IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 019 OF 2021

BETWEEN:	**PETERO MAINUKUBATI**	**APPELLANT**
A N D:	**STATE**	**RESPONDENT**

Counsel:	Appellant In Person Ms. S. Latu for Respondent
Date of Hearing:	22nd March 2022
Date of Judgment:	27th May 2022

JUDGMENT

1. The Appellant was charged in the Magistrate's Court sitting in Labasa with one count of Unlawful Possession of Illicit Drugs contrary to Section 5 (a) of the Illicit Drugs Control Act and one count of Unlawful Cultivation of Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Control Act. The Appellant pleaded guilty to both counts on 30 September 2021. Upon satisfied that the Appellant had pleaded guilty of his own free will and voluntarily, the learned Magistrate had convicted the Appellant to the same and sentenced him to 30 days imprisonment for the first count and three years five months and 26 days imprisonment for the second count with a non-parole period of 2 years and six months. The Court has further

ordered that both sentences be served concurrently. Aggrieved with the said sentence the Appellant appealed to this Court on the following grounds *inter alia*;

i) *The learned Magistrate erred in his sentencing with mixed law and facts in not accurately distinguished the exact number of plants in their respect heights;*

ii) *The learned Magistrate had overlooked the fact that those 16 plants of cannabis sativa had 12 plants of 8cm in height and 4 plants of 170cm also in height.*

iii) *That the learned Magistrate erred in not arriving with some other similar precedence of cases that had similar facts to justify a reasonable and decent sentence in State v Salevuwai (2018) FJHC; HAC02.2018 (19 January 2018) Justice Daniel Goundar held that:...;*

iv) *That the aggrieved appellant was not accorded with his full constitutional rights since the initial stages of the investigation.*

Additional grounds:

i) *That the trial Magistrate erred in principle when he chose a starting point at the higher end of the tariff;*

ii) *That the learned Magistrate erred in principle in taking into account the height and weight of the illicit drugs is likely for commercial purpose when there is no evidence to prove it;*

iii) *That the sentencing Magistrate erred when he did not carefully weigh the mitigating factors of the appellant when he said in page 12 of the copy record that he used the cannabis sativa to receive the pain of his medical sickness;*

iv) *That the learned Magistrate had erred in principle and also error in exercising his sentencing discretion to the extent that the new parole period is too close to the head sentence resulting in much more severe punishment;*

v) *The sentencing Magistrate erred in principle when he labeled the appellant to be of bad character when actually one active conviction that was not serious in nature.*

2. Having carefully considered the grounds of appeal filed by the Appellant in person, I find this appeal is fundamentally based on the contention that the learned Magistrate had relied on wrong sentencing principles in sentencing the Appellant. The Appellant argues that the learned Magistrate had not considered the height and the number of plants involved in this matter to impose an appropriate sentence.

3. The Court heard the submissions of the Respondent stating that the Courts in Fiji are following two sentencing approaches in sentencing the offender for the cultivation of illicit drugs. One approach is based on the sentencing guidelines enunciated by **Kini Sulua v State [2012] FJCA 33; AAU0093.2008 (31 May 2012)**, and the other approach is based on the number of plants, age and height of the plants and the purpose of the cultivation. The second approach has been applied in a number of High Court matters. The Fiji Court of Appeal in **Koroitamana v State [2021] FJCA 170; AAU110.2019 (21 October 2021)** held that:

> *"(31). There is a general state of confusion prevalent in the sentencing regime on cultivation of illicit drugs among trial judges which is yet to be resolved by the Court of Appeal or the Supreme Court.*
>
> *[32] Some High Court judges and Magistrates apply sentencing guidelines in **Sulua v State** (supra) in respect of cultivation as well while some other High Court judges have suggested different sentencing regimes on the premise that there is no guideline judgment especially for cultivation of marijuana*[11]

meaning that Sulua guidelines may not apply to cultivation and the sentences not following Sulua guidelines have been based by and large on the number of plants and scale and purpose of cultivation[2]. State has earlier cited before this court the scale of operation measured by the number of plants (incorporating potential yield) and the role of the accused as a measure of his responsibility as the basis for possible guidelines in 'cultivation' cases deviating from Sulua guidelines[3].

[33] These disparities and inconsistencies have been amply highlighted in eleven recent Rulings[4] in the Court of Appeal and therefore, the same discussion need not be repeated here.

4. The learned Magistrate, in his sentence, has clearly discussed the two sentencing regimes and directed his mind to the weights, height, and number of plants in considering the appropriate punishment.

5. In considering the correctness of the sentence, the Appellate Court focuses on the ultimate sentence rather than each step in the reasoning process leading to it. (vide **Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006)**. The Appellate Court must 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.

6. In this case, the learned Magistrate had correctly discussed the two sentencing approaches and then considered the weight, the height and the purpose of cultivation. The learned Magistrate had rightly considered the mitigating factors and given a substantial discount for the early plea of guilty. The non-parole period has been fixed according to Section 18 of the Sentencing and Penalties Act.

7. Further, the record of the proceedings in the Magistrate's Court confirms the Appellant was given all his rights during the process of taking his plea. Therefore, I do not find this is an

appropriate case for this Court to intervene under Section 256 of the Criminal Procedure Act.

8. Having considered the reasons discussed above, I find the grounds of appeal filed by the Appellant have no merits. I accordingly dismiss this appeal.

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

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Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva
27th May 2022

Solicitors
Appellant In Person
Office of the Director of Public Prosecutions for the Respondent.