IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Decree 2009.

SAILOSI TUIDAMA

Appellant

CASE NO: HAA. 29 of 2016
[MC Nausori, Crim. Case No. 104 of 2015]

Vs.

STATE

Respondent

Counsel	:	Ms. M. Tarai for Appellant Ms. S. Tivao for Respondent
Date of Hearing	:	17th October 2016.
Date of Judgment	:	14th November 2016.

JUDGMENT

1. This is an appeal against the sentence imposed on the appellant on 11/12/2015 in Magistrate Court Nausori Criminal Case No. 104 of 2015.

2. The appellant has been sentenced to an imprisonment term of 4 years and 6 months with a non-parole period of 4 years upon pleading guilty to the following charge;

Statement of Offence

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: contrary to section 5(a) of the Illicit Drug Control Act No. 9 of 2004.

Particulars of Offence

SAILOSI TUIDAMA on the 11th day of November, 2015 at Davuilevu Settlement, Nasau, Wainibuka, Tailevu in the Central Division, without lawful excuse, cultivated 2.68 kilo grams of Cannabis Sativa or Indian hemp an illicit drug.

3. The appellant sought leave to enlarge the period of limitation to appeal against the aforementioned sentence 3½ months after the expiry of the appealable period. The respondent did not object for the said application. Considering that the proposed grounds of appeal were satisfactorily arguable to justify the enlargement of time and the fact that the delay was not substantial, the time was accordingly enlarged.

4. The grounds of appeal are as follows:
    a) *The learned Magistrate erred in principle when he chose a starting point at the higher end of the tariff scale.*
    b) *The learned Magistrate had erred in principle when he failed to give a one-third discount for the Appellant's early guilty plea after a final sentence is reached.*
    c) *The learned Magistrate had erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence resulting in much more severe punishment.*

5. In the case of ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999)] the court of appeal recounted the factors to be considered in deciding whether a sentence imposed in the court below should be disturbed in an appeal against sentence. The court said;

    "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 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) 55 CLR 499)."

Ground one

6. I note that the learned magistrate has taken 3 to 7 years imprisonment as the applicable tariff for the above offence based on the majority decision in the case of ***Sulua v. State*** [2012] FJCA 33. The learned Magistrate has selected 6 years imprisonment as the starting point and deducted $1^1/_2$ years for the early guilty plea, period in remand and mitigation to arrive at his final sentence of $4^1/_2$ years imprisonment. On the first ground, the appellant argues that the learned Magistrate had erred by selecting a higher starting point.

7. According to the majority decision in ***Sulua's*** case (supra) the tariff of 3 to 7 years applies for the possession of 1kg to 4kg of cannabis sativa. The said judgment also says that the sentence for the possession of less than 2.5kg should be less than 4 years and if it is more than 2.5kg the sentence should be more than 4 years. Therefore, the starting point of 6 years the learned Magistrate selected in respect of the weight of 2.68kg cannot be justified based on the aforementioned decision of the court of appeal.

8. In the circumstances, I find that the starting point of 6 years the learned Magistrate selected is substantially disproportionate to the objective seriousness of the offence committed. The first ground is accordingly made out.

Ground two

9. The issue raised on the second ground is based on the failure of the learned Magistrate to give a one-third discount after the final sentence is reached in view of the early guilty plea.

10. It is pertinent to note that the Sentencing and Penalties Decree 2009 ("Sentencing and Penalties Decree") does not provide for a discount of one-

third to be granted for an early guilty plea. What the said Decree provide in terms of section 4(2)(f) is that, when sentencing an offender the sentencing court must have regard to 'whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so'.

11. Therefore, there is no statutory requirement to grant a one-third discount for an early guilty plea. What is required by a sentencer is to ensure that proper weight is given to a guilty plea based on the stage at which the offender pleaded guilty when determining the appropriate sentence. It can be deduced from the relevant case authorities that a discount equivalent to a one-third of the sentence is the proper weight that should be given to an early guilty plea. I am in total agreement of the respondent's submission with regard to the second ground of appeal that the discount given by the learned magistrate does not adequately reflect the totality of the appellant's plea and mitigation. The second ground succeeds.

12. In the submissions on the second ground of appeal the respondent has also pointed out that the learned Magistrate has not dealt with the time the appellant spent in custody in line with the provisions of section 24 of the Sentencing and Penalties Decree.

13. The proper way to give effect to section 24 of the Sentencing and Penalties Decree is to order that the time spent in custody by the offender shall be considered as a period of imprisonment already served from the final sentence. Therefore, that order should be made after the sentencer determines the appropriate sentence. [***Sowane v State*** [2016] FJSC 8; CAV0038.2015 (21 April 2016)]

Ground three

14. On the third ground, the appellant argues that the learned Magistrate erred by fixing of the non-parole period too close to the head sentence and this resulted

in a more severe punishment being imposed. I am unable to agree with this contention as the legal requirement in fixing a non-parole period in terms of section 18(4) of the Sentencing and Penalties Decree is only to ensure that the non-parole period is at least 6 months less than the term of the sentence.

15. The actual grievance of the appellant is in fact the practice adopted by the Fiji Prisons and Corrections Service pertaining to remission under section 27(2) of the Prisons and Corrections Act 2006 ("Prisons and Corrections Act"). That is, the practice of calculating the remission as one-third of the difference between the sentence and the non-parole period. Accordingly, a prisoner will only be entitled to be released based on remission after serving the non-parole period and two third of the remaining period of the sentence depending on the behaviour of the prisoner.

16. Section 27(2) of the Prisons and Corrections Act reads thus;

"For the purposes of the initial classification a date of release for each prisoner shall be determined which shall be calculated on the basis of a remission of ***one-third of the sentence*** *for any term of imprisonment exceeding one month."*
[emphasis added]

17. One may argue that the above provisions do not allow the Fiji Prisons and Corrections Service to calculate the remission based on the difference between the sentence and the non-parole period and therefore the present practice is contrary to the prevailing law.

18. It is pertinent to also note that there is no functioning parole system in place at the moment and the non-parole period fixed by the sentencing court is in fact considered as the minimum term to be served. Therefore, the proper way to deal with remission would be to release a prisoner on the release date determined based on sections 27(2) and other relevant provisions of the Prisons and Corrections Act or after serving the non-parole period, whichever comes later. However, this is a matter for the Fiji Prisons and Corrections Services as

highlighted in the case of ***Bogidrau v State*** [2016] FJSC 5; CAV0031.2015 (21 April 2016).

19. Therefore, the learned Magistrate has not erred in fixing the non-parole period in this case as the said period is 6 months less than the sentence. The third ground fails.

20. However, considering the findings on the first and the second grounds, this appeal against sentence should be allowed.

21. It follows that the sentence imposed by the learned Magistrate should be quashed and a sentence warranted by law should be passed by this court in terms of Section 256 (3) of the Criminal Procedure Decree 2009.

22. Accordingly, I now turn to determine the appropriate sentence.

23. My attention was drawn to the fact that in ***Sulua*** (supra), the court dealt with cannabis sativa that was in the form of dried leaves. The weight that was used to identify the four different categories in the majority decision of that case therefore is the weight of dried cannabis sativa leaves.

24. The quality and the state of the cannabis sativa involved in this case at the time the weight was recorded is different from that of ***Sulua***'s case. According to the Government Analyst Report available in the Magistrate Court Case Record in this case, the weight recorded was of 13 'green' plants of cannabis sativa. Therefore, the weight (2.68kg) mentioned in the charge against the appellant seems to include the weight of the stems and the weight of water content in the plants. Further, the report does not indicate whether or not the roots were excluded. Therefore, this weight of 2.68kg mentioned in the charge in this case cannot be used as the basis to decide the sentencing tariff in line with the ***Sulua*** case as the categorisation in the said case is based on the dry weight of cannabis sativa leaves. It is very unlikely that this offence would fall under the 3rd category in ***Sulua***'s case if the dry weight of the leaves in the 13 plants was taken into account.

25. In my view, if weight is to be used as the decisive factor in forming a general tariff for an offence under section 5 of the Illicit Drug Control Act in relation to cannabis sativa, it is necessary that regulations are also put in place pertaining to the nature and state of the drug at the time the weight considered for sentencing should be recorded.

26. Having considered all the circumstances, I am inclined to take the view that the categorisation set out in the case of ***Meli Bavesi v State*** [2004] FJHC 93; HAA 0027.2004 is the appropriate method to identify the seriousness of offending for the purpose of sentencing in cases of this nature that involves cultivation of cannabis sativa. According to the categorisation provided in ***Bavesi*** (supra), the tariff is determined based on the scale of the cultivation.

27. However, upon considering the majority decision in ***Sulua***, I find that the tariff identified in ***Bavesi***'s case in respect of the second and the third categories therein does not adequately reflect the need to rid society of the destructive presence of cannabis sativa. Therefore, I am of the view that the tariff established for the third category and fourth category in ***Sulua***'s case should apply to the second category and third category in ***Bavesi***'s case in relation to cultivation, respectively.

28. Accordingly, in my view, the tariff for cultivation of cannabis sativa should be as follows;

    a) The growing of a small number of plants for personal use by an offender on a non-commercial basis - 1 to 2 years imprisonment;

    b) Small scale cultivation for a commercial purpose with the objective of deriving a profit - 3 to 7 years imprisonment;

    c) Large scale commercial cultivation - 7 to 14 years imprisonment.

29. Section 5 of the Illicit Drug Control Act 2004 provides that a person who is convicted of an offence under that section is liable to a fine not exceeding

$1,000,000 or imprisonment for life or both. Therefore, a fine may also be imposed where necessary. It would be at the discretion of the sentencer to suspend the sentence where appropriate in terms of the provisions of section 26 of the Sentencing and Penalties Decree.

30. The quantity of the drugs involved in this case is 13 plants of cannabis sativa. According to the summary of facts, those plants were found in the appellant's banana plantation. Nine out of the thirteen plants were more than one metre in height according to the Government Analyst Report. In my view, there is a strong inference that the appellant was cultivating these plants for a commercial purpose. Therefore, I hold that this offending falls under the second category set out in ***Bavesi*** (supra).

31. Accordingly, the applicable tariff should be an imprisonment term between 3 to 7 years. I select 3 years imprisonment as the starting point of the appellant's sentence. The summary of facts does not reveal any aggravating factors. The appellant is given a discount of one-third of the sentence in view of his early guilty plea which brings the sentence to 2 years imprisonment. The fact that the appellant cooperated with the police and the fact that he has expressed remorse from the time he was interviewed under caution, as submitted by the respondent are taken into account as mitigating factors and the sentence is reduced by 06 months in view of those factors. Accordingly, the final sentence is 18 months imprisonment.

32. Section 18(3) of the Sentencing and Penalties Decree provides discretion to the sentencing court whether or not to fix a non-parole period if the sentence is more than 12 months but less than 2 years. Accordingly, I find it appropriate not to fix a non-parole period.

33. I note that the appellant has spent one month in remand. That period of one moth spent in custody shall be considered as time already served by the appellant pursuant to the provisions of section 24 of the Sentencing and Penalties Decree. Accordingly, the time remaining to be served is 17 months.

34. In the result;

a) The appeal is allowed;

b) The sentence imposed by the learned Magistrate on 11/12/2015 in Magistrate Court Nausori Criminal Case No. 104 of 2015 is quashed;

c) The said sentence is substituted with an imprisonment term of 18 months where the time remaining to be served in view of the time spent in custody is 17 months.

Vinsent S. Perera
JUDGE

Solicitor for the Appellant : Legal Aid Commission, Suva.
Solicitor for the State : Office of the Director of Public Prosecution, Suva.