideration the paramount interest which is safety. In ***Sunflower Aviation Limited and another v Civil Aviation of Fiji and another*** (supra) the court made a number of pertinent observations; one being that CAAF (Civil Aviation Authority of Fiji) is the authority established under the Fiji Island Civil Aviation Authority Act 1979 to regulate Civil Aviation in Fiji and its core functions including the issuing of licenses to airport operators, developing, promoting and enforcing good aviation safety standards.

42. The court in ***Sunflower Aviation Ltd*** (supra) further discussed fully the international legal framework under the International Civil Aviation Organization (ICAO) within which CAAF operates. Fiji became a fully-fledged member of the International Civil Aviation Organization in 1973.

43. The International Civil Aviation Organization (ICAO) is a UN specialized agency, established by States in 1944 to manage the administration and governance of the Convention on International Civil Aviation (Chicago Convention). ICAO works with the Convention's Member States and industry groups to reach consensus on international civil aviation Standards and Recommended Practices (SARPs) and policies in support of a safe, efficient, secure, economically sustainable and environmentally responsible civil aviation sector. These SARPs and policies are used by ICAO Member States to ensure that their local civil aviation operations and regulations conform to global norms, which in turn permits more than 100,000 daily flights in aviation's global network to operate safely and reliably in every region of the world. (https://www.icao.int/about-icao/Pages/default.aspx)

44. This was the first prosecution of this nature filed in a court in Fiji. The learned Magistrate was correct in referring to the foreign law and tariffs from New Zealand and Australia which are relevant to the case before him. The Learned Magistrate has not acted upon a wrong principle. This ground fails.

Ground 5

The Learned Magistrate erred in law and in fact in choosing to rely on the Prosecution's sentencing recommendation in the Prosecution's submissions.

45. The Appellant was sentenced to pay a fine of $29,000.00 within 3 months in default 2,900 days' imprisonment. It is obvious that the Learned Magistrate has not accepted the sentence recommended by the Respondent in its submission and letter to the Learned Magistrate. According to paragraph 8 of the Sentence Ruling, the prosecution was asking the court to impose maximum fine of $ 1000 for each count and one year imprisonment term suspended for 2 years and suspension of licence for one year. At paragraph 18 the Learned Magistrate observed *"I note that CAAF has sole right to issue renewal of licence hence I will not suspend the licence of the accused as submitted by Prosecution"*.

46. The Learned Magistrate has not accepted the recommendation of the Prosecution. He exercised his discretion independently when he did not

impose a suspended term of imprisonment and a suspension of licence. This ground is misconceived and be dismissed.

Ground 6

The Learned Magistrate erred in law in not recusing himself in view of allegations made by the Prosecutor as to conversation had between him and the Learned Magistrate which gave rise to a reasonable perception of bias.

47. In the present case, the Appellant provided a copy of the transcript of his discussions with the Prosecutor. During their discussions, the Prosecutor had allegedly informed the Appellant that he discussed this case with the Learned Magistrate. This fact was not denied by the Prosecutor. However the Learned Magistrate denied discussing the matter with anyone.

48. As per the copy records, there was no allegation of apperant bias on the part of the Learned Magistrate. There was also no application made that the Magistrate should recuse himself. The Magistrate himself did state in page 50, *"first I have not read it the issues I have never discussed with anyone".*

49. In ***Tikoniyaroi v State*** [2011] FJCA 47; AAU0034.2005(29 September 2011)the Court of Appeal adopted the principles in recusal application established in ***Amina Koya v The State*** Criminal Appeal No. AAU 0011/1996

This Court is bound to follow the Supreme Court's judgment in Amina Koya. The principle to be applied is that where the trial has taken place, and there is an appeal that the High Court Judge who presided should not have sat on account of apparent bias, ***the only issue is whether a miscarriage of justice has taken place. If the record is examined it shows that the Judge acted fairly and correctly throughout then there is no miscarriage of justice.*** *The judgment of Sriskandarajah JA below examines the trial of the Appellants and the record shows that Mr Justice Govind acted correctly throughout including a summing up which was a model impartiality. This appeal was always doomed to fail on this relatively short and decisive point.(emphasis added)*

50. There is no evidence that a miscarriage of justice has taken place. The record shows that the Learned Magistrate acted fairly and correctly throughout the proceedings. A fair minded reasonable observer would not have inferred that there was a real danger of bias merely because the prosecutor alleged that he had discussed the matter with the Learned Magistrate in the absence of the Appellant and his counsel. This ground fails.

The Sentencing Magistrate Allowed Extraneous or Irrelevant Matters to Guide or Affect Him

Ground 7

The Learned Magistrate failed to take into consideration relevant mitigatory factors and relying on unsubstantiated and irrelevant matters.

51. There were various mitigating factors submitted on behalf of the Appellant. The Appellant submits that the Learned Magistrate failed to properly evaluate and give sufficient consideration to those matters. The following mitigating factors were highlighted on behalf of the Appellant in his submissions:

a) the Appellant was a first offender.

b) the Appellant had pleaded guilty to all 29 counts at the first available opportunity when the amended charge was filed.

c) the Appellant had apologized to the Court.

e) the Respondent had already suspended the Appellant's licence for 10 months before the court imposed the penalty in its sentence. The Appellant has allegedly lost $200,000.00 from cancelled booking after the suspension of his licence.

52. The Learned Magistrate took into account the relevant factors and gave sufficient weight in mitigating the sentence except for '(b)' and '(e)' above. It is alleged that the Learned Magistrate has not considered the alleged loss suffered by the Appellant during his suspension and the fact that he pleaded guilty to the charges.

53. There was no concrete and consistent evidence either before the Learned Magistrate or this court so that the court can be satisfied that the Appellant had suffered a loss of $ 20000.00 during his suspension. This claim is not supported by the position he has taken to justify Appeal Ground 9. In relation to Ground 9 it was submitted on behalf of the Appellant that *"All flights undertaken by the Petitioner between 11th April and 29th July 2015 were private flights and for recency purposes. The ANR defines private flights as any flight operation that does not involve payment or remuneration in exchange for the flight operation. The flights conducted by the petitioner at the material time were only for private purposes"*. The Appellant has not satisfactorily explained that the flights that could have been operated during the suspended period are not for recency purposes.

54. In light of this unsatisfactory evidence, the Learned Magistrate was not bound to consider the purported loss suffered by the Appellant during suspension.

55. The Appellant pleaded guilty on 4th November, 2016, nearly 4 months after the amended charges were filed on 21st July, 2016. The amendment was done only to the particulars of the charges. The Appellant pleaded not

guilty to all charges at the first available opportunity and subsequently changed his plea on the 4th November 2016. There is no genuine expression of remorse on the part of the Appellant. Therefore, the discount on account of guilty plea has only little or no mitigating value.

56. The Learned Magistrate had considered the tariffs from Australia and New Zealand which were relevant to the facts before him. This ground fails.

The Sentencing Magistrate Mistook the Facts

Ground 8

The Learned Magistrate erred in fact by holding that the Appellant *"was immediately suspended pending a complete investigation, after which he was charged"* when there was evidence lead by the Appellant showing that investigation, was completed on 27th July, 2016.

57. The Learned Magistrate held:-

> *"Whilst it was processed, the Licensing officials noted that his second licence, the CPL (aeroplane) Licence No. 200928A had earlier expired about 5 months ago, on the 6th of April, 2015. This initiated an investigation and evidence indicated that he had flown with an expired licence on 29 different occasions, that is, from the*

11th of April, to 20th July, 2015. He was immediately suspended pending a complete investigation, after which he was charged.

58. The Appellant has agreed to the summary of facts filed by the Prosecution. The learned Magistrate in his Sentence Ruling has reproduced verbatim the summary of facts agreed to by the Appellant. Therefore, there is no basis for the Appellant to challenge his own admission in appeal and take up a different position. This ground has no merit and be dismissed.

Ground 9

The Learned Magistrate erred in fact by failing to hold that the flights were private

59. The Appellant had submitted that all the flights undertaken by the Appellant between 11th April and 29th July, 2015 were private flights and for recency purposes and not for commercial purposes. However, the Appellant voluntarily pleaded guilty to the charges for having piloted an aircraft and acted as a flight crew member of the aircraft without being in possession of a valid commercial pilot's licence.

60. The Summary of Facts he admitted states that the Appellant was actively involved with all the businesses and was usually involved in the flight operations. There was no evidence that the flights were operated 'within the meaning of the definition 'private flight' under the ANR which states " *private flight means any flight operation that does not involve payment or*

remuneration in exchange for the flight operation. The submission that the Appellant suffered a loss of $ 20000.00 due to cancellation of bookings runs contrary to his own position that he piloted during the material period only for recency purposes. Therefore the Learned Magistrate did not err when he failed to hold that the flights were private.

Ground 10

The Learned Magistrate erred in fact by accepting the date of the breaches were between 6th to 10th April and from 21st July to 14th September, as there were no official charges for these dates nor evidence lead by the Civil Aviation Authority of Fiji.

61. The initial and amended dates in the Charge Sheet indicate that the offences were from 11th April, 2015 to 20th July, 2015. The Appellant agreed the summary of facts which carried the timeframe within which the offences were committed. The Summary of Facts states: *This initiated an investigation and evidence indicated that he had flown with an expired licence on 29 different occasions, i.e. from the 11th of April to the 20th of July, 2015.* The Learned Magistrate at paragraph 2 of the Sentence Ruling has reproduced the relevant part of the Summary of Facts. The sentence has been crafted on the basis of the summary of facts agreed by the Appellant. There is no error on the part of the Learned Magistrate.

Ground 11

The Learned Magistrate erred in fact by holding that "the aggravating factor are the inherent dangers from flying with a licence and subjecting passengers the same dangers and level of recklessness..." in the absence of any evidence before the Court that there were passengers and by ignoring that the Appellant was otherwise highly qualified and entitled to renewal.

62. In his ruling the Learned Magistrate stated the following:-

> *16. The aggravating factor are the inherent dangers from flying with(sic) a licence and subjecting passengers the same dangers and the level of recklessness from a highly qualified pilot not follow procedures and committing the offence for 29 times.*

63. There was no direct evidence before the Learned Magistrate that the flights were operated with passengers and that the Appellant had subjected them to real danger. However the Appellant had admitted that he and his company suffered a loss of $ 200,00.00 due to cancellation of bookings. Therefore it can be inferred that the flights were operated with passengers during the material period. However, the Appellant was not charged or convicted for reckless piloting and therefore punishing the Appellant for an offence for which he was not convicted is contrary to basic principles of sentencing.

64. The Learned Magistrate fell into error when he took an irrelevant matter into consideration as an aggravating factor. This ground succeeds.

The Sentencing Magistrate failed to take into account some relevant considerations

Ground 12

The Learned Magistrate failed to give any and/or sufficient weight to the fact that the Appellant is a first offender.

65. The Learned Magistrate at paragraph 6 of the Sentencing Ruling accepted that the Appellant was a first offender. There is no basis for this ground and therefore, this ground should fail.

Ground 13

The Learned Magistrate failed to give any and/or sufficient weight to the fact that the Appellant is also a Fiji citizen.

The Summary of Facts notes that the Appellant holds a dual Australian and Fijian citizenship. The Learned Magistrate in his Ruling considered the Appellant only as an Australian citizen. However, there is no evidence that Appellant's citizenship was considered by the Learned Magistrate to aggravate the sentence. The fact that the Appellant had Fiji citizenship does not place him in a privileged position when it comes to sentencing.

Therefore, no prejudice was caused to the Appellant. This ground has no merit.

Ground 14

The Learned Magistrate failed to properly evaluate all the evidence and submissions presented and made on behalf of the Appellant and most significantly failed to consider that the Appellant had valid medical certificate, recency and renewal fees could have been deducted by CAAF from his companies' account with CAAF at the material times who was aware that he possessed two pilots licences and both would require renewal.

Ground 16

The Learned Magistrate failed to hold that the offence was a technical breach of the law and the Appellant was otherwise competent and qualified to be a pilot.

66. Evidence was tendered by the Appellant before the Magistrates Court that he had submitted his CPL (A) with his CPL (H) for renewal with an Application for Renewal of Professional Pilot Licence with a valid medical certificate, pilot logbook for both licences showing that he had met recency requirement for pilot and that Appellant's companies held an account with CAAF from which the requisite fees could have been deducted.

67. The Appellant has submitted that he inadvertently overlooked to tick the CPL (A) under Section 2 of the Application for Renewal of Professional Pilot Licence. The Appellant had acknowledged that what had transpired was not intentional and it was an oversight. This was brought to the Respondent's attention by way of his letter dated 6th October, 2015.

68. The Appellant submits that his breach of Section 70 (1) of the ANR was an administrative or technical breach, as the Appellant had overlooked to tick renewal for CPL (A).

69. I am not inclined to agree to the proposition that piloting an aircraft 29 times without a valid licence should be regarded as a mere technical or administrative breach. It has to be accepted that CAFF regulatory mechanism expects aircraft pilots to exercise appropriate judgment and care in the operation of the aircraft and adhere to all regulations incidental thereto. The periodic renewal (in every six months) of pilot licence and regulatory processes are in place to guard against careless or reckless conduct of pilots and to ensure their fitness to the high risk job. Pilots are required to tick all the boxes in the pilot's checklist to ensure that everything was perfectly in order before each take off. Therefore, a pilot cannot merely say that his omission was not intentional or due to an oversight.

70. Furthermore the Appellant should have known that the fee for the renewal was not paid. He cannot expect the Respondent to deduct the

requisite payment or fee from his companies account without his authorization. A reasonable inference could have been drawn from the circumstances that the breach of Section 70 (1) of the ANR in this case was not merely an oversight due to inadvertence.

71. In the circumstances, the proposition that the appellant should have been discharged without a conviction being recorded cannot be accepted. Section 43 of the Sentencing and Penalties Act describes the following guidelines for non-conviction:-

> *"(a) 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."*

72. The Appellant contends that he is morally blameless, because as soon as he became aware of the breach in August, he cancelled all his bookings and stopped flying even before the Respondent found out the breach at the end of September, 2015. However, the Summary of Facts he agreed to is not consistent with this claim. In the Summary of Facts it is stated: *"briefly, on the 14th of September, 2015, the accused went to renew his Medical Certificate for*

his CPL (Helicopter) Licence No. 200928H at the CAFF Head Office. Whilst it was being processed, the Licensing officials noted that his second licence, the CPL (Aeroplane) Licence No. 200928A had expired about 05 months earlier on the 6th April 2015. There is no evidence that the Appellant had gone to the licensing authority before 14th of September, 2015 and admitted his omission.

73. Public interest would not have been served if the Appellant was discharged without a conviction. Having read the sentencing submission of the Prosecution, the Learned Magistrate should have been well aware as to why the Respondent had brought these charges before him instead of resorting to internal disciplinary procedure of CAFF which, according to them, had been rendered ineffective to deal with Appellant's offending. The Learned Magistrate at paragraph 20 of the Sentence Ruling stressed the need for *"rehabilitation to teach accused to respect aviation laws of the country not to compromise the safety and security of the aviation industry"*. The safety and security is at the heart of the aviation industry. The criminal prosecution without considerable punishment will have little or no deterrent effect on the Appellant and other potential offenders and, would not have served its purpose. Furthermore, as a trainer and leader in the aviation industry the Appellant will be looked upon as a role model. Therefore, he is expected to demonstrate extra care and diligence in all his affairs in the industry.

74. Since the Appellant has been convicted upon his own guilty plea, he is only allowed to appeal against the sentence pursuant to Section 247 of the Criminal Procedure Act, which states that;

"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".

75. The Appellant has not appealed his conviction although in the submission filed on his behalf he has asked for a discharge upon non-conviction. It is clear that an appellate court has no power to quash a conviction which has not been appealed. The Appellant does not say that the Summary of Facts does not satisfy the charges or that the guilty plea is equivocal. Therefore substituting a non- conviction order in place of the conviction recorded by the Learned Magistrate in any event is not permitted in law. These grounds have no merit and must necessarily be dismissed.

Ground 15

The Learned Magistrate failed to consider the penalties previously imposed by CAAF for breach of Section 70 (1) of the ANR 1981.

Ground 17

The Learned Magistrate failed to give any weight or consider the evidence tendered by Appellant wherein he provided list of breaches of Section 70 (1) of the Air Navigation Regulation (ANR) from his knowledge and evidence of penalties imposed by Civil Aviation Authority of Fiji (CAAF).

76. As I said before, the Learned Magistrate was not bound to look at the sanctions/ penalties imposed by the CAFF for guidance because the very purpose of bringing the prosecution in court was to bypass the same regime which had been rendered ineffective. Therefore the Learned Magistrate has not fallen into an error when he did not give sufficient weight to the evidence of penalties imposed by the Respondent on other pilots for breaches of Section 70 (1) of the ANR.

Ground 18

The Learned Magistrate failed to give weight to the evidence lead showing that Civil Aviation Authority of Fiji was willing to trade off this case with Judicial Review Action Nos. 8 & 9 of 2015.

77. The Mitigation Submissions filed on behalf of the Appellant contained a copy of the transcript of an alleged discussion between the Appellant and the Prosecutor where it was revealed that the Respondent was willing to trade off this action with the Judicial Review Action Nos. 8 & 9 of 2015 filed by the Appellant.

78. Based on this unsubstantiated conversation between the Appellant and the Prosecutor, the Appellant contends that the prosecution's 'trade-off proposal' should have been considered by the Learned Magistrate to test Appellant's moral blameworthiness. These are not reconcilable offences.

Plea bargaining has no place in our sentencing process and therefore, the judicial mind will not be swayed by such considerations. Moral blameworthiness cannot be tested against prosecutor's willingness to trade off. The case against the Appellant has been brought to court with the intention of sending a clear message in terms of deterrence to the Appellant and other potential offenders. There is no evidence that the Respondent has compromised its position. This ground should fail

The sentence is otherwise harsh and excessive.

79. The prescribed penalty under Section 157 (3) of the ANR is a fine not more than $1,000.00 or imprisonment term not more than 6 months or both.

80. The Learned Magistrate imposed the maximum fine for each count. He has not followed the *"Koroivuki principle"*

81. In ***Koroivuki v State*** the Court of Appeal observed the following in respect of the starting point:

> *"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 stage. 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."

82. The Learned Magistrate treated the Appellant as a first offender. He pleaded guilty to all counts albeit not at the first available opportunity.

83. In these circumstances, the sentence passed by the Learned Magistrate is harsh and excessive as the Learned Magistrate imposed the maximum fine for each count on the Appellant with a total of $29,000.00. The Learned Magistrate incorrectly aggravated the sentence taking into consideration an irrelevant fact. Therefore the sentence should be quashed and the Appellant be sentenced afresh.

84. Considering the above, I quash the sentence passed by the Learned Magistrate and substitute it with a fine of $ 750/- for each count. Accordingly the Appellant is fined $ 21,750/- in total to be paid within 3 months in default 3 months imprisonment. If the Appellant has already paid the fine as per the original sentence, he is entitled to claim the fine paid in excess.

85. Following orders are made:

i. Appeal is partially allowed.

ii. The sentence imposed by the learned Magistrate at Nadi is quashed.

iii. The appellant is sentenced afresh.

iv. A fine of $ 750/- for each of the 29 counts is imposed.

v. Total fine of $21,750.00 to be paid within 3 months in default 3 months' imprisonment.

vi. Application for discharge upon non-conviction is dismissed.

Aruna Aluthge

Judge

At Lautoka

13th February, 2019

Counsel: **A. K. Lawyers for Appellant**

Civil Aviation Authority of Fiji Legal Counsel for Respondent