IN THE HIGH COURT OF FIJI
AT SUVA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 52 OF 2020

IN THE MATTER of an Appeal from the decision of the Magistrate's Court of Kadavu, in Criminal Case No. 96 of 2020.

BETWEEN : **NOA TOGA**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : The Appellant appears in person
Mr. Rajneel Kumar for the Respondent

Date of Hearing : 16 March 2021

Judgment : 1 October 2021

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Kadavu.

[2] The Appellant was charged in the Magistrate's Court of Kadavu for the following offence:

Statement of Offence (a)

<u>UNLAWFUL CULTIVATION OF ILLICIT DRUGS</u>: Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.

Particulars of Offence (b)

NOA TOGA, on the 21st of August 2020, at Kadavu, in the Southern Division, without lawful authority cultivated 172 plants of *Cannabis Sativa*, weighing 962 grams.

[3] The Appellant was first produced in Court on 26 August 2020. His Right to Counsel had been explained to him. However, it is recorded that the Appellant had waived his Right to Counsel.

[4] On the same day, the Appellant was ready to take his plea. Accordingly, the Appellant pleaded guilty to the charge. The Learned Resident Magistrate had been satisfied that the Appellant pleaded guilty voluntarily and on his own free will. On the same day the Summary of Facts had been read over and explained to the Appellant. Having understood same the Appellant admitted to the said Summary of Facts. Accordingly, he had been found guilty and convicted of the charge on his own plea.

[5] After hearing submissions in mitigation, the Learned Resident Magistrate imposed his sentence on 26 August 2020. The Appellant was sentenced to 3 years and 6 months imprisonment, with a non-parole period of 2 years and 6 months.

[6] Aggrieved by the said Order, on 12 October 2020, the Appellant filed a Petition of Appeal in the High Court. The Petition of Appeal was in respect of both his conviction and sentence.

[7] The said Petition of Appeal was filed approximately 18 days out of time. However, the Learned Counsel for the State submitted that he was not objecting to the late filing of same. Accordingly, this Court granted Leave to the Appellant to file his Petition of Appeal out of time.

[8] It must be mentioned that even during these proceedings in the High Court the Appellant had waived his right to Counsel and remained unrepresented.

[9] This matter was taken up for hearing before me on 16 March 2021. The Appellant and the State Counsel for the Respondent were heard. Both the Appellant and the State filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[10] Although judgment in this case had been fixed for an earlier date it had to be postponed as regular Court sittings were not held for several months due to the outbreak of the coronavirus pandemic in Fiji.

[11] As per the Petition of Appeal the Grounds of Appeal taken up by the Appellant are as follows:

[1] That the appeal is based on "good cause" as it involves "a question of law of unusual difficulty" as per Section 248 (2) and 248 (3) (b) [Extension of Time] of the Criminal Procedure Act of 2009.

[2] That the Learned Magistrate erred in law and facts when he failed to consider ample time for mitigation given the fact that the Appellant was unrepresented.

[3] That the Learned Magistrate erred in law and facts when he failed to consider that the Appellant's plea might have been equivocal since he was also unrepresented.

[12] As can be observed from the above, these are Grounds of Appeal against both the conviction and sentence.

<u>The Law and Analysis</u>

[13] Section 246 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

> *"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court*

against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.''

[14] Section 247 of the Criminal Procedure Act, which is relevant as the Appellant has pleaded guilty to the charge against him, stipulates that "*No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence."*

[15] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"*(2) The High Court may —*

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

Grounds of Appeal against Sentence

[16] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

*"…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 he 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] HCA 40; [1936] 55 CLR 499)."*

[17] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v. The King** [1936] HCA 40; [1936] 55 CLR 499; and adopted in **Kim Nam Bae v The State** Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration."

[18] Therefore, it is well established law that before this Court can interfere with the Sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

Discussion of the Grounds of Appeal taken up by the Appellant

Ground 1

[19] This Ground of Appeal is that the appeal is based on "good cause" as it involves "a question of law of unusual difficulty" as per Section 248 (2) and 248 (3) (b) [Extension of Time] of the Criminal Procedure Act.

[20] For ease of reference, I reproduce below Sections 248 (1) and 248 (2) of the Criminal Procedure Act:

248. — (1) Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against —

(a) it shall be presented to the Magistrates Court from the decision of which the appeal is lodged;

(b) a copy of the petition shall be filed at the registry of the High Court; and

(c) a copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption..

(2) The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.

[21] What the Appellant is contending in this Ground of Appeal is that there is 'good cause' for Court to grant leave or to grant an enlargement of time for filing of this appeal out of time. However, as I have already mentioned earlier in this judgment, although the Petition of Appeal was filed approximately 18 days out of time, the Learned Counsel for the State has submitted that he was not objecting to the late filing of same. Accordingly, this Court has granted Leave to the Appellant to file his Petition of Appeal out of time.

Ground 2

[22] This Ground of Appeal is that the Learned Resident Magistrate erred in law and facts when he failed to consider ample time for mitigation given the fact that the Appellant was unrepresented.

[23] When examining the Magistrate's Court Case Record in this matter, it is clearly recorded (in the proceedings of 26 August 2020), that the Appellant's Right to Counsel had been duly explained to him. However, it is recorded that the Appellant had waived his Right to Counsel.

[24] I concede that the Learned Resident Magistrate had called upon the Appellant to make submissions in mitigation on the same day. In mitigation the Appellant had submitted the following factors:

That he is 23 years old, single, residing at Togani Village with his father, and that he is a subsistence farmer by occupation. He has sought forgiveness from Court and promised not to re-offend. He has also submitted that he has no means to pay a fine.

[25] In his Sentence the Learned Resident Magistrate has duly made reference to the aforesaid submissions in mitigation [At paragraph 11 of the Sentence]. In addition, the Learned Resident Magistrate has considered the fact that the Appellant had pleaded guilty at the earliest opportunity thereby saving Court's time and resources; that the Appellant had co-operated with the police and that he was a young first offender.

[26] The maximum punishment for Unlawful Cultivation of an Illicit Drug is a fine not exceeding $1,000,000.00 or imprisonment for life or both. In his endeavour to determine the tariff for this offence the Learned Resident Magistrate has made

reference to the authority of ***Sulua v. State*** [2012] FJCA 33; AAU 93 of 2008 (31 May 2012), where the Fiji Court of Appeal laid out the following tariffs for the possession of *cannabis sativa*:

> (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.*

[27] The Learned Resident Magistrate has correctly pointed out that recently there have been several High Court decisions which have set out a different tariff for the offence of cultivation of illicit drugs. He has made reference to the case ***State v. (Simione) Nabenu*** [2018] FJHC 539; HAA10.2018 (25 June 2018); where His Lordship Justice Aluthge held:

> *"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."

[28] In sentencing the Appellant in this case it is clear that the Learned Resident Magistrate has not adopted the 'two-tiered process' of reasoning, but instead seems to have adopted the 'instinctive synthesis' approach.

[29] In ***Solomone Qurai v. The State*** [2015] FJSC 15; CAV 24 of 2014 (20 August 2015); the Fiji Supreme Court held:

"[47] Guidelines for sentencing contained in the Sentencing and Penalties Decree of 2009 require a sentencing court to have regard to, amongst other things, the current sentencing practice and the terms of any applicable guideline judgment (section 4(2)(b) of the Decree), whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so (section 4(2)(f) of the Decree), the conduct of the offender during the trial as an indication of remorse or the lack of remorse (section 4(2)(g) of the Decree) and the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence (section 4(2)(j) of the Decree).

[48] The Sentencing and Penalties Decree does not provide any specific guideline as to what methodology should be adopted by the sentencing court in computing the sentence, and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case.

[49] In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one), and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two), before deriving the sentence to be imposed. This is the methodology adopted by the High Court in this case.

[50] It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.

[51] In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges."

[30] In ***Sharma v. State*** [2015] FJCA 178; AAU48.2011 (3 December 2015); the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

> *"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when*

*sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (**R –v- Lee Oosthuizen** [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*

" The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."

[41] The Supreme Court then observed in paragraph 51 that:

"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability _ _ _."

[42] To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.

……..

[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be

imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."

[31] As outlined in ***Qurai v. The State (Supra) and Sharma v. State (Supra)*** the Sentencing and Penalties Act No 42 of 2009 (Sentencing and Penalties Act) does not limit a sentencing judge to the 'two-tiered process' of reasoning and leaves it open for the sentencing judge to adopt a different approach, such as 'instinctive synthesis' approach, which is what the Learned Resident Magistrate has adopted in this case. The 'instinctive synthesis' approach is described as a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.

[32] In this case, the Learned Resident Magistrate has stated that he is selecting a starting point considering the objective seriousness of the offence, although, he has not specified what the starting point was. He has considered the number of *cannabis sativa* plants cultivated by the Appellant (172) as an aggravating factor. He has considered all the factors in mitigation as referred to earlier [At paragraph 11 of the Sentence] and said that he is making an appropriate discount for the said mitigating factors. A separate 1/3 deduction has been made from the sentence in view of the Appellant's early guilty plea. Accordingly, the Learned Resident Magistrate has arrived at a final sentence of 3 years and 6 months imprisonment. In terms of Section 18 of the Sentencing & Penalties Act he has imposed a non-parole period of 2 years and 6 months.

[33] Considering all the facts and circumstances of this case the final sentence imposed by the Learned Resident Magistrate is just and reasonable. It is evident that the Learned Resident Magistrate has duly taken into account all factors relevant to this case and arrived at a proper conclusion.

[34] Considering the aforesaid, I am of the opinion that this Ground of Appeal against sentence is without merit.

Ground 3

[35] This Ground of Appeal is that the Learned Resident Magistrate erred in law and facts when he failed to consider that the Appellant's plea might have been equivocal since he was unrepresented.

[36] The Appellant is alleging that the Learned Magistrate erred in law and facts when he failed to consider that the Appellant's plea might have been ambiguous, or that his plea was not made voluntarily or on his own free will, since he was unrepresented.

[37] As stated before, when examining the Magistrate's Court Case Record in this matter, it is clearly recorded (in the proceedings of 26 August 2020), that the Appellant's Right to Counsel had been duly explained to him. However, it is said that the Appellant had waived his Right to Counsel.

[38] It is also recorded that the Appellant had submitted that he was ready to take his plea on the same day. The charge had been read and explained to the Appellant in I-taukei as he had informed that I-taukei was his preferred language. The Appellant had stated that he was pleading guilty on his own freewill. Furthermore, when the Summary of Facts had been read out and explained to him the Appellant had said that he understood and admitted to the said Summary of Facts.

[39] Having considered the Appellant's plea of guilt, the Summary of Facts, his Caution Interview Statement and the Analyst Report on the Drugs, the Learned Resident Magistrate had been satisfied that the plea was made voluntarily, free from any influence and as such was unequivocal. Accordingly, the Appellant had been found guilty on his own plea and convicted of the charge.

[40] In the circumstances, it is now not permissible for the Appellant to submit that his plea might have been equivocal since he was unrepresented.

[41] In any event, in terms of Section 247 of the Criminal Procedure Act, it is stated that where the Appellant has pleaded guilty to the charge against him, as in this case, no

Appeal shall be allowed against his conviction. An Appeal may only be permitted in respect to the extent, appropriateness or legality of the sentence.

[42] For the aforesaid reasons, I find that the Grounds of Appeal taken up by the Appellant are all without merit.

Conclusion

[43] Accordingly, I conclude that this Appeal should stand dismissed and the conviction and sentence be affirmed.

FINAL ORDERS

[44] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.

2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Kadavu, in Criminal Case No. 96 of 2020 is affirmed.

AT SUVA
This 1st Day of October 2021

Solicitors for the Appellant : Appellant in Person.
Solicitors for the Respondent: Office of the Director of Public Prosecutions, Suva.