IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 10 OF 2018
SIGATOKA MAGISTRATES COURT NO. 166 OF 2017

BETWEEN: STATE

APPELLANT

AND : SIMIONE NABENU

RESPONDENT

Counsel: Ms R. Uce for Appellant
Ms J. Singh for Respondent

Date of Hearing: 16th May, 2018
Date of Judgment: 25th June, 2018

JUDGMENT

Background

1. This is an appeal filed by the State against the sentence imposed on the Respondent by the learned Magistrate at Sigatoka in the Criminal case No. 166 of 2017.

2. The Respondent Simione Nabenu was charged with one count of Unlawful Cultivation of Illicit Drugs Contrary to Section 5 (a) (ii) of the illicit Drugs Control Act No. 9 of 2004.

3. The particulars of the offence read as follows:

> *"**SIMIONE NABENU** on the 24th day of March, 2017 at Sigatoka in the Western Division, without lawful authority cultivated 34 plants of Marijuana, an illicit drugs namely cannabis sativa or Indian Hemp, weighing 10 kg"*

4. On the 26th of September, 2017, the Respondent pleaded guilty to the charge on his own volition and admitted the summary of facts read in Court. The learned Magistrate convicted the Respondent as charged and, on the 21st of December, 2017, he sentenced the Respondent to 18 months' imprisonment.

5. The Appellant has filed this timely petition of appeal against the sentence imposed by the learned Magistrate on following two grounds.

Grounds of Appeal

6. The Appellant submits the following grounds of appeal against sentence:-

(a) The learned Magistrate erred in law by failing to take into account the period spent in remand by the Respondent prior to trial when sentencing the Respondent; and

(b) The learned Magistrate erred in law and in fact by imposing a sentence of 18 months' imprisonment which is manifestly lenient considering the offence charged and the weight of the drugs.

Law

7. In ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999) the Court of Appeal described the factors to be considered in deciding an appeal against sentence imposed by the court below. The court said;

> *"It is well established law that before this Court can disturb the sentence, the ppellant must demonstrate that the Court below fell into error in ex-ercising 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 in-ferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)."*

Analysis

Ground (a) - Time Spent in Remand

8. The Appellant submits that the learned Magistrate, when sentencing the Respondent, had erred in law by failing to take into account the period the Respondent spent in remand.

9. The provision of Section 24 of the Sentencing & Penalties Act 2009 (SPA) states:-

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender"*

10. According to the above provision, a sentencing court must regard any period spent by an offender in remand before trial as a period already served in prison. *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)]* Therefore, unless the court otherwise orders, the time spent in remand must be deducted from the final sentence.

11. In the present case, the Respondent was produced before the Sigatoka Magistrates Court on the 28th of March, 2017 and was remanded in custody for 14 days. This is reflected on page 1 of the Court Record. The Respondent was then produced in

Court on the 11th of April, 2017, on which date, he was granted bail by the learned Magistrate. Accordingly, the Respondent had spent 14 days in remand before pleading guilty to the charge.

12. There is nothing in the Sentencing Ruling to indicate that the time spent in remand by the Respondent was considered by the learned Magistrate.

13. The learned Magistrate has failed to comply with the provision of Section 24 and has erred in law. Therefore, there is merit to this ground of appeal.

Ground (b) - Whether the sentence is manifestly lenient

14. The Appellant submits that the learned Magistrate erred in law and in fact by imposing a sentence of 18 months' imprisonment which is manifestly lenient considering the offence charged and the weight of the drugs.

15. The maximum penalty for the offence of cultivation of illicit drugs under the Illicit Drugs Act 2004 is a fine not exceeding $1,000,000 or imprisonment for life or both. This was correctly highlighted by the learned Magistrate in paragraph 4 (page 1) of his Sentencing Ruling.

16. When identifying the applicable tariff, the learned Magistrate relied on the guideline established in ***Sulua v State*** [2012] FJCA 33; AAU0093.2008 (31 May 2012). This is outlined in paragraph 7 and 8 (page 3) of the Ruling on Sentence.

17. The Appellant argues that the learned Magistrate had fallen into error when he applied the tariff established in ***Sulua*** (supra), having disregarded the recent decision of ***Emori Dibi v State*** Criminal Appeal No. HAA 96 of 2017, where Madigan J had held that although ***Sulua*** (supra) establishes the tariff for possession and dealing in illicit drugs, it should not be used for sentences involving cultivation.

18. In ***Emori Dibi*** (supra), police officers found 23 marijuana plants growing on accused's farm and some marijuana seeds. The Government Chemist certified that the weight of the plants was 29.7 grammes and weight of the seeds was 2.7 grammes and in all a total of 32.4 grammes.

19. The Court in ***Emori Dibi*** *(supra),* having acknowledged that the offence of cultivation was a far more serious offence than mere possession, emphasized the need to apply a different tariff in cultivation cases notwithstanding the guideline established in ***Sulua***. The court sentenced the accused to 14 months imprisonment without a non-parole period.

20. To support the argument for harsher punishment for cultivation, Madigan J cited the English Court of Appeal judgment in ***Auton*** *[2011] EWCA Crim 76:* where the court observed:

> *"Cultivation is further widening and socializing the use of an illegal drug and making it available in the circumstances where the risk of detection is reduced.....*
>
> *"A defendant who embarks upon cultivation even exclusively for his own use is avoiding the risk of being caught buying on the open market and making available to himself large quantities of strong cannabis. The total drug available in the community is appreciably increased by that operation".*

21. Having cited ***Auton,*** (supra) His Lordship accepted the tariffs adopted in ***In re Koroi et al*** *HAR002-006.2012 (20 April)* and, insisted that guidelines set by Court of Appeal in ***Sulua*** (supra) should not be used for sentences involving cultivation.

22. It appears that the learned Magistrate would have been in a difficult position to apply the tariff set in ***In re Koroi et al*** and ***Emori Dibi*** (supra) to the case before him for following reasons.

23. Firstly, ***Sulua*** (supra) guideline was handed down by a three bench division of the Court of Appeal (one Judge dissenting). Pursuant to Section 6 (2) of the Sentencing and Penalties Act (SPA), a guideline judgment given by the Court of Appeal or the Supreme Court is binding on High Courts and Magistrates Courts when **considering cases to which the guideline applies.** Section 6(2) of the SPA reads as follows:

> *" A guideline judgment given by the Court of Appeal or the Supreme Court shall be taken into account and applied by the High Court and the Magistrates Court when considering cases to which the guideline judgment applies.*

24. Furthermore Section 4(2)(b) of the SPA provides that the courts in sentencing offenders must have regard to current sentencing practice and the terms of any applicable guideline judgment.

25. Secondly, the tariff set in ***In re Koroi et al*** (supra) and adopted in ***Emori Dibi*** (supra) which has been relied upon by the State in this appeal was pronounced by the High Court. Pursuant to section 6 (3) of the SPA, a judge of the High Court on hearing an appeal from a sentence given by a Magistrate, on its own initiative or on an application made by a party to the appeal, is of course empowered to give a guideline judgment, or to review a guideline judgment that has already been made by the High Court under Section 6(3) of the SPA. However this section does not empower a judge of the High Court to review a guideline judgment that has been made by the Court of Appeal.

26. Under Section 6(4) of the SPA, the Magistrates are required to follow a guideline judgment given by the High Court only made under Section 6(3) of the SPA. It cannot be said that the tariff in ***Emori Dibi*** (supra) has been made in accordance with Section 6(3) because in that case, the High Court had not reviewed a guideline judgment that has already been made by the High Court. Therefore a Magistrate is bound to apply the tariff set by ***Sulua*** (supra) until it is overturned by the Court of Appeal itself or by the Supreme Court **unless he can show that the guideline judgment is not applicable to the case before him.**

27. I am of the view that the learned Magistrate has not fallen into an error in selecting the applicable tariff established by the Court of Appeal in ***Sulua*** because, on the face of it, the tariff applies to cultivation offences.

28. Thirdly, the learned Magistrate would have found it practically difficult to follow the guideline proposed in ***In re Koroi et al*** (supra) and ***Emori Dibi*** (supra) because it provides for cases involving both possession and cultivation, two separate types of offending. No guidance is given for purely cultivation cases except for cases involving cultivation of no more than 5 plants.

29. Madigan J in ***Emory Dibi*** (supra) adopted the tariff set in ***Koroi*** (supra). His Lordship at paragraph 19 states:

"For ease of reference those tariffs as suggested by the UK Sentencing Council and adopted by this Court are :

(i) Possession of up to 100 grammes or cultivation of no more than 5 plants, non- custodial sentences at the discretion of the Court.

(ii) Possession of 100-1000 grammes and cultivation of 5-50 plants; custodial sentences in the range of one year to six years

(iii) Possession of more than 1000 grammes and cultivation of more than 50 plants, custodial sentences of six years or more

(iv) Possession of very large quantities (5kg or more) custodial sentences in the range of 10 to 15 year"

30. In the case under appeal, the Respondent pleaded guilty to and was convicted only for cultivation and not for both possession and cultivation although the weight of the cannabis plants seized is also included in the charge.

31. It should be noted that in formulating the tariff in ***Koroi***, (supra) the court has amalgamated two types of offending (possession and cultivation) and, except for limb (i), other limbs can only be applied when sentencing both possession and cultivation. For example, sentences in the range of one year to six years under limb (ii) can be imposed only where a conviction has been recorded for both possession and cultivation. Therefore, I do not find any wrong on the part of the learned Magistrate in not applying the tariff set in ***Koroi*** *(supra).*

32. Now I turn on to the ***Sulua***, (supra), the guideline judgment relied on by the learned Magistrate to sentence the Respondent. The State argues that the wrong application of tariff established in ***Sulua*** by the learned Magistrate has resulted in a manifestly lenient sentence, disproportionate to the offence the Respondent had committed.

33. In ***Sulua*** (supra) following four categories were identified and tariffs were established accordingly in respect of offences involving possession of marijuana or *cannabis sativa.* In summary, the four categories are as follows: (paragraph 115)

(i) Category 1: possession of 0 to 100 grams of cannabis sativa - a non-custodial sentence to be given, for example, fines, community service, counselling, discharge

with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.

(ii) Category 2: possession of 100 to 1,000 gram of cannabis sativa. Tariff should be a sentence between 1 to 3 years imprisonment, with those possessing below 500 grams, being sentenced to less than 2 years, and those possessing more than 500 grams, be sentenced to more than 2 years imprisonment.

(iii) Category 3: possessing 1,000 to 4,000 grams of cannabis sativa. Tariff should be a sentence between 3 to 7 years, with those possessing less than 2,500 grams, be sentenced to less than 4 years imprisonment, and those possessing more than 2,500 grams, be sentenced to more than 4 years.

(iv) Category 4: possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment.

34. Although the Court of Appeal was called upon to review the legality and appropriateness of the sentence below in a case involving 'possession', in setting the tariff, it extended the ambit of the guideline to other forms of offending under Section 5 (a) of the Illicit Drugs Control Act 2004 (IDCA). The court at paragraph 117 held:

"Section 5(a) of the Illicit Drugs Control Act 2004 treated the verbs "acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug" equally. All the verbs are treated equally. In other words, all the offending verbs or offending actions are treated equally. "Supplies, possesses, manufactures and cultivates" are treated equally, and none of the offending actions are given any higher or lower standing, as far as section 5(a) of the Illicit Drugs Control Act 2004 was concerned. It follows that the penalties applicable to possession, must also apply to the offending verbs of "acquire, supplies, produces, manufactures, cultivates, uses or administers". That is the will of Parliament, as expressed in the words of section 5(a) of the Illicit Drugs Control Act 2004. Consequently, the four categories mentioned above, apply to each of the verbs mentioned in section 5(a) of the 2004 Act mentioned above. The weight of the particular illicit drug will determine which category the case falls under, and the applicable penalty that will apply. It is also suggested that, the application of the four categories mentioned in paragraph 115 hereof to section 5(a) of the Illicit Drugs Control Act 2004, be extended to the offending verbs or offending actions in section 5(b) of the Illicit Drugs Control Act 2004. This will introduce some measure of consistency in how sentences are passed for offendings against section 5(a) and 5(b) of the Illicit Drugs Control Act 2004.

This will enhance the objective and purpose of the 2004 Act, as highlighted in paragraph 111 hereof.

35. The position of the State is that, given the weight of the plants seized by police, which is 10 k.gs, the Respondent's offending should fall under category *(vi)* above and his sentence should be within the tariff range of 7-14 years' imprisonment.

36. In light of the judicial pronouncement above, it can be argued that the learned Magistrate, in sentencing the Respondent, was bound to apply the guideline judgment made by the Court of Appeal because the charge specified the weight of the Indian hemp plants seized by police.

37. I am strongly of the view that the application of ***Sulua*** (supra) to cultivation offences, particularly to the case presented before the learned Magistrate would result in a highly disproportionate sentence to the offence committed thereby causing a grave injustice to the Respondent.

38. Although the weight of green plants was 10 kgs, the police had uprooted only 34 green plants. The learned Magistrate in his sentencing process appears to have appreciated this awkward situation and ended up coming to a lenient sentence. However he has failed to give a valid reason to justify his sentence that had fallen far below tariff upon which he relied.

39. The Respondent was convicted for having cultivated 34 plants of Marijuana, /cannabis sativa, weighing 10 kgs. According to Sulua guideline, his sentence should fall under category 4, for which a sentence between 3 and 7 years imprisonment period is prescribed. However, the sentence imposed by the learned Magistrate is 18 months imprisonment, far below the established tariff.

40. In the majority decision of ***Sulua*** (supra), at paragraph 188. The Court observed that:

"Categories numbers 1 to 4 merely sets the tariff for sentence, given the weight of the illicit drugs involved. The actual sentence will depend on the aggravating and mitigating factors, in the particular circumstances of the case, and it may well fall below or above the set tariff".

41. It is clear that, by this paragraph, a wide discretion is given to the sentencer in coming to the final sentence. However after the decision by the Court of Appeal in ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013) it is well settled that 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. The Court observed:

> *"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".* [paragraph 27].

42. The learned Magistrate had not given any reason to justify his sentence which fell far below the established tariff. He had merely quoted paragraph 188 of the ***Sulua*** (majority) Judgment where Temo JA had observed: *"The actual sentence will depend on the aggravating and mitigating factors, in the particular circumstances of the case, and it may well fall below or above the set tariff".* However, none of the mitigating factors recorded by the learned Magistrate justifies such a lenient sentence.

43. In the process of establishing the tariff in ***Sulua*** *(supra),* the Court had considered about 50 previous cases involving possession of *cannabis sativa.* Temo JA, with the concurrence of K.P. Fernando JA, extended the ambit of the tariff established for possession to other types of offending under Section 5(a) and stated:

> *"Section 5(a) of the Illicit Drugs Control Act 2004 treated the verbs "acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug" equally. All the verbs are treated equally. In other words, all the offending verbs or offending actions are treated equally. "Supplies, possesses, manufactures and cultivates" are treated equally, and none of the offending actions are given any higher or lower standing, as far as section 5(a) of the Illicit Drugs Control Act 2004 was concerned.*

44. It appears that it is on this very basis that the tariff established for possession was extended to other types of offending under Section 5(a) of the IDCA, including cultivation.

45. The Section covers a wide range of illicit drugs from less harmful drugs like *cannabis sativa* to most dangerous hard drugs like heroine and also a wide range of criminal acts such as acquisition, supply, possession, production, manufactures, cultivation, etc. Therefore, the legislature in its wisdom has prescribed the maximum sentence of life imprisonment, leaving the discretion with the judiciary to select the sentence appropriate to each individual case, considering the nature of the drug and circumstances of the case.

46. It is my considered view that possession and cultivation of cannabis are two distinct offences and therefore should be treated differently when imputing the criminal liability and punishment. As correctly observed by Madigan J in ***Emori Dibi*** (supra), the offence of cultivation of *cannabis sativa* is a far more serious offence than that of mere possession, and therefore the need to apply a different tariff in cultivation cases is highly warranted notwithstanding the fact that both offences carry the same maximum penalty under the IDCA, that is life imprisonment.

47. However, as I emphasized earlier, this court is not the right forum to review a tariff established by the Court of Appeal and set a new tariff for cultivation offences. Having said that, for the sake of justifying the decision I am reaching in the present appeal and also for future references, it is apposite to delve into the sentencing approach taken by the courts in the United Kingdom in cases concerning cultivation of *cannabis* plants in the context of UK Sentencing Council Guidelines.

48. In England, cultivation of cannabis plant is recognized as a distinct offence under Misuse of Drugs Act 1971 (section 6(2)) and carries a maximum sentence of 14 years' imprisonment, in the tariff range of a discharge to 10 years' imprisonment. It should be noted that the maximum sentence prescribed for possession is far below the maximum sentence prescribed for cultivation offences.

49. The courts in the UK are supposed to determine the offender's culpability (role) and the harm caused (output or potential output) with reference to the criteria provided in the guideline. These criteria should be used to determine the starting point or gravity of the offence at step or tier one in the sentencing process. In assessing culpability, the sentencer should weigh up all of the factors of the case to determine

role played by the offender. Where there are characteristics present which fall under different role categories, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

50. In assessing harm, output or potential output is determined by the weight of the product or number of plants or scale of operation. For production offences, **purity is not taken into account at step 1 but is dealt with at step 2 in determining aggravation and mitigation.**

51. Culpability demonstrated by offender's role is characterized under three headings, leading role, significant role and lesser role. It is possible in some cases one or more of these characteristics demonstrate the offender's role. (It is specifically stated that, these lists are not exhaustive).

Leading role:

- directing or organising production on a commercial scale;
- substantial links to, and influence on, others in a chain;
- expectation of substantial financial gain;
- uses business as cover;
- abuses a position of trust or responsibility.

Significant role:

- operational or management function within a chain;
- involves others in the operation whether by pressure, influence, intimidation or reward;
- motivated by financial or other advantage, whether or not operating alone;
- some awareness and understanding of scale of operation.

Lesser role:

- performs a limited function under direction;
- engaged by pressure, coercion, intimidation;
- involvement through naivety/exploitation;
- no influence on those above in a chain;
- very little, if any, awareness or understanding of the scale of operation;
- if own operation, solely for own use (considering reasonableness of account in all the circumstances).

52. Category of harm - indicative output or potential output (upon which the starting point is based):

> Category 1– operation capable of producing industrial quantities for commercial use;
>
> Category 2- operation capable of producing significant quantities for commercial use;
>
> Category 3– 28 plants; (with assumed yield of 40g per plant)
>
> Category 4 – 9 plants (domestic operation); (with assumed yield of 40g per plant)

53. It should be noted that when the Court established the tariffs in ***Sulua*** (supra) it had only considered the harm factor and the application of the tariff is intended purely on the basis of the quantity or the weight of the illicit drug. At paragraph 188, the Court observed:

> *"Categories numbers 1 to 4 merely sets the tariff for sentence, given the weight of the illicit drugs involved. The actual sentence will depend on the aggravating and mitigating factors, in the particular circumstances of the case, and it may well fall below or above the set tariff".*

54. The Court had neither considered the culpability factor which is the main determining factor in the UK Sentencing Council Guidelines nor does it provide a clear guidance in terms of number of plants or scale of operation where fresh green plants have been uprooted and seized.

55. Having considered the UK Sentencing Council Guidelines it is my considered opinion that the proper focus is the degree of involvement the offender might have in the plantation, or scale of operation and the nature of the drug involved.

56. D.A. Thomas in his 'principles of sentencing' at page 183 talks of the culpability of drug offenders in this way:

"For the purposes of assessing culpability, offenders are divided into categories according to whether they are users or suppliers and according to the nature of the substance involved"

57. Cannabis is a depressant drug, which means it slows down messages travelling between the brain and body. When large doses of cannabis are taken, it can also produce hallucinogenic effects. Cannabis is usually smoked and the harmful effect lies in Marijuana – the **dried plant** that is smoked. This is the most common form of consumption. Hashish is also produced from the **dried plant** resin. It takes about an hour to feel the effects of eating cannabis, which means it's easy to have too much. If it's smoked, the effects are usually felt straight away. (source: Alcohol and Drug Foundation, Australia thttps://adf.org.au/drug-facts/cannabis/)

58. Having considered this lesser degree of harmful effect of green plants, cannabis in my opinion, should be classified for sentencing purposes into two broader categories on the basis whether it was in the dry form or in the green foliage. It has also to be appreciated that a green plant shrinks and reduces its weight in the process of dehydration and, therefore, sentencing a planter on the basis of a tariff designed for dry plants will produce awkwardly unjust results.

59. In the UK Sentencing Guidelines, in assessing the harm factor, output or potential output is determined by the weight of the product or number of plants/scale of operation. In case of the first two Categories the courts are supposed to consider scale of operation, whether the plantation is capable of producing industrial quantities or significant quantities for commercial use. Categories 3 and 4 which concern small scale plantations output or potential output is determined by the number of plants with assumed yield of 40g per plant.

60. The Court in *Sulua* (supra) dealt with a case of <u>possession</u> of *cannabis sativa* that was in the form of <u>dried leaves</u> (marijuana). Identification of the four different categories (in the majority decision) is based on the weight of dried leaves and sentencing trigger points are based on the amount (weight) of illicit drugs. Accordingly, the sentencing tariffs had been set up purely on the basis of the weight of dried plants.

61. Having considered all these aspects, it is my considered view that the proper focus is the degree of involvement the offender might have in any commercial aspect of

the drug cultivated. Therefore, it is time to recognise that the true culpability of these offenders lies in their degree of involvement and profit from this offending.

62. I am in full agreement with the view held by Vincent Perera J in the recent judgment of ***Sailosi Tuidama*** HAA 29 of 2016 where His Lordship observed:

> *"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.*

63. His Lordship further elaborated on the difficulty in applying the tariff established in ***Sulua*** to the cultivation case before him in following terms: [paragraphs 8]:

> *"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.*

64. Having considered all the circumstances, Vincent Perera J took 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 involving cultivation of *cannabis sativa*.

65. In ***Bavesi v The State*** [2004] FJHC 93; HAA0027.2004 (14 April 2004), Winter J after an in depth examination of New Zealand case law held:

> *"If the focus remains the same ie the degree of involvement or preparation for commercial gain, then the Fiji and New Zealand cases sit comfortably together. The decree "trigger points" must be kept in mind. However, it will after logically*

following that the amount of drug attributed to the offenders use will coincide with the degree of involvement which will coincide with the maximum available range of penalty. The more you've got, the more you get is perhaps another way of establishing at the sentencing principles at play.

In line with another New Zealand decision R v Terewi [1999] 3 NZLR 62 (CA, Blanchard, Anderson and Robertson JJ). I now return to the issue of categorization of these offences. This type of offending can be divided into categories with the ultimate concern being the offenders degree of involvement in the drug supply process. The 3 broad categories might be:

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.

Category 2 – Small scale cultivation of cannabis plants or possession for a commercial purpose with the object of deriving 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.

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.

I emphasise that these indications relate to starting points before aggravating features (like previous drug offending) or mitigating features (like early guilty pleas) are applied. In addition there will of course have to be a focus on the quantities of drugs involved and their relationship to the 3rd schedule of the decree, not forgetting Pickering (supra) and the disproportionality test".

66. Upon considering the majority decision in ***Sulua*** (supra), the court in ***Sailosi Tuidama*** (supra) found that the tariff identified in ***Bavesi's*** case in respect of the second and the third categories did not adequately reflect the need to rid society of the destructive presence of *cannabis sativa*. Therefore, the court substituted the tariff established for the third and fourth categories with Sulua's categorization and modified the second and third categories in Bavesi's case in line with Sulua and introduced a new tariff for cultivation of *cannabis sativa* which I quote:

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.*

67. In ***Meli Bavesi*** (supra), the tariff is determined on the basis of the scale of the operation or cultivation and to a great extent it agrees with the UK Sentencing Council Guidelines. Its main focus is the degree of involvement the offender might have in any commercial aspect of the drug cultivated. It does not create awkward situations which tariff established in *Sulua* will create in sentencing the offenders for cultivation.

68. However, Madigan J in ***Emory Dibi*** (supra), criticized the application of the tariff established in *Meli Bavesi* (supra) which his Lordship termed as a "discredited" decision. His Lordship's criticism appears to be based on three grounds, namely, that it is harsh for small scale cultivation offending, that ***Meli Bavesi*** (supra) was decided before the IDCA was decided in 2004, and that it cannot be relied upon because it offends the principle laid down by the Supreme Court in ***Vakalalabure v State*** [2006] FJSC8; CAV0003U.20045 (15 June 2006), that *"a person must not be punished except for offences for which he has been convicted"*.

69. I agree with only the first ground above, but not with other two grounds. The tariff established in ***Meli Bavesi*** (supra) proposes a short prison term, staring point of which will be 1 to 2 years, even for first offenders who are small scale cannabis planters for personal use.

70. The therapeutic and recreational value of cannabis are increasingly being recognized and, in nearly 14 developed jurisdictions, Canada being the last, have now decriminalized the use of this drug for those purposes. Therefore, I agree that the first category tariff proposed in ***Meli Bavesi*** (supra) for first offenders who are planters of small number of cannabis plants for personal use is harsh. Therefore, I prefer to adopt the tariff proposed by Madigan J with small modifications for such offending.

71. I find that the second objection is without merit because ***Meli Bavesi*** (supra) addresses many issues that the courts will find in applying ***Sulua*** to cultivation offending although it ***(Meli Bavesi)*** was decided before the IDCA came into being. Winter J had strenuously analyzed the rationale behind sentencing in drug offending and examined nearly 17 New Zealand decisions before coming to his decision which he considered good law. It also agrees to a greater extent with the UK Sentencing Council Guidelines.

72. I also do not find that ***Meli Bavesi*** (supra) offends the principle laid down by the Supreme Court in ***Vakalalabure*** (supra) The accused in that case was convicted of taking engagements in the nature of an oath purporting to bind himself to commit treason. The offence did not require proof that the accused committed an act of treason. The trial judge imputed a higher culpability on the accused for setting of the new government after the lawful government was taken hostage by George Speight in 2000. After citing the English and Australian authorities, the Supreme Court concluded that the petitioner was sentenced for treasonable conduct for which he was not charged or convicted.

73. In ***Tirai v State*** [2009] FJCA 13; AAU 0023.2009 (23 September 2009), a more relevant case to the present appeal, the accused was convicted of being found in possession of 617.6 grams of cannabis sativa. In sentencing the accused the learned Magistrate erroneously took into account that the accused had admitted dealing in drugs when there was no such admission made by the accused. Apart from the quantity there was no evidence direct or circumstantial to show that the accused had possessed the drugs for supply. The Court of Appeal reached the following conclusion at paragraph [18]:

> *"We are satisfied that the Learned Magistrate erred in increasing the sentence of the appellant by three months to reflect the fact that the appellant was a supplier of drugs. The appellant was not charged with the offence of supply of an illicit drug. The prosecution did not lead any evidence to show the appellant was a supplier of an illicit drug".*

74. In ***The King v Bright*** [1916] 2 KB 441 Darling J, giving the judgment of the Court of Criminal Appeal, said at 444-5:

> *"...the judge...must not attribute to the prisoner that he is guilty of an offence with which he has not been charged - nor must he assume that the prisoner is guilty of*

some statutory aggravation of the offence which might, and should, have been charged in the indictment if it had been intended that the prisoner was to be dealt with on the footing that he had been guilty of that statutory aggravation."

75. Marshall JA who wrote the minority decision in ***Sulua*** (supra) reached the same conclusion that the trial judge erred in taking into account as an aggravating factor that the drugs (cannabis) were intended for supply when the accused was charged and convicted for possession only. Temo JA who wrote the majority decision (with whom K.P. Fernando JA concurred) also agreed that the sentencer below had fallen into an error in sentencing the accused on the basis the drugs were possessed for supply. Their Lordships however, concluded that the error was not fatal because the maximum penalty prescribed for possession and supply is the same that is life imprisonment.

76. When looking at these authoritative judicial pronouncements quoted above, there can be no doubt that it is a fundamental principle of our criminal law that a person must not be punished except for offences for which he has been convicted.

77. However I believe ***Meli Bavesi*** (supra) does not offend that principle. As far as I can see, Gounder J in ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013), having disagreed with the finding in ***Sulua*** (supra), has addressed the third issue raised by Madigan J in ***Emory Dibi*** (supra). Although the Court in ***Koroivuki*** (supra) dealt with an offence concerning possession of *cannabis,* the principle laid down therein is equally applicable *mutatis mutandis* to cultivation offending. His Lordship at paragraphs 22, 23 observed:

"I respectfully differ in opinion expressed in Sulua to the extent it states that the court cannot take into account the purpose for which the drugs were in possession in sentencing the offender. Unlike the English statute, the Illicit Drugs Control Act 2004 does not prescribe any form of aggravation regarding the intention of the offender for the offence of "possession". So there is no legal obligation on the State to include aggravation in the charge.

If there is evidence led by the prosecution regarding the purpose for which the offender had the drug in his possession, then that purpose becomes relevant in assessing the culpability of the offender. If the drug is of a small quantity and was intended for personal use, the court can take that into account in reducing the offender's culpability when passing sentence. If the drug was possessed with the intention to keep for another, that intention is

relevant in assessing the offender's culpability and role in the joint enterprise. If the drug is intended for distribution or sale, a higher culpability is imputed on the offender. The list is not exhaustive. Further, the court can impute various degrees of culpability based on commercial aspects involved. If the drug is kept in possession for sale, the degree of culpability will be much higher than if the drug was possessed for supply for no remuneration but as a favour for another. The criminality that is involved in each case will depend on the evidence led by the prosecution or facts admitted by the offender."

[24] In the present case it was open on the evidence for the trial judge to impute the commercial use that the appellant had intended to put the drugs to, as an aggravating factor to enhance the sentence. No error of law or fact has been shown in the trial judge's consideration of the intention of the appellant in possessing the drugs. This ground fails.

78. The statement quoted above not only concurs with the UK Sentencing Guidelines but also with the principles laid down in ***Meli Bavesi*** (supra). Even for cultivation cases, the Illicit Drugs Control Act 2004 does not prescribe any form of aggravation regarding the intention of the offender for the offence of "cultivation". So there is no legal obligation on the State to include aggravation in the charge. Therefore, the sentencer in coming to the final sentence in large scale operations/ cultivations can take into account the circumstances of the offending, weight and/ or number of plants either to aggravate or mitigate the sentence.

79. In Fiji the intention of the planter might be readily gauged from the surrounding circumstances such as the extent of cultivation, weight or number of plants, number of people involved, acknowledgments of dealing, preparation for sale or distribution etc.

80. Therefore, having distinguished the facts in *Sulua,* I prefer to adopt the tariff proposed by Perera J in ***Sailosi Tuidama*** (supra) for the offence of cultivation of *cannabis sativa* with slight modifications to accommodate Madigan J's concern for planters of small number of *cannabis* plants. Accordingly, the tariff for cultivation of *cannabis sativa* should be as follows;

a The growing of a small number of plants (less than 9 plants with assumed yield of 40g per plant) for personal use by a first offender - non- custodial sentence or a fine at the discretion of the court.

b Small scale cultivation (10 to 30 plants with assumed yield of 40g per plant) for a commercial purpose with the objective of deriving a profit - 1 to 3 years imprisonment, with or without a fine at the discretion of the court.

c Medium scale commercial cultivation (30 -100 plants)- 3 to 7 years imprisonment with or without a fine at the discretion of the court.

d. Large scale cultivation capable of producing industrial quantities for commercial use (more than 100 plants) 7 - 14 years imprisonment with or without a fine at the discretion of the court.

At step two of the sentencing process the sentencing court can take into account the weight of the green plants to aggravate or mitigate the sentence.

81. Having proposed the above tariff for offences involving cultivation of cannabis sativa, I now move on to consider the appropriateness of the sentence imposed by the learned Magistrate.

82. The question to be answered in this appeal is whether the learned Magistrate had fallen into error by imposing a manifestly lenient sentence quite disproportionate to the offence the Respondent had committed. As I have noted above, the learned Magistrate had failed to give any valid reason to deviate from the tariff set in the guideline judgment he relied upon. When considered the weight (10 kgs), it can be assumed that the plants uprooted comprised fully grown ones. According to the report filed before the learned Magistrate, they were in the range of 32-213 cm in height. I find the sentence of 18 months imprisonment is manifestly lenient to the offending. Therefore, I quash the sentence of the learned Magistrate at Lautoka and sentence the Respondent afresh.

83. The quantity of the drugs involved in this case is 34 plants of cannabis sativa. The weight is 10 kgs. When considering the circumstances of the offending, and the scale of operation, it can be inferred that the Respondent was cultivating these plants for a commercial purpose. Even the learned Magistrate, when recording

aggravating factors, had found that the Respondent had a commercial purpose in his mind. In the circumstances of the case, I find that the offending should fall under the category C above. Accordingly, the applicable tariff should be an imprisonment term between 3 to 7 years.

84. Considering the culpability and harm factor of the offending, I select 5 years' imprisonment as the starting point in the middle range. The summary of facts does not reveal any aggravating factors. I do not find the fact that the offence had been committed despite several public appeals and warnings from courts and expressed through social media all over the country aggravating the offence. The Respondent is a first offender. He pleaded guilty at the first available opportunity.

85. Having considered Respondent's clear record and personal circumstances, I deduct 6 months. After making this adjustment, he is given a full discount of one-third of the sentence in view of his early guilty plea. Accordingly, Respondent's sentence is 3 years' imprisonment.

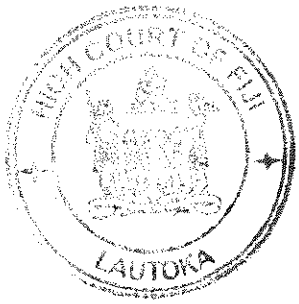
86. I note that the Respondent had spent 14 days in remand. That period of two weeks spent in custody is considered as time already served by the Respondent pursuant to the provisions of section 24 of the Sentencing and Penalties Act.

87. Accordingly, the final sentence for the Respondent is 2 years 11 months and 2 weeks' imprisonment from the date of the original sentence which is 21st December, 2017.

88. Respondent is a first offender with a potential of rehabilitation. Considering Section 18 (1) of the Sentencing and Penalties Act, and principles enunciated in ***Tora v State*** [2015] FJSC 23; CAV11.2015 (22 October 2015), I impose a non-parole period of 2 years.

89. Following Orders are made:

i The appeal is allowed;
ii The sentence imposed on 21st December, 2017 by the learned Magistrate at Sigatoka is quashed;
iii The Respondent is sentenced afresh to 2 years', 11 months and 2 weeks imprisonment with effect from 21st December, 2017 .
iv The Respondent is eligible for parole after serving 2 years in prison.



Aruna Aluthge
Judge

At Lautoka
25th June, 2018

Counsel:

- **Office of the Director of Public Prosecution for Appellant**
- **Legal Aid Commission for Respondent**