IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 17 OF 2024

BETWEEN:	**JONE KARIKARITU**	**APPELLANT**
A N D:	**THE STATE**	**RESPONDENT**

Counsel: Mr. A. K. Singh for Appellant
Mr. H. Nofaga for Respondent

Date of Hearing: 30th August 2024

Date of Judgment: 21st February 2025

J U D G M E N T

1. The Appellant and two others were charged in the Magistrate's Court at Navua on 4th October 2012 with one count of "Found in Possession of Illicit Drugs," contrary to Section 5 (a) of the Illicit Drugs Control Act. The particulars of the offence are as follows:

Charge

(Complaint By Public Officer)

Statement of Offence (a)

FOUND IN POSSESSION OF ILLICIT DRUGS*:- Contrary to Section 5 (a) of the Illicit Drugs Control Act Number 9 of 2004.*

Particulars of Offence (b)

IMMANUEL SMITH, JONE KARIKARITU *and* ***JESONI TAMANIKAU****, on the 31st day of May 2009, at Navua in the Central Division, without lawful authority possessed 970 grams of Cannabis an Illicit drug.*

2. Following the not-guilty plea entered by the Appellant and the two other Defendants, the matter progressed at a snail's pace, experiencing numerous adjournments for various reasons. Eventually, the hearing commenced on the 5th of March 2018 and continued until the 6th of March 2018, concluding with the evidence of six out of eight Prosecution witnesses listed. Notably, the Government Analyst, a key Prosecution witness, was absent from giving evidence. The hearing was adjourned until the 7th of March 2018. Subsequently, the matter was adjourned several more times.

3. On 28 August 2018, the Counsel for the Appellant made an unusual application when the matter was brought before the Learned Magistrate. He sought an order for a trial *de novo* on the grounds that his disclosures were unclear. The Police Prosecutor did not object, and the Magistrate granted the order for a trial *de novo*. The trial *de novo* commenced on 29 April 2019 and continued on 30 April 2019, 19 November 2019, and 15 April 2021. On 10 January 2024, although he had left the jurisdiction after completing his term, the Learned Magistrate delivered the judgment through his successor, finding the Appellant and two co-accused guilty of the offence as charged. The matter was then adjourned until 14 February 2024 for a mitigation hearing.

4. The Learned Counsel for the Appellant made another unusual application before the successor Magistrate, the second Magistrate, on 24th April 2024. He requested that the proceedings in the Magistrate's Court be stayed without delivering the sentence until the appeal he filed in the High Court against the conviction was heard. The second Learned Magistrate, having reviewed the judgment of her predecessor, stayed the proceedings of the Magistrate's Court pending the outcome of the Appellant's proposed appeal. The Appellant filed this appeal on 19 June 2024.

5. In light of the chronological procedural background of the proceedings in the Magistrate's Court, I find it appropriate to briefly comment on the two key decisions made by the Learned Magistrates: i.e. the granting of a trial *de novo* and the staying of proceedings pending the appeal, even though the parties did not submit any arguments on these matters in this appeal.

(On 12 June 2024, this court set aside the order of the second Learned Magistrate made on 24 April 2024 and directed the second Learned Magistrate to deliver the sentence.)

6. Section 101 (2) of the Constitution stipulates the jurisdiction of the Magistrates' Court, stating that it possesses such jurisdiction as conferred by a written law. As a result, the jurisdiction of the Magistrates' Court is limited to what is defined by written law.

7. A trial *de novo* refers to a fresh or new trial. Black's Law Dictionary defines it as a new trial on the entire case, conducted as if there had never been a trial in the first place.

8. According to the Criminal Procedure Act, the Magistrate has jurisdiction to conduct a trial *de novo* only in two circumstances. The first is the procedure outlined in Section 139 of the Criminal Procedure Act, i.e. the continuation of a hearing by the second Magistrate, where the evidence has been partially or wholly heard and recorded by his predecessor.

9. The second instance arises from an order issued by the High Court under Section 256 (2) of the Criminal Procedure Act. Therefore, in this case, the Learned Magistrate lacks the jurisdiction to order a trial *de novo* due to the unclear disclosure provided to the Defence lawyer. It is prudent to leave the question of whether the subsequent trial *de novo* conducted by the Learned Magistrate was void in law for a future appropriate instance.

10. Section 183 of the Criminal Procedure Act states that:

> *"The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either—*
>
> *i) find the accused guilty and pass sentence or make an order according to law; or*
>
> *ii) acquit the accused; or*
>
> *iii) make an order under the provisions of Part 9 of the Sentencing and Penalties Act 2009.*

11. In accordance with Section 183 of the Criminal Procedure Act, it is evident that the Learned Magistrate is required to impose a sentence upon finding the Accused guilty or to issue an order consistent with the law. There is no written law granting the Magistrate's Court the jurisdiction to stay the sentencing process after finding the Accused guilty, pending the outcome of the appeal lodged in the High Court against the conviction. If he believes that the conviction is manifestly wrong, the appropriate course for the Accused is to file an appeal in the High Court and seek an order for bail pending the appeal (*vide; section 17 (3) of the Bail Act*).

12. Having briefly commented on the two significant procedural errors made by the Learned Magistrate in these proceedings, which are evidently *obiter dicta* to this appeal, I shall now address the grounds of appeal submitted by the Appellant. The grounds of appeal are as follows:

Grounds of Appeal

(i) That the Learned Magistrate erred in law and facts when he convicted the Appellant without the Drugs or the Analyst report being tendered as an exhibit.

(ii) That the Learned Magistrate erred in law when he failed to uphold that the Prosecution witness's evidence was inconsistent or omission and, as such, cannot be believed.

(iii) That the Learned Magistrate erred in law and facts when he failed to consider the Appellant and his witness's evidence.

(iv) That the Learned Magistrate erred in law when he failed to consider the totality of the evidence in that the Appellant had no knowledge of the drugs being kept in the taxi.

(v) The Petitioner reserves the right to argue, amend and/or file further or revised Grounds of Appeal after perusing the copy of the Court Record.

1st Ground

13. The primary basis for the first ground of appeal is that the Learned Magistrate erred in both law and fact by considering the Government Analyst's report as evidence, despite the Prosecution's failure to adhere to the procedure stipulated under Section 36 (2) of the Illicit Drugs Control Act.

14. The Learned Magistrate, in his judgment, found that the report made by the Principal Scientific Officer was admissible under Section 36 of the Act on the grounds that the Prosecution had disclosed it to the Defence as part of the disclosures and the Appellant failed to provide the Prosecution with notice as required under Section 36 (3) of the Act.

15. Section 36 of the Illicit Drugs Control Act states:

> *i) In any proceedings under this Act, the production of a certificate purporting to be signed by a Government analyst is prima facie evidence of the facts stated in the certificate.*
>
> *ii) A copy of the analyst certificate must be served by or on behalf of the prosecutor on the accused or his or her defence counsel at least 42 working days before the hearing at which the certificate is to be tendered as evidence and the accused must be informed in writing that the prosecutor does not propose to call the person who made the analysis as a witness.*
>
> *iii) If the accused intends to cross-examine the analyst, the accused must, in writing give the prosecution at least 21 working days ʹnotice of his or her intention to do so to enable the prosecution to produce the analyst at the hearing.*

16. Goundar J in **State v Nikolic [2019] FJHC 80; HAC 115 of 2018 (14 February 2019)** outlined the scope of Section 36 of the Act, where Goundar J observed:

> *[6] Section 36 was adopted from section 44 of the Dangerous Drugs Act, Cap 114 before that legislation was repealed and replaced with the Illicit Drugs Control Act. In Balram v Reginam [1984] FJSC 62; Criminal Appeal 57 of 1983 (2 March 1984) Justice Cullinan took the view that the section provides for a procedure for admissibility of an analyst report without calling the government analyst to give evidence. There is no ambiguity in the manner in which section 36 is drafted. It is not necessary to look at the intention of the Parliament when there is no ambiguity in the statutory provision. Section 36 provides for the admissibility of an analyst certificate in any proceedings where the analyst is not called to give evidence. An analyst certificate can be relied upon as evidence only if there is compliance of subsection (2) by the prosecution and of subsection (3) by the accused.*

17. Therefore, so as to consider the report signed by the Government Analyst as *prima facie* evidence of fact under Section 36 (1) of the Act, the Prosecution must serve a copy of the analyst's report to the Defence at least 42 working days before the hearing and also inform the Defence in writing of their intention to not call the person who made the report as a witness. Once the copies of the report and the written notice have been served as stipulated under Section 36 (2) of the Act, Section 36 (3) of the Act will come into operation, granting the Defence the right to notify the Prosecution in writing of its intention to cross-examine the Analyst.

18. Therefore, the written notice to the Defence under Section 36 (2) of the Act is essential for considering the report of the Government Analyst as *prima facie* evidence under Section 36 (1) of the Act.

19. In this case, the Learned Magistrate made a fundamental error by equating the service of disclosure with the two-step requirement stipulated under Section 36 (2) of the Act. Section 36 (2) explicitly outlines the mandatory requirement of serving a written notice, which the Prosecution had failed to comply with in this matter. Therefore, the Prosecution could not rely on Section 36 (1) of the Act.

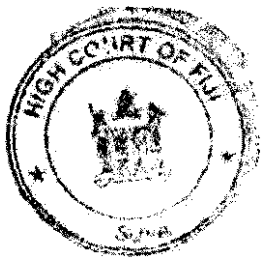
20. The Prosecution neither summoned the Government Analyst to testify nor submitted the analyst's certificate as evidence. Consequently, it was not open to the Learned Magistrate to conclude, based on the evidence presented before him, that the Prosecution had proven beyond reasonable doubt that the substance found in the car in which the Appellant and two co-accused travelled, was illicit drugs, specifically cannabis.

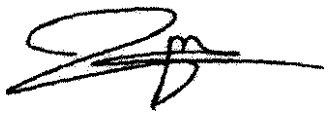
21. Considering the reasons outlined earlier, I find the first ground of appeal has merits. Accordingly, I find this is an appropriate case for this Court to intervene under Section 256 of the Criminal Procedure Act. This alleged incident happened on May 31, 2009, and the Prosecution's main witnesses had already given evidence twice. The Learned Counsel for the Respondent informed that if this Court allowed this appeal, the State would not seek a retrial.

22. In conclusion, I make the following orders:

    i) The appeal is allowed,
    ii) The judgment dated 10th of January 2024 is quashed, and the subsequent sentence is set aside.

23. Thirty (30) days to appeal to the Fiji Court of Appeal,





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

At Suva

21st February 2025

Solicitors.

A. K. Singh Law for Appellant.

Office of the Director of Public Prosecutions for the Respondent.