

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 26 of 2022**  
**CRIMINAL MISC. NO. HAM 131 of 2022**

**BETWEEN** : **RATU SAIRUSI VULUMA NALIVA**

**APPELLANT**

**A N D** : **THE STATE**

**RESPONDENT**

**Counsel** : Mr. R. N. Vananalagi for the Appellant.  
: Ms. S. Naibe for the Respondent.

**Date of Hearing** : 25 August, 2022  
**Date of Judgment** : 08 September, 2022

---

**JUDGMENT**

---

**BACKGROUND INFORMATION**

1. The appellant was charged in the Magistrate's Court at Ba for one count of failure to comply with orders contrary to section 69 (1) (c) 3 (v) of the Public Health Act, 1935 and section 2 of Public Health (Infectious Diseases) Regulation 2020, and Public Health (Covid-19 Response) Public Notice No. 46 (5). The appellant was also charged for one count of breach of suspended sentence contrary to section 28 (1) of the Sentencing and Penalties Act.

2. It was alleged as follows:

First Count

*Ratu Sairusi Vuluma Naliva on the 18<sup>th</sup> day of June, 2021 at Naidrodro Ba in the Western Division without lawful excuse was found in Naidrodro Ba at about 2025 hrs and failed to comply with hours of curfew [8pm – 4am] with the orders issued by Permanent Secretary for Health & Medical Services.*

Second Count

*Ratu Sairusi Vuluma Naliva on the 18<sup>th</sup> day of June, 2021 at Naidrodro, Ba in the Western Division during the operation period of suspended sentence of imprisonment vide CF 662/20 committed another offence punishable by imprisonment.*

3. The brief facts as stated by the learned Magistrate were:

*On 18<sup>th</sup> June 2021 at about 8.25 pm at Naidrodro, Ba a team of police officers were on mobile patrol when they saw the accused wearing a black t/shirt and blue  $\frac{3}{4}$  pants walking along the side of the road and was staggering. The police officers approached the accused and noticed that he heavily smelt of liquor. He was asked and he told police that his name is Naliva and that he had attended a party at FSC and was returning to his place at Sorokoba. Accused was then arrested for breaching the curfew hours. He was interviewed under caution and he admitted that he had breached the curfew hours. Further, at the time of offending the accused was on suspended sentence (6 months imprisonment suspended for 2 years) in CF 662/20 imposed by the court on 2<sup>nd</sup> February 2021.*

4. On 21<sup>st</sup> June, 2021 the appellant appeared in the Magistrate's Court his plea was deferred and he was bailed. After numerous adjournments due to the Covid-19 pandemic on 22<sup>nd</sup> June, 2022 the appellant pleaded guilty to both counts and also admitted the summary of facts read.

5. The learned Magistrate upon being satisfied that the appellant had voluntarily entered an unequivocal plea and the summary of facts read satisfied all the elements of the offences charged, found the appellant guilty and convicted him accordingly.
6. After hearing mitigation on 6<sup>th</sup> July, 2022 the appellant was sentenced to 4 months imprisonment in count one and 3 months imprisonment in count two to be served consecutively. This meant the appellant was to serve in total 7 months imprisonment.
7. The appellant being aggrieved by the conviction and sentence of the Magistrate's Court filed a timely petition of appeal in this court. The appellant also filed a notice of motion with his supporting affidavit sworn on 5<sup>th</sup> August, 2022 seeking the following orders:
  1. *That the applicant to be released on bail while awaiting the determination of this appeal.*
  2. *That the applicant be granted leave to adduce new evidence.*
  3. *That the directions for filing of affidavit in opposition to be restricted to 14 days.*
  4. *That the service of this application to be abridged to one day.*
  5. *That the hearing date for this application to be fixed to an early hearing date preferable any date in late August or early September 2022 and/or subject to the Honourable Court's diary.*
  6. *Any other order deemed just in all the circumstances.*
8. The appellant's counsel filed helpful written submissions and also made oral submissions, the state counsel filed skeletal submissions and also made oral submissions during the hearing for which this court is grateful. This court would like to express its appreciations to the appellant's counsel

for also providing copies of the legal notices which was of immense assistance.

9. Before the hearing the appellant's counsel withdrew the appellant's application for leave to adduce new evidence and also abandoned his appeal against conviction. For the appeal against sentence the second ground of appeal was abandoned as well.
10. In view of the above the appellant has for determination the following:
  - i) Bail pending appeal; and
  - ii) Appeal against sentence.
11. Considering the short imprisonment term imposed on the appellant this appeal has been given an expedited hearing.

#### **APPEAL AGAINST SENTENCE**

12. The appellant relies on the following ground of appeal:

*The learned Magistrate erred in law when he sentenced your Petitioner to a term of imprisonment which was harsh and excessive considering the facts of the offending and the circumstances of the Petitioner.*

#### **LAW**

13. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

*“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. AAU0015 at [2]. 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.”*

### **SUBSTANTIVE APPEAL**

14. The appellant’s counsel argued that the learned Magistrate erred when he overlooked the changes in law that took place and which was applicable on the date of sentencing. The appellant committed the offence on 18<sup>th</sup> June, 2021 in the first count and was sentenced on 6<sup>th</sup> July, 2022. At the time of the offending the maximum penalty for failure to comply with orders was a fine not exceeding \$10,000.00 or imprisonment for a term not exceeding 5 years or both.
15. However, at the time of sentence the Public Health (Infectious Diseases) (Infringement Notices) (Amendment) Regulations 2022 which came into force on 10<sup>th</sup> January, 2022 was applicable. By virtue of Regulation 4 of the amendment a specific category of offending came about in respect of breach of curfew orders which was named as fixed penalty offence for natural persons being a fine of \$250.00 only.

16. Finally, counsel submitted that when the appellant was sentenced the law had changed and therefore the punishment under the new amendment should have been applied. Counsel further stated that section 14 (2) (n) of the Constitution provided a benefit to the appellant for a least severe punishment in this respect which was not taken into account at the time of sentencing.
17. Counsel also submitted that considering the high likelihood of success in respect of this ground of appeal this court should allow bail to the appellant pending appeal.

### **DETERMINATION**

18. It is not in dispute that the appellant was unrepresented when he appeared in the Magistrate's Court. Count one was committed by the appellant whilst he was on a suspended sentence in case no. CF. 662/20 for failure to comply with orders. For this offending the appellant on 2<sup>nd</sup> February, 2021 was sentenced to 6 months imprisonment which was suspended for 2 years.
19. It is also not in dispute that the appellant committed count one the subject of this appeal during the operational period of the suspended sentence. The new offending by the appellant has been about 4 months after he was given a suspended sentence.
20. The argument raised by the appellant's counsel has some force in view of the situation created by the Covid-19 virus globally and in Fiji. It is expected in a pandemic that laws will be made to protect and safeguard the population who are vulnerable and susceptible to harm. In this regard the law evolves to counter the threat caused by the pandemic hence it

becomes necessary for the relevant authorities to make laws in a short time to protect its people.

21. The regulations that were brought in force subsequent to the Public Health Act 1935 are an illustration of the urgency shown by the Ministry of Health and Medical Services. The learned Magistrate had correctly identified the maximum sentence at paragraph 9 of the sentence as follows:

*The Public Health Act 1935 sets out the Public Health and Infectious Disease Regulation 2020 subsection (2) of the regulation provides:*

*“any person who fails to comply with an order, prohibition, declaration, directive issued pursuant to section 69 (1) (c ) or (3) of the Public Health Act 1935 commits an offence and is liable to conviction to a fine not exceeding \$10,000 or imprisonment for a term not exceeding 5 years or both.”*

22. I accept that there was a change in the sentencing regime relating to Covid-19 virus by Public Health (Infectious Diseases) (Infringement Notices) Regulation 2021 which brought about fixed penalty offences. Under regulation 2 any person who failed to comply with an order in relation to any curfew committed a fixed penalty offence.

23. Regulation 24 states:

*Issuance of infringement notice*

*(1) Subject to sub regulation (2), an authorized officer may issue an infringement notice to a person who commits a fixed penalty offence by serving the infringement notice –*

- (a) personally upon the person;
  - (b) through registered mail sent to the person's postal address last recorded by the Ministry;
  - (c) at the registered office of the person; or
  - (d) upon another person who resides at the person's physical last recorded by the Ministry;
- (2) Where an infringement notice is issued to an individual who commits a fixed penalty offence, the authorised officer must serve the infringement notice personally upon the individual.
- (3) An authorized officer may issue a new infringement notice to the person if the person commits another fixed penalty offence.
- (4) In these Regulations, service of the infringement notice is deemed to have been effected in the infringement notice is:
  - (a) in the form set out in Schedule 2; and
  - (b) served in accordance with this regulation.
- (5) The Ministry may notify a person to whom an infringement notice is issued of the person's alleged commission of a fixed penalty offence and such notification may be made by -
  - (a) Short Message Service (SMS) messaging to a registered mobile phone contact; or
  - (b) Electronic mail to a valid electronic mailing address, Submitted by the person to the Ministry and verified by the Ministry.



24. Regulation 25 states:

*Fixed penalty*

*A person to whom an infringement notice is issued is liable to a fixed penalty and must, within 90 days from the date the infringement notice is issued, undertake one of the following actions —*

*(a) Pay the fixed penalty in a single payment or by instalments; or*

*(b) A company, all the directors of the company in Fiji are prohibited from leaving Fiji.*

25. The appellant was no doubt charged before this regulation came into force. For completeness, I would like to state that the above regulation was further amended by Public Health (Infectious Diseases) (Infringement Notices) (Amendment) Regulations 2022 which came into force on 10<sup>th</sup> January, 2022. The contention of the appellant is that in view of section 14 (2) (n) of the Constitution he is entitled to the benefit of a lesser sentence which by virtue of the above amendment is less severe because when he was sentenced on 6<sup>th</sup> July, 2022 the fixed penalty for an individual was only a fine of \$250.00.

26. Section 14 (2) (n) of the Constitution of Fiji provides:

*(2) Every person charged with an offence has the right -*

*(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing; and*

*(o) of appeal to, or review by, a higher court.*

27. Whilst the argument raised by the appellant is convincing *per se* I am unable to agree with the contention raised. The answer is simple the fixed penalty regime of punishment under the amendment was a new category of punishment which had nothing to do with the maximum penalty prescribed under the Principal Act which the appellant was charged with. The maximum penalty prescribed still continues.
28. The appellant was charged under the general offence of failure to comply with orders whereas the amendment brought about a new offence specific to curfew as a fixed penalty offence. In my judgment this is the reason why the schedule in the regulations continues to mention the maximum penalty applicable under the Principal Act of \$10,000.00 and 5 years imprisonment. Under the amended regulation an infringement notice is issued by an authorized officer for fixed penalty offences. Here the appellant did not undergo the process of an infringement notice issuance but was arrested, caution interviewed and charged.

### **DISCHARGE WITHOUT CONVICTION**

29. In his oral submission counsel submitted that considering the lack of awareness in regards to the changes in law at the time and the spread of the Covid-19 virus and the appellant's mitigation a discharge without conviction was an appropriate result in this case.
30. When it comes to whether a conviction is to be recorded or not, the law bestows a discretion upon the sentencing court. Section 16 of the Sentencing and Penalties Act gives discretion to the court which must be exercised judicially having regards 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.
31. Considering the nature and circumstances of the offending it cannot be said to be a trivial offending. The appellant was charged with a serious offence to protect people against a deadly virus. The appellant had shown a blatant disregard by breaching the curfew order in place.
32. There was no justifiable reason for the appellant to breach the curfew. A pandemic is a serious matter for the entire population and any breaches are not to be taken lightly by any court. The facts of the offending warranted the recording of a conviction. Although the appellant was unrepresented the mitigation presented was taken into consideration by the learned Magistrate.
33. The appellant ought to have known the consequences of his actions. The offending called for a deterrence factor principle to be invoked which was just in all the circumstances of the case.
34. The following paragraph of the sentence is noteworthy:

#### Paragraph 8

*This type of offending was prevalent in community at that time and showed a blatant disregard for the law. You were also under the influence of liquor at relevant time. A person under the influence of liquor lacks the proper capacity or is inhibited to make wise decisions. These I consider as aggravating.*

35. In *State v David Batiratu [2012] Revisional Case no. HAR 001 of 2012* at paragraph 29, his Lordship Gates C.J (as he was) mentioned the following questions that must be answered if a discharge without conviction is urged upon the sentencing court 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?*

36. Furthermore, the Sentencing and Penalties Act provides for situations and circumstances where a court can consider a discharge without entering a conviction. Part IX begins with the heading “Dismissals, Discharges and Adjournments”, section 43 of the Sentencing and Penalties Act states:

*"43. (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."*

37. Section 45 specifically governs discharges or releases without conviction as follows:

- (1) *A court on being satisfied that a person is guilty of an offence may dismiss the charge and not record a conviction.*
- (2) *A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) adjourn the proceedings for a period of up to 5 years and release the offender upon the offender giving an undertaking to comply with the conditions applying under sub-section (2), and any further conditions imposed by the court.*
- (3) *An undertaking under sub-section (2) shall have conditions that —*
  - (a) that the offender shall appear before the court if called onto do so during the period of the adjournment, and if the court so specifies, at the time to which the further hearing is adjourned;*
  - (b) that the offender is of good behaviour during the period of the adjournment; and*
  - (c) that the offender observes any special conditions imposed by the court.*

- (4) *A court may make an order for restitution or compensation in accordance with Part X in addition to making an order under this section.*
- (5) *An offender who has given an undertaking under sub-section (1) may be called upon to appear before the court —*
- (a) *by order of the court;*
- (b) *by notice issued by a court officer on the authority of the court.*
- (6) *If at the time to which the further hearing of a proceeding is adjourned the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding.”*
38. The Fijian Courts have over the years developed the jurisprudence relating to discharge without conviction. In *State v Patrick Nayacalagilagi and others* (2009) FJHC 73; HAC165 of 2007 (17th March 2009) Goundar J. looked at the principles governing discharge without a conviction under the repealed section 44 of the Criminal Procedure Code.
39. His lordship succinctly outlined the situations where the courts have exercised its discretion in regards to granting a discharge without conviction. His lordship at paragraph 3 mentioned the following:
- "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."*

40. In the appeal of *The State v Mosese Jeke Cr. App HAA 010.2010 (2nd July 2010)* Goundar J. substituted a term of 6 months imprisonment suspended for 12 months. The Magistrate's Court had ordered an absolute discharge. The injuries to the complainant were minor scratches and tenderness as a result of two blows from the blunt side of a cane knife. There were other mitigating factors, however, the imposition of a term of imprisonment was necessary to demonstrate the seriousness with which the court viewed the offence of act with intent to cause grievous bodily harm together with the circumstances of aggravation, particularly the use of cane knife.

41. Goundar J. correctly took into account the seriousness of the offending and at paragraph 11 mentioned about the use of cane knife as:

*"...The court would not condone the use of a cane knife in a family conflict. The circumstances of the case warranted imposition of a sentence on the respondent despite his previous good character."*

42. The underlying principle emanating from *Batiratu's* case is that public interest plays a dominant role when a sentencer considers whether a discharge without conviction was warranted in a given situation which was mentioned at paragraph 27 in *Batiratu's* case (supra) as follows:

*"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 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..."*

43. The cases mentioned above takes into account general and specific deterrence which public interest demands in imposing a penalty and not a discharge. In such cases fines or terms of imprisonment will override mitigating factors such as previous good character or other personal mitigating factors.

44. In *State v Nand Kumar Cr. App. No. HAA014 of 2000 (2 February, 2001)* Gates J. (as he was at the time) in the matter of an appeal from the Magistrate's Court against an order of absolute discharge for the offence of common assault said:

*"...The court, in its sentencing remarks, said rightly, it was faced with "a very awkward situation" for this appellant was facing dismissal from his employment if a conviction were to be entered. Nevertheless, a discharge without conviction being entered, was not an appropriate sentence here. Absolute discharges are appropriate only in a limited number of circumstances, such as where no moral blame attaches (R v O'Toole (1971) 55 Cr App p 206) or where a mere technical breach of the law has occurred, perhaps by imprudence without dishonesty (R v Kavanagh (unreported) May 16th 1972 CA)".*

45. There is no error made by the learned Magistrate in the exercise of his discretion in convicting the appellant.

### **RESTORATION OF IMPRISONMENT TERM**



46. Counsel further stated that had the learned Magistrate being aware of the changes in law he would not have exercised his discretion to impose a consecutive sentence by restoring the imprisonment in part since there were exceptional circumstances such as his loss of employment. The learned Magistrate ought not to have made any order with respect to the restoration of the imprisonment term at all. Counsel finally submitted that by making the sentences consecutive the appellant has been punished with a harsh and excessive sentence.
47. The power to restore the imprisonment term wholly or partly held in suspense and ordering the offender to serve the same is governed by section 28 (4) and (5) of the Sentencing and Penalties Act. The law also provides an exception for the sentencing court to consider any exceptional circumstances which made the restoration of the imprisonment term unjust.
48. If the sentencing court was satisfied that there are exceptional circumstances available the court may exercise the following options:
- (a) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or
  - (b) in the case of a wholly suspended sentence, extend the period of the order suspending the sentence to a date not later than 12 months after the date of the order; or
  - (c) make no order with respect of the suspended sentence.
49. Although not argued by the appellant's counsel it is obvious to me from the copy record that there is nothing to suggest that the learned Magistrate had asked the appellant to show cause why his imprisonment term should

not be restored (see *Isei Tamani vs. The State*, HAA 90 of 2008, 28<sup>th</sup> November, 2008). It was important for the learned Magistrate to ask the appellant for a reason why his suspended sentence should not be restored.

50. In restoring the imprisonment term the learned Magistrate had stated the following at paragraphs 11 to 13 of his sentence:

11. *Bearing in mind the circumstances of offending, aggravating and mitigating factors and prescribed penalty, I order as follows:*

- *1<sup>st</sup> count – 4 months imprisonment;*
- *2<sup>nd</sup> count – 3 months imprisonment activated.*

12. *The 2<sup>nd</sup> count will be served consecutively to the 1<sup>st</sup> count pursuant to section 28(5) (b) of the SPA 2009.*

13. *In my view, the 7 months imprisonment reflects the totality of offending in both matters. The purpose of sentencing is deterrence and rehabilitation secondary consideration. I don't see any compelling reason to suspend your sentence. The sentence imposed should serve as a lesson to you and warning to likeminded people.*


51. In respect of the restoration of the imprisonment term it is noted that the appellant had served only 4 months of the operational period of the suspended sentence which was not a substantial compliance of the sentence order. A perusal of the sentence shows that the learned Magistrate also did not consider and/or direct his mind to whether there were any exceptional circumstances available before proceeding to activate the imprisonment term in the suspended sentence and impose consecutive sentences.

52. However, considering the comments made by the learned Magistrate and the blatant disregard by the appellant to comply with a sentence order for which he had previously been given a second chance and bearing in mind that the order in place was to protect the appellant and others as well and then being found in a drunken state does not deserve any mercy from any court. The restoration of 3 months was a generous addition which is half of the 6 months imprisonment for breach of suspended sentence 4 months into the operation period. In my considered judgment no substantial miscarriage of justice has occurred to the appellant by the above error.
53. Since this court has arrived at a decision to dismiss the appeal bail pending appeal fails as well.

### **ORDERS**

1. The application for bail pending appeal is refused;
2. The appeal against sentence is dismissed;
3. The sentence of the Magistrate's Court is affirmed.
4. 30 days to appeal to the Court of Appeal.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

08 September, 2022

### **Solicitors**

**Messrs. R. Vananalagi & Associates, Suva, for the Appellant.**

**Office of the Director of Public Prosecutions for the Respondent.**