IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 022 OF 2018S

BETWEEN: NAMOSIMALUA MIRIALOLO

APPELLANT

AND: THE STATE

RESPONDENT

Counsels : Appellant in Person
Ms. S. Swaztika and Ms. S. Serukai for Respondent
Hearing : 17 June, 2019.
Judgment : 8 November, 2019.

JUDGMENT

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1. On 24 November 2017, the appellant appeared in the Nausori Magistrate Court on the following charge:

> ***"First Count***
>
> ***Statement of Offence (a)***
>
> ***FOUND IN POSSESSION OF ILLICIT DRUGS:*** ***Contrary to section 5 (a) of the Illicit Drug Control Act, 2004.***
>
> ***Particulars of Offence (b)***
>
> ***NAMOSIMALUA MIRIALOLO, on the 22nd day of November, 2017 at Navesikalou, Naimasimasi, Nausori in the Central Division without lawful authority was found in possession of 8.3 grams of Cannabis Sativa or Indian hemp an illicit drug.***

Second Count

Statement of Offence (a)

<u>UNLAWFUL CULTIVATION OF ILLICIT DRUGS:</u> Contrary to section 5 (b) of the Illicit Drug Control Act, 2004.

Particulars of Offence (b)

NAMOSIMALUA MIRIALOLO, on the 22nd day of November, 2017 at Navesikalou Farm, Naimasimasi, Nausori in the Central Division, without lawful authority cultivated 1,075.9 grams of Cannabis Sativa or Indian hemp an illicit drug."

2. The proceeding were recorded as follows:

"IN THE RESIDENT MAGISTRATE S COURT
AT NAUSORI

Criminal Case No. 738 of 2017

24/11/17

Prosecution: Present ***Court Clerks: Rajneel/Naca***
Accused: Present

Preferred language: i-Taukei
Charge read explained and understood: Count 1: understand
Plea: Guilty
Charge read explained and understood: Count 2: understand
Plea: Guilty

Right to counsel:
Accused: waive

Summary of Facts – attached
<u>Accused</u> – Admitted
Convicted as charge
2 previous conviction-admitted

<u>Mitigation</u>: – 40 years old

- ***Married x 3 kids***
- ***Seek forgiveness will not re-offend***

<u>Court:</u> ***Accused is remanded in custody. Prosecution to get drugs to Court for destruction. Adjourned 08/12/17 for Mention.***

Sgd: Chaitanya Lakshman
Resident Magistrate"

3. After four adjournments, the appellant was sentenced on 12 January 2018 by the learned Magistrate. On count no. 1, the appellant was sentenced to 1 week imprisonment. On count no. 2, he was sentenced to 6 years 10 months imprisonment, with a non-parole period of 5 years imprisonment. The sentence in both counts were made concurrent to each other. The appellant was not happy with the sentence. On 17 January 2018, he appealed the above decision by writing an informal letter of petition. He did not appeal his conviction.

4. On 18 April 2019, the appellant perfected his sentence grounds of appeal as follows:

> ***"1. The appellant humbly submits that his contention in regards to his sentence is that his sentence is harsh and excessive for the following reason; firstly, the appellant submits that the learned sentencing magistrate has erred when he commenced the sentence with a starting point of 10 years, which in the appellant's view was harsh in the circumstances of his offending as it is towards the higher end of the usual tariff and also that it falls under category 4.***
>
> ***2. The appellant humbly suggest that his sentence should have fallen below 4 years as the total weight of the drug was below 2500g and therefore the appellant humbly submits that the learned sentencing magistrate <u>was under some misapprehension</u> when he did calculate the <u>appellant's sentence</u> with the starting point of <u>10 years.</u>***
>
> ***3. Secondly the appellant humbly submits that the learned sentencing magistrate has erred when his lordship failed in giving the appellant an***

adequate deduction on his plea of guilty, as the appellant has pleaded guilty on a very first opportunity where by the magistrate has deducted 2 years.

4. ***The appellant humbly suggest that there is a usual trend in the sentencing practice where the majority of courts has exercised their inherent judicial discretion in giving a 1/3 discount on the overall sentence where the accused had pleaded guilty on the very first stance, thus saving the court its precious time.***

5. ***In view of the aforementioned the appellant humbly seek your honourable court's discretion in having an analysis on the aforementioned circumstances and where the appellant prays that justice will prevail under your honourable court judicial discretion."***

5. I had carefully read the court record and the learned magistrate's sentencing remarks (3 pages) to find out whether or not the appellant's complaint was justified. In his sentencing remarks, the learned magistrate referred to three authorities to assist him pass his sentence. The first authority was the Court of Appeal decision in **Kini Sulua & Another** v **The State** [2012] Fiji Law Reports, Volume 2, page 111 to 147, and two High Court authorities in **State** v **Dukubure**, HAC 076 of 2017, High Court, Suva (28 April, 2017) and **Tuidama** v **State**, HAA 29 of 2016, High Court, Suva (14 November, 2016). This appeal had called into question the issue of whether or not the above authorities can be reconciled with each other, given Parliament's commands to the High Court and Magistrate Courts, as enshrined in section 6 (1) and 6 (2) of the Sentencing and Penalties Act 2009.

6. Section 6 (1) and 6 (2) of the Sentencing and Penalties Act 2009, reads as follows:

> ***"(1) On hearing and considering an appeal against sentence the Court of Appeal and the Supreme Court may, on its own initiative or on an application made by a party to the appeal, consider whether to give a guideline judgment or to review a guideline judgment that has already been given.***

(2) 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."

7. As I stated in **Vilikesa Taginakalou v The State**, HAA 003 of 2019S, High Court, Suva (8 November, 2019), ever since the passing into law of the Illicit Drugs Control Act 2004, the courts in Fiji had struggled for a guideline judgment on how to deal with the cannabis sativa (commonly known as marijuana) type offences in Fiji. While sitting in the Court of Appeal in **Kini Sulua** v **The State** [supra] with their Lordships Mr. Justice Marshall and Mr. Justice Fernando, the Office of the Director of Public Prosecution and the Defence called for a guideline judgment. The answer to the call was the majority judgment in **Kini Sulua** v **The State** [supra]. It was designed to introduce certainty into the sentencing process in the High Court and Magistrate Courts of Fiji.

8. In arriving with the majority judgment in **Kini Sulua** v **The State** [supra], all the matters raised by His Lordship Mr. Justice Marshall in his minority judgment were considered. It was found that the United Kingdom Misuse of Drugs Act 1971 and its amendments, like the New Zealand Misuse of Drugs Act 1975 and its amendments, were completely different in terms of format, content and punishment from Fiji's Illicit Drugs Control Act 2004. The United Kingdom and New Zealand Acts did not prescribe $1,000,000 fine, or life imprisonment, or both, for the offences noted in section 5 (a) or 5 (b) of Fiji's Illicit Drugs Control Act 2004. Justice Marshall's opinion in his minority judgment were well founded given international development. However, as judges in Fiji, we are bound to give effect to Fiji's Illicit Drugs Control Act 2004. This issue was highlighted in paragraphs 110 to 112 (pages 141 and 142) in **Kini Sulua** v **The State** [supra] by myself, while sitting in the Court of Appeal. Also refer to paragraphs 116 to 119 (pages 143 and 144) of the same judgment.

9. **Sailosi Tuidama v The State,** HAA 29 of 2016, High Court, Suva was decided on 14 November 2016. This was approximately 4 years 5 months 14 days after the Court of Appeal decision in **Kini Sulua** v **The State** [supra]. Pursuant to section 6 (2) of the

Sentencing and Penalties Act 2009, the High Court was bound to follow **Kini Sulua** v **The State** [supra]. His Lordship Mr. Justice Perera tried to distinguish **Kini Sulua** v **The State** [supra] on the facts by stating the following in **Sailosi Tuidama** v **The State** [supra]:

> ***"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 (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 2.28 kg 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 categorization 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. [pages 3 and 4]"***

10. With the utmost respect to His Lordship Mr. Justice Perera, Counsel for the State and the Defence did not properly assist the court, by referring it to the definition of "illicit drug" in section 2 of the Illicit Drugs Control Act 2004, which states, "illicit drug" means any drug listed in Schedule 1. When Schedule 1 is referred to, under "Part 8 –Other Illicit Drugs, "cannabis plant" is defined as "cannabis plant (whether fresh, dried or otherwise)-that is, any part of any plant of the genus cannabis except a part from which all the resin has been extracted". This means, with respect, that the above distinguishing on the facts of the case with reference to dried or wet cannabis leaves/plants cannot stand. Cannabis sativa leaves

or plants means in its dried, wet or watery form, or otherwise. So, with respect, trying to circumvent **Kini Sulua** v **The State** [supra] by distinguishing the case facts on whether or not "the dried or water contents" of the cannabis sativa plants were involved, appear misconceived.

11. Next, His Lordship referred to the authority of **Meli Bavesi v State** [2004] HAA 027 of 2004, High Court, Suva (14 April 2004), as an authority for him to circumvent the Court of Appeal decision in **Kini Sulua** v **The State** [supra]. This was a decision of His Lordship Mr. Justice Winter. It was dealing with a case under the Dangerous Drugs Act 1938. It was repealed by section 39 of the Illicit Drugs Control Act 2004. It was arguable that it offers no assistance at all in interpreting the relevant offences under Illicit Drugs Control Act 2004 after the **Kini Sulua** v **The State** [supra] decision. In fact, His Lordship Mr. Justice Marshall, in **Kini Sulua** v **The State** [supra] was highly critical of **Meli Bavesi** v **The State** [supra]. Please, refer to **Kini Sulua** v **The State** [supra], paragraphs 93 to 102, pages 137 to 139. The majority in **Kini Sulua** v **The State** [supra] also agreed with Justice Marshall, see paragraph 113 on page 142. So, it could be argued that the full Court of Appeal in **Kini Sulua** v **The State** [supra] had overruled **Meli Bavesi** v **The State** [supra]. Even His Lordship, Mr. Justice Madigan, criticized **Meli Bavesi** v **The State** [supra] in **Dibi** v **The State**, HAA 96 of 2017, High Court, Lautoka (19 February 2018), although on different grounds.

12. Furthermore, in **Meli Bavesi** v **The State** [supra], His Lordship Justice Winter was relying on 18 or thereabout New Zealand cases to set up his sentence guideline. As mentioned before, the above cases were dealing with the New Zealand Misuse of Drugs Act 1975 and its amendments, which did not carry the penalties prescribed in section 5 (a) and 5 (b) of Fiji's Illicit Drugs Control Act 2004, that is, $1,000,000 fine, life imprisonment or both. Therefore, as an aid to interpreting section 5 (a) and 5 (b) of Fiji's Illicit Drugs Control Act 2004, it was highly arguable that **Meli Bavesi** v **The State** [supra], with respect, was flawed, and of no assistance. As a result of the above, it was arguable that because the decision in **Sailosi Tuidama** v **The State** [supra] followed the discredited **Meli Bavesi** v

The State [supra] decision, as opposed to the binding Court of Appeal authority of **Sulua** v **The State** [supra], **Tuidama** v **The State** [supra] was decided, with respect, per incuriam, and thus must not be followed. The defect discussed above, with respect, followed on to **State** v **Dukubure**, HAC 076 of 2017, High Court, Suva (28 April 2017). As a result, it was highly arguable that **State** v **Dukubure** [supra] was also decided, with respect, per incuriam.

13. As a result of what was discussed above, it was no wonder that the learned Magistrate was inevitably thrown into confusion in this case, when trying to reconcile **Kini Sulua** v **The State** [supra], **State** v **Dukubure** [supra] and **Tuidama** v **The State** [supra]. They were irreconcilable. However, because **State** v **Dukubure** [supra] and **Tuidama** v **The State** [supra] were High Court decisions, and **Kini Sulua** v **The State** [supra] was a Court of Appeal decision, by virtue of section 6 (1) and 6 (2) of the Sentencing and Penalties Act 2009, the learned magistrate was bound to follow **Kini Sulua** v **The State**, and disregard **Dukubure** and **Tuidama**. Because of the above confusion, the learned magistrate erred in sentencing the appellant. It was unfortunate that I witnessed the same scenario and confusion in the magistrate courts, when considering the appeal in **Vilikesa Taginakalou v The State**, HAA 003 of 2019, High Court, Suva (8 November, 2019). There the learned Magistrate was thrown into confusion also in trying to reconcile **re- Koroi & Others**, HAR 002-006 of 2012, High Court, Suva (20 April, 2012); **Dibi** v **The State** [2018] HAA 96 of 2017, High Court, Lautoka (19 February, 2018) and **Kini Sulua** v **The State** [supra]. Here again two High Court authorities were pitted against a Court of Appeal authority. **Re- Koroi & Others** [supra] and **Dibi** v **The State** [supra] were His Lordship Mr. Justice Madigan's decision. In **Vilikesa Taginakalou v The State** [supra]. I was respectfully of the view that **Re- Koroi & Others** [supra] and **Dibi** v **The State** [supra] should not be followed.

14. Given the discussion above, I will outline below what the learned Magistrate should have done in this case:

    (i) When sighting the charge, he would immediately know that he was dealing with a "cannabis sativa" type offence;

(ii) There were numerous High Court and Court of Appeal authorities on "cannabis sativa" type offences. Concerning sentencing, the prevailing authority is **Kini Sulua** v **The State** [supra], unless amended and/or replaced by another Court of Appeal or Supreme Court authority. You must be careful not to use High Court authorities that are not consistent with **Kini Sulua** v **The State** [supra], otherwise you will be thrown into confusion and commit errors;

(iii) Using the **Kini Sulua** [supra] guideline, count no 1 is a Category 1 offence, while count no.2 is a Category 3 offence;

(iv) In this case, the appellant had pleaded guilty to both counts on first call. You will have to note the aggravating and mitigating factors in this case;

(v) In this case, the learned Magistrate had correctly referred to the four categories in **Kini Sulua** v **The State** [supra]. The learned Magistrate should have disregarded **State** v **Dukubure** [supra] and **Tuidamu** v **State** [supra], given the discussion mentioned above;

(vi) The learned Magistrate should have itemized his aggravating and mitigating factors. There does not appear to be any aggravating factors, but for the drugs found on him and his cultivating the same. There were a lot of mitigating factors. He pleaded guilty on first call. He was remanded in custody for 2 months. He co-operated with police by showing them his marijuana farm, and admitted the offence when caution interviewed by police;

(vii) Count No. 1 being a Category 1 offence, using the **Kini Sulua** v **The State** [supra] guideline, I will not disturb the learned Magistrate sentence of 1 week imprisonment;

(viii) On count no.2, it being a Category 3 offence, using the **Kini Sulua** v **The State** [supra] guideline, the tariff is a sentence between 3 to 7 years imprisonment since the drugs he cultivated were less than 2,500 grams. His sentence cannot go above 4 year imprisonment. I would start with a 4 years prison sentence. There is nothing

to add to the 4 years, because there does not appear to be any aggravating factors. Two months should be deducted from the 4 years, for time already served while remanded in custody, leaving a balance of 3 years 10 months imprisonment. For co-operating with police, 6 months should be deducted, leaving a balance of 3 years 4 months imprisonment. For pleading guilty at the first opportunity, I would deduct 1 year 4 months, leaving a balance of 2 years imprisonment. On count no. 2, given the above, the sentence would be 2 years imprisonment;

(ix) The one week prison sentence in count no. 1 would be made concurrent to the 2 years imprisonment in count no.2, because of the totality principle of sentencing, leaving a final total sentence of 2 years imprisonment;

(x) The above 2 years prison sentence is to start from the 12 January 2018, and I will not fix any non-parole period.

15. Given the above, the appellant succeeds in his sentence appeal. The learned Magistrate's sentence of 6 years 10 months imprisonment, with a non-parole period of 5 years, dated 12 January 2018, is quashed and set aside. In substitution thereof, and as described in paragraph 14 above, the appellant is sentenced to 2 years imprisonment, with no non-parole period, this to run from 12 January 2018. I order so accordingly.

Salesi Temo
JUDGE

Solicitor for the Appellant : **In Person**
Solicitor for the Respondent : **Office of the Director of Public Prosecution, Nausori.**