31A SCHEDULE

IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0015 of 2005S
(High Court Criminal Action No. HAA 22 of 2005L)

BETWEEN:

OSEA BALESAVU

Appellant

AND:

THE STATE

Respondent

Coram: Smellie JA, Presiding Judge
Penlington, JA
Scott, JA

Hearing: Tuesday, 15 November 2005, Suva

Counsel: Appellant in Person
Mr Kuruisaqila for the Respondent

Date of Minute: Friday, 18 November 2005, Suva

MINUTE OF PRESIDING JUDGE - SMELLIE, JA

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[1] This matter was embarked upon at 2.15 p.m. on Tuesday 15th November. By 3 pm as explained below Counsel for the State required time to research a point arising from material handed up by the appellant. The case was adjourned to 4.15 pm.

[2] We indicated to the Appellant and Counsel for the State at the resumed hearing that we would issue a minute next Thursday 24th November at 10 am which would timetable a hearing for the March 2006 sessions of this Court when all the

unanswered questions the initial hearing threw up, would be investigated. Subsequently we have had the opportunity to read the three High Court decisions handed up after the adjournment by Counsel and two others referred therein.

[3] The first is ***State v. Audie Pickering*** (HAM 007 of 2001S) decided 30th July 2001 by Shameem J. In a lucid and thoroughly researched judgment Her Honour traced the history of section 8(b) of the Dangerous Drugs Act, as mended by the Dangerous Drugs Act (Amendment) Decree No. 4 of 1990 and the Dangerous Drugs (Amendment) Decree No.1 of 1991. On the face of it this legislation imposes minimum sentences for possession of marijuana. (For the amount found in the Appellant's possession 5 years imprisonment is the minimum). Her Honour held that the minimum penalty of 3 months for possession of marijuana under 10 grams in the case before her was unconstitutional – more of that later.

[4] Next came ***Ramswarup v. State*** (HAA 014 of 2001) decided on 27 September 2002 by Prakash J. an Acting Puisine Judge. The appellant there was arrested with 546.6 grams in his possession and was sentenced in the Magistrates Court to the minimum of 5 years imprisonment, which of course complied with the Act as amended. The result of the appeal to the High Court, however, was that the penalty was quashed again on the grounds that the Act as amended offended Article 25(1) of the 1999 Constitution– ***Audie*** (Supra) was relied on.

[5] The third case is ***Tomasi Drava v. The State*** (HAA 95/2002S) judgment 31/1/03 again a decision of Shameem J. Drava was found with 205.3 grams in his possession. The Magistrate imposed a sentence of 12 months whereas the statutory minimum is 3 years. Referring to her earlier judgment in Audie and Ramswarup (Supra), and accepting the latter decision's conclusion that those minimum sentence provisions offended the Constitution, Her Honour was prepared to vary the sentence if the circumstances indicated that was appropriate. At p.5 of the judgment she said *"Certainly the penalty for the offence no longer has a minimum*

mandatory term." (3 years). In the event, however, the 12 months sentence was allowed to stand.

[6] The fourth case is ***Lemeki Tunidau v. The State*** (HAA 045 of 2003S) again decided by Shameem J. on 24 October 2003. Here the appellant was found with 5 grams of marijuana. In the Magistrates Court the sentence was "a minimum term of 12 months imprisonment" which was in accordance with the schedule to the Act as amended by the decrees.

[7] The Judge said the Magistrate was in error because *"minimum terms under the Dangerous Drugs Act ... were unconstitutional and the Courts had a discretion to impose lesser or alternative punishment"* and a little latter

> *"With the legislative minimum term removed, it must now be for the courts to establish suitable tariffs for drugs offences in Fiji. This is only possible if counsel are able to provide to the courts comparable sentences for similar offences abroad. This has not been possible in this case."*

Her Honour discussed some English authorities and gave credit for mitigating factors and amended to 6 months.

[8] The fifth case in ***Meli Bavesi v. The State*** (HAA027 of 2004) a decision of Winter J. delivered on 14/4/04. In the section of his judgment dealing with sentence His Honour said at page 8

> *"A most useful summary of sentencing principle for dangerous drugs cases is contained in the judgment of my sister Justice Shameem. Tomasi Drava Criminal Appeal No. HAA 95/2002. I will not repeat but adopt the expressions of principle detailed by her honour at page 4 of the judgment particularly concerning the imposition of minimum mandatory terms by decree. That issue is now settled."*

[9] The comment *"That issue is now settled"* together with Shameem J's comments about the level of sentencing in other jurisdictions lead the Judge to cite the NZ Court of Appeal decision in ***R. v. Smith*** [1980] 1 NZLR 412 where the Court in that

jurisdiction carried out a comprehensive survey of sentencing for drug offences. Basing himself on that survey Winter J. then identified 3 categories of offending and suggested tariffs within flexible margins for each category. At page 13 of the judgment he said:

> *"Category 1 - The growing of a small number of cannabis plants for personal use by an offender or possession of small amount of cannabis coupled with 'technical" supply of the drug to others on a non-commercial basis. First offender a short prison term, perhaps served in the community. Sentencing point 1 to 2 years.*
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> *Category 2 - Small scale cultivation of cannabis plants or possession for a commercial purpose with the object of driving profit, circumstantial evidence of sale even on small scale commercial basis. The starting point for sentencing should generally be between 2 to 4 years. However, where sales are limited and infrequent and lowest starting point might be justified.*
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> *Category 3 – Reserved for the most serious classes of offending involving large scale commercial growing or possession of large amounts of drug usually with a considerable degree of sophistication, large numbers of sales, circumstantial or direct evidence of commercial involvement the starting point would generally be 5 to 6 years."*

[10] We express some surprise that only in the first of these 5 cases did the State raise any substantial opposition and in none of them did the State appeal.

[11] All this only came to our attention when the appellant handed up a Magistrates decision where at the morning sitting the minimum of 5 years was imposed and later in the afternoon was reduced it to 18 months. His Worship referred to the ***Lemeki Tunidau*** case (Supra) as authority for what he had done observing that he had not been aware initially of the decision.

[12] For the sake of completeness we observe that the above decisions express the law of the Republic of Fiji regarding minimum sentences for marijuana offences as it stands today. If in the future, another such case, is taken on appeal the position may change. But for the present Magistrates are bound by them. Clearly what emerges from all this is that the High Court over several years has held on at least five

occasions (and probably more) that because the minimum sentences provided in the Act breach the Constitution they are of no effect.

[13] It seems that in this decision now under appeal, Govind J. when he increased the appellants sentence effectively from 5½ years to 6 ¼ was unaware of this development. Alternatively he may have been out of sympathy with what has occurred and may regard himself as not bound by the above decisions.

[14] In our judgment, however, whilst respecting the Judge's right to dissent from others on the High Court bench, he may nonetheless have fallen into error. By adhering to the statutory minimum and in fact increasing beyond it, the penalty he imposed here, was markedly out of step with those visited upon comparable offenders. The sentence effectively of 6 ¼ years appears to offend the principle of consistency which must be observed to avoid disproportionately serve penalties being imposed, resulting in unjustice. Departure from that principle in this case is arguably an error of law. If that is so, the Court has jurisdiction to entertain the appeal.

[15] It follows that at 10 am on Thursday 24th , (contrary to what we earlier indicated) we will want to hear submissions from both sides on the matters raised in the preceding paragraph and what the penalty should be. We expect then to be able to deliver our decision, if not immediately than at 3 pm the following day. Depending on when the appellant would be entitled to his freedom, (were it not for the sentence under appeal), and our decision on the appeal, the date of release for him will then be known.

FIJI COURT OF APPEAL

Smellie, JA
PRESIDING JUDGE

Solicitors

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent