IN THE HIGH COURT OF FIJI AT SUVA

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

[APPELLATE JURISDICTION]

JORAMA NATUI DUIKORO

Appellant

CASE NO: HAA. 22 of 2019
[MC, Suva Criminal Case No. 2180 of 2018]

Vs.

STATE

Respondent

Counsel	**:**	Ms. L. Manulevu for the Appellant Mr. A. Jack for the Respondent
Hearing on	**:**	02 March, 2020
Judgment on	**:**	15 May, 2020

JUDGMENT

1. The above named appellant was charged before the Magistrate Court at Suva with one count of *found in possession of illicit drugs* contrary to section 5(a) of the Illicit Drugs Control Act 2004.

2. He was convicted as charged after he pleaded guilty to the charge on 14/02/19 and was sentenced to 37 months' imprisonment with a non-parole period of 25 months on 13/03/19.

3. The charge reads as follows;

> ***Statement of Offence (a)***
> **FOUND IN POSSESSON OF ILLICIT DRUGS:** Contrary to section 5 (a) of the Illicit Drugs Act of 2009.
>
> ***Particulars of Offence (b)***
>
> **JORAMA NATUI DUIKORO,** on the 11th day of November, 2018, at Lami, in the Central Division, without lawful authority was in possession of **1358.50 grams** of **Cannabis Sativa** an **Illicit Drugs**.

4. The appellant initiated this appeal in person. Subsequently he decided to seek the assistance of the Legal Aid Commission and accordingly the Commission came on board and filed an amended notice of appeal on 31/01/20.

5. The amended grounds of appeal are as follows;

   a) **THAT** the Learned Magistrate erred in law and in fact when she considered extraneous factors to guide her when sentencing the appellant;

   b) **THAT** the Learned Magistrate erred in law when he failed to give sufficient discount to the Appellant for being a first and young offender.

6. A party aggrieved by a decision of a magistrate has a right to appeal against such decision within 28 days from the date of that decision. An appeal can be brought after that period only with the leave of the High Court. The High Court is given the power under section 248(2) to enlarge the period of limitation prescribed by section 248(1) for good cause.

7. Section 248(3) provides that;

> *"(3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include –*

(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;

(b) any case in which a question of law of unusual difficulty is involved;

(c) a case in which the sanction of the Director of Public Prosecutions or of the commissioner of the Fiji Independent Commission Against Corruption is required by any law;

(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents."

8. Apart from the above factors, this court would also consider the following factors outlined in the case of ***Kumar v State; Sinu v State*** [2012] FJSC 17 in deciding whether there is a good cause to enlarge the period of limitation to file a petition of appeal provided under section 248 of the Criminal Procedure Act;

a) The reason for the failure to file within time.

b) The length of the delay.

c) Whether there is a ground of merit justifying the appellate court's consideration.

d) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

e) If time is enlarged, will the Respondent be unfairly prejudiced?

9. This appeal is not filed within the stipulated period of 28 days and the appellant has not provided any reason for this failure.

10. In the court record I find a photocopy of a document dated 15/07/19 titled 'NOTICE OF AMENDED AND ADDED GROUNDS OF APPEAL' which bears a 'RECEIVED' stamp of the High Court Registry dated 24/07/19 and again a 'FILED' stamp with the date 01/08/19. Then there is the original of that document with a 'FILED' stamp with the date 01/08/19. There is no 'RECEIVED' stamp in the original.

11. Even if I regard 15/07/19, the date the appellant appear to have prepared the document through which this appeal was initiated, as the date of filing this appeal, still there is a delay of more than 3 months.

12. I do note that the appellant had stated in the written submission filed in person dated 01/08/19 and bears a 'FILED' stamp with the date 27/08/19, that his 'notice of appeal and the application of leave on the enlargement of time' was filed on 27/06/19. However, such document is not found in the court record and no attempt was made by the appellant or his counsel to submit this document to court if it ever existed.

13. Counsel for the respondent submits that leave to appeal out of time in this case should be refused due to the substantial delay which is not explained.

14. All in all, I agree with the counsel for the respondent that the delay in filing this appeal which no explanation is offered, is substantial.

15. I would now move on to consider whether there is merit in the grounds of appeal.

16. In the case of ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999)] the court of appeal said thus;

> "*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).*"

17. Therefore, in order for this court to disturb the impugned sentence, the appellant should demonstrate that the Learned Magistrate in arriving at the sentence had;
    a) acted upon a wrong principle;
    b) allowed extraneous or irrelevant matters to guide or affect him;
    c) mistook the facts; or
    d) did not take into account some relevant consideration.

18. On the first ground of appeal, the appellant complains that the Learned Magistrate was guided by extraneous factors when determining the sentence. On the second ground the complaint is that the Learned Magistrate failed to give a sufficient discount in view of the fact that the appellant was a first offender and a young offender.

19. The quantity of the drug (cannabis sativa) found to be in the possession of the appellant was 1358.5 grams. The Learned Magistrate had identified the applicable tariff based on the said quantity which is a term of imprisonment between 3 years and 7 years given the majority decision in ***Sulua v. State*** [2012] FJCA 33.

20. The Learned Magistrate has selected 48 months as the starting point, added 12 months in view of the aggravating factor that was identified and then deducted 3 months in view of the mitigating factors that were identified. Thereafter the Magistrate has further deducted a one-third of the remaining sentence which was 19 months in view of the early guilty plea to arrive at the term of 38 months. Finally, the Learned Magistrate has deducted another month to reflect the time the appellant had spent in remand. The final sentence was declared as a term of 37 months' imprisonment.

21. The relevant tariff band pronounced in ***Sulua*** (supra) is as follows;

    (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.

22. The Court of Appeal in ***Sulua*** (supra) had clearly stated that if the quantity is less than 2500 grams, the sentence should be less than 04 years imprisonment. Therefore, in this case the selection of the starting point of 48 months (04 years) where the quantity the appellant had found to be in possession was only 1358.5 grams, on the face of it, offends the tariff which was set in ***Sulua*** (supra) alluded to above.

23. In this case there was there is only 358.5 grams more than the baseline for the relevant tariff band which is 1000 grams. According to ***Sulua*** (supra) it could be discerned that the possession of 2500 grams of cannabis sativa should attract an imprisonment term of 04 years. In fact this could be taken as another tariff band or a subcategory of category (iii). That is, if the quantity of cannabis sativa involved with the offence was between 1000 grams and 2500 grams, the sentencing range should be 03 years to 04 years imprisonment, a difference of 12 months. Therefore, every 500 grams between 1000 grams and 2500 grams would attract a term of 04 months imprisonment.

24. The situation is different when it comes to the next 1500 grams in the above third tariff category, which could be identified as the second subcategory. That is, if the quantity of the drugs in question is between 2500 grams and 4000 grams, the range of the sentence should be 04 years to 07 years imprisonment. So for the 1500 grams from 2500 grams the term increases by 03 years or 36 months. On this subcategory, every 500 grams (between 2500 grams and 4000 grams) would attract a term of 12 months imprisonment.

25. I can understand the difficulty in performing the calculations to obtain precise figures that would correspond to the quantity of the drugs in question. However, at least if the sentencer is mindful to round up the quantity of the drugs to the nearest 500 grams and to follow the table below in selecting the starting point, it would assist in reducing the disparity in the sentences in relation to the offence of possession of

cannabis sativa that falls under the third tariff band of the '*Sulua Tariff*', substantially.

26. The table I would propose is as follows;

Quantity	**Starting Point**
1000g	**3 years**
1500g	3 years and 4 months
2000g	3 years and 8 months
2500g	**4 years**
3000g	5 years
3500g	6 years
4000g	**7 years**

27. Accordingly, the period that should have been added to the lower end of the relevant tariff (03 years), to reflect the 358.5 grams that was in excess of the base line for the tariff which is 1000 grams in this case, was 04 months if the quantity of the drugs was to be taken into account properly and proportionately when selecting the starting point.

28. The starting point of 04 years selected by the Learned Magistrate for 1358.5 grams of cannabis sativa is therefore impeachable.

29. Now I will move on to the aggravating factor that was taken into account by the Learned Magistrate to add 12 months to the starting point that was selected. This is what the Learned Magistrate had stated in the impugned decision;

> *I increase your sentence by **12 months** for attempting to conceal the drugs in a rubbish dump which could have been found by children.*

30. The summary of facts filed in this case describes how the drugs were recovered, as follows;

- *(A-1) whilst checking the said car saw fine pieces of dried leaves upon the rear seat and*

when he lifted the sear found 2 x parcel of green stalks with leaves wrapped in plastic cling wrap believed to be marijuana.

- *(A-1) then seized the exhibit, arrested (B-1) and escorted him to the Lami Police Station.*
- *(A-2) stated that same night she went to pick (B-1) from Suva Wharf as he was bringing some food and drove back home with him.*
- *(B-1) then asked (A-2) for a bag to put some of his stuffs and asked her to drop to Suva.*
  (B-1) has mentioned that he brought some marijuana from the village to sell it in Suva.
- *Upon enquiry* ***Tomu O'Connor (A-3)*** *31 years, Farmer of Wailekutu stated that (B-1) called him after being arrested and told him that he has hidden some drugs at the rubbish dump beside their house.*
  PC 3629 Iowane (A-4) *with others open searching the rubbish dump found a black bag containing 5 x parcel of green stalks with leaves wrapped in plastic cling wraps believed to be marijuana with another camouflage bag and escorted to the station.*

31. It is noted that the summary of facts does not clearly reflect the possibility of the drugs that were found hidden in the rubbish dump being discoverable by children. Those drugs could have been found by anyone. On the other hand, the entire quantity of cannabis sativa relevant to the charge was not hidden in the rubbish dump, it was only a part of it. Thus, it is clear that the Learned Magistrate had mistaken the facts. Nevertheless, the possibility of the drugs getting into the hands of children which the Learned Magistrate regarded as an aggravating factor cannot be regarded as extraneous; it was rather hypothetical.

32. However, based on the facts that were part of the summary of facts that are alluded to above, it is evident that the Learned Magistrate had not taken into account certain relevant factors as aggravating factors. The facts reproduced above reveal, that the appellant was having those drugs in his possession for commercial purposes; the fact that he had got two other persons involved to deal with the drugs relevant to the charge putting them at risk; and more importantly, that the appellant had attempted to deal with the drugs that were hidden in the rubbish dump through A-3, probably dispose them, even after he was arrested by the police. These factors

should have been considered as aggravating factors in this case.

33. The second complaint regarding the sentence as reflected in the second ground of appeal is that the Learned Magistrate had not given sufficient weight to the mitigating factors. The counsel for the appellant is only focusing on the fact that the appellant was a first offender and that the appellant was a young offender among the facts that had been submitted to the Learned Magistrate as mitigating factors in relation to this ground of appeal. The Learned Magistrate had granted a one-third discount on the early guilty plea and there is no complaint on that.

34. I am unable to endorse the contention that the appellant who was 24 years old should have been regarded as a young offender to give him a discount in his sentence for being in possession of illicit drugs. In my view, the decision of the Learned Magistrate to grant a discount of 03 months in view of the mitigating factors where in fact there was only one, cannot be challenged by way of an appeal. What was necessary for the Learned Magistrate to do was to consider the fact that the appellant was a first offender as a mitigating factor. The weight given to that mitigating factor is something which was within the Magistrate's discretion. This court cannot interfere with that discretion in appeal even if this court takes the view that the discount should have been different from what the Learned Magistrate in this case had considered appropriate. This is because, it cannot be shown that the Learned Magistrate had erred in law or in principle by deciding that 03 months is the appropriate discount to be given in view of the mitigating factor(s).

35. I find that the second ground of appeal has no chance of success. Though the first ground of appeal could be regarded as having merit, given the fact that the Learned Magistrate has not taken into account relevant matters as aggravating factors, no miscarriage of justice had occurred by adding 12 months to the starting point. In fact, the aggravating factors that are reflected in the summary of facts as mentioned above warrants the sentence to be enhanced by a term longer than 12 months. Moreover, for this same reason, the issue I have highlighted in relation to the selection of 04 years as the starting point is also mitigated.

36. All in all, in this case, there is no ground of appeal that would probably succeed.

37. Leave to appeal out of time in this case should therefore be refused.

Orders;

a) Leave to appeal out of time is refused;

b) The appeal is dismissed.

Solicitors;
Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the State