IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 355 of 2016

[CRIMINAL JURISDICTION]

STATE

V

ARISI KAITANI

Counsel	:	Ms. S. Lodhia and Mr. Z. Zunaid for State Mr. T. Ravuniwa for Accused
Hearing on	:	25th June – 06th July 2018
Summing up on	:	09th July 2018
Judgment on	:	10th July 2018
Sentenced on	:	16th July 2018

SENTENCE

1. Arisi Kaitani, you stand convicted of the following offence after trial;

Statement of Offence

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: contrary to section 5(a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

ARISI KAITANI AND ATIKINI MATAKOROVATU on the 15th day of September 2016 at Kadavu in the Eastern Division, unlawfully cultivated 7975.7 grams of an illicit drug known as cannabis sativa.

2. On 15/09/16 you were arrested by the police during a drug raid while you were uprooting (*cannabis sativa*) marijuana plants with another in a farm at Kadavu. The police seized 824 plants of marijuana from the said farm.

3. The maximum penalty for committing an offence under section 5 of the Illicit Drugs Control Act 2004 ("Illicit Drugs Control Act") is a fine not exceeding $1,000,000 or imprisonment for life or both.

4. In the case of ***Tuidama v State*** [2016] FJHC 1027; HAA29.2016 (14 November 2016) this court decided to apply the following tariff for the offence of unlawful cultivation of illicit drugs based on the judgment in the case of ***Meli Bavesi v State*** [2004] FJHC 93; HAA 0027.2004;
    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; [Cultivating up to 10 plants]
    b) Small scale cultivation for a commercial purpose with the objective of deriving a profit - 3 to 7 years imprisonment; [Cultivating more than 10 plants up to 100 plants]
    c) Large scale commercial cultivation - 7 to 14 years imprisonment. [Cultivating more than 100 plants]

5. In the recent judgment in the case of ***State v Nabenu*** [2018] FJHC 539; HAA10.2018 (25 June 2018) His Lordship Justice Aluthge suggested the following tariff after considering a number of case including ***Tuidama*** (supra);
    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.

6. I agree with Aluthge J's categorization in ***Nabenu*** (supra) where His Lordship has made certain amendments to what was proposed in ***Tuidama*** (supra). For the purpose of uniformity, I would recommend the judgment in ***Nabenu*** (supra) to be regarded as the guideline judgment by the Magistrate Court in terms of section 6(3) of the Sentencing and Penalties Act 2009 with regard to sentencing offenders for the offence of cultivation of *cannabis sativa*.

7. However, I wish to highlight two concerns I have with regard to the sentencing tariff proposed in ***Nabenu*** (supra) for the purpose of being considered in an appropriate case.

8. First concern is not having a term of imprisonment as the tariff for the first category and the fact that it is applicable only for first offenders. I would consider cultivation of *cannabis sativa* plants to be more serious than possession. In my view, it may not be proper to have a non-custodial sentence as the penalty in every case an accused is found to be cultivating less than 9 plants even though the accused is a first offender. According to the definitive guideline issued by the Sentencing Council of the United Kingdom for drug offences, the assumed yield per plant of *cannabis sativa* is 40grams. Accordingly, the assumed yield of 8 plants would be 320grams. If an accused had been found to be cultivating 8 plants for a number of years, a non-custodial sentence may not be appropriate.

9. On the other hand, if the same accused was charged for possession instead of cultivation and if the weight of the dried leaves of those plants in fact matched the estimated yield of 320grams, then his sentence would fall under the second

category pronounced in the majority decision in ***Sulua v State*** [2012] FJCA 33; AAU0093.2008 (31 May 2012) where the sentencing tariff is 1 to 3 years.

10. The second concern I have is on using weight as an aggravating or a mitigating factor when sentencing an accused for cultivation. Weight of a plant may give an indication as to how old the plant was at the time it was uprooted. That may be relevant in determining how long the accused had been cultivating. But, I would be careful in taking into account the weight of the plants seized as a clear indicator of that factor for a number of reasons. For an example, if there were two old plants with relatively big trunks that weigh 4kg along with 10 small plants that had a total weight of 400g, the total weight of 4.4kg alone in my view, would not give a proper indication on how long the accused had been cultivating the 12 plants. On the other hand, the fact that the plants that are relevant to a charge of cultivation were seized before or after the leaves were plucked, should not have a bearing on the culpability of the offender for cultivating those plants. The following information provided by the prosecution in the sentencing submissions further illustrates, why a sentencing court should not rely on weight when sentencing an offender for cultivation;

Number of plants	Weight (kg)	Case
824	7.98	State v Matakorovatu (HAC355/16)
484	160.60	State v Waisake Kaloulia and Naqeleca (HAC64/15)
228	26.40	State v Inoke Ratu (HAC83/15)
127	8.60	State v Lemeki Tbusoi (HAC 156/17)
94	41.00	State v Mara Vuloaloa (HAC3/15)
74	4.34	State v Dukubure (HAC76/17)
34	10.00	State v Nabenu (HAA10/18)
13	2.60	Tuidama v. State (HAA29/16)

11. Coming back to your case, you have been involved in cultivating 824 plants with another. Your sentence should therefore be within the range of 7 to 14 years imprisonment as you have been engaged in a large scale commercial cultivation which is more than 100 plants. 100 plants would have the assumed yield of 4000grams and therefore, this tariff is in line with ***Sulua*** (supra). It is pertinent to note that the assumed yield of 824 plants is 32960 grams or 32.96 Kg.

12. I would select 7 years imprisonment as the starting point of your sentence.

13. According to the categorisation, I selected the starting point based only on the fact that you have cultivated more than 100 plants and did not take into account the fact that you cultivated 824 plants. In my view, the number of plants you have cultivated beyond the 100 plants which is used to identify the tariff should be taken into account as an aggravating factor since that was not considered in selecting the starting point.

14. In your case, you have cultivated 724 plants more than the minimum number of plants stipulated for category 4. Considering the said quantity of plants which clearly suggests that you have been involved in a very large scale cultivation but also bearing in mind that another person was also involved in this cultivation, I would add 11 years to your sentence. It is pertinent to note that, since cultivating 100 plants warrants a minimum of 7 years imprisonment according to the relevant tariff and if I am to add 7 years for each set of 100 plants you have cultivated; that would bring the term of imprisonment to 56 years. I decided to mention this, merely for you to understand the seriousness of the offence you have committed.

15. The evidence in this case does not reveal any other aggravating factor. Your sentence now is 18 years imprisonment.

16. You are 27 years old. In your mitigation, your counsel submitted that you are a first offender and that you have cooperated with the police. Your counsel says that you are remorseful and you seek forgiveness from this court. It was also submitted that you have a sick child who had suffered a stroke and that you are looking after your elderly father. These two factors cannot be considered as mitigating factors to reduce your sentence.

17. Considering your mitigating factors, I would deduct 02 years of your sentence. Accordingly, your sentence for cultivating 824 plants of *cannabis sativa* plants is 16 years imprisonment. I order that you are not eligible to be released on parole

until you serve 12 years of your sentence pursuant to the provisions of section 18 of the Sentencing and Penalties Act 2009. The fact that the cultivation you have been involved in was found to be a very large scale cultivation, justifies the sentence outside the tariff. On the other hand your sentence appears to be lenient in view of the sentence of 20 years imposed (it became 19 years after deducting the remand period) for cultivating 484 plants of *cannabis sativa* in ***State v Kaloulia*** [2017] FJHC 47; HAC064.2015S (31 January 2017).

18. I note that you have spent around 01 year and 10 months in custody in relation to this case. The period you were in custody shall be regarded as a period of imprisonment already served by you in view of the provisions of section 24 of the Sentencing and Penalties Act. I order that the period to be considered as served should be 01 year and 10 months.

19. In the result, you are sentenced to an imprisonment term of 16 years with a non-parole period of 12 years. Considering the time spent in custody, the time remaining to be served is as follows;

    Head Sentence – 14 years and 02 months

    Non-parole period – 10 years and 02 months

20. Thirty (30) days to appeal to the Court of Appeal.

HIGH COURT OF FIJI SUVA

Vinsent S. Perera
JUDGE

Solicitors;

Office of the Director of Public Prosecutions for State.
MIQ Lawyers, Suva for Accused.