

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 24 of 2022

BETWEEN : **RONALD RICHARD KUMAR**
APPELLANT

A N D : **THE STATE**
RESPONDENT

Counsel : Ms. L. Taukei for the Appellant.
: Mr. U. Lal for the Respondent.

Date of Submissions : 05 December, 2022

Date of Hearing : 20 December, 2022

Date of Judgment : 21 December, 2022

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged in the Magistrate's Court at Lautoka for one count of unlawful possession of illicit drugs contrary to section 5 (a) of the Illicit Drugs Control Act, 2004 and one count of unlawful cultivation of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act 2004.
2. It was alleged that on 3rd December, 2017 the appellant without lawful authority had in his possession 0.4 grams of cannabis sativa or Indian hemp, an illicit drug. It was also alleged that on the above mentioned date

the appellant without lawful authority, had cultivated green plants and materials weighing 8.9 grams of cannabis sativa or Indian hemp, an illicit drug.

3. After numerous adjournments the appellant on 1st March, 2022, pleaded guilty to the above charges. Thereafter the appellant admitted the summary of facts read and then offered his mitigation.
4. The brief summary of facts was as follows:
 - a) On 3rd December, 2017 at about 3:19 am at Ram Asre Road, Lautoka the appellant was arrested by IP Samisoni Naqica, Special Constable Temo and Special Constable Pauliasi. On the above mentioned date, time and place IP Samisoni Naqica was leading a team to attend a complaint at the appellant's residence.
 - b) IP Samisoni Naqica whilst checking the appellant's compound noticed three grown plants beside the appellant's house believed to be Indian hemp. Thereafter IP Samisoni Naqica accompanied by the other two police officers executed a search warrant and entered the appellant's house.
 - c) Upon search the following items were confiscated, dried leaves wrapped in aluminum foil from inside a room with smoking apparatus and 55 newly germinated plants in aluminum foil tray in another room in the same flat occupied by the appellant.
 - d) The appellant was arrested and escorted to the police station with the items confiscated. The green plants and the dried leaves were taken for analysis and it was confirmed that those green plants and dried leaves were Indian hemp with the total weight of 9.3 grams. The appellant was interviewed under caution then later charged for one count of unlawful possession of illicit drugs and one count of

unlawful cultivation of illicit drugs contrary to the Illicit Drugs Control Act No. 9 of 2004.

5. On 31st May, 2022 the appellant was fined \$100.00 in default 10 days imprisonment for the first count and for the second count he was sentenced to 3 years imprisonment with a non-parole period of 2 years.

APPEAL TO THE HIGH COURT

6. The appellant being aggrieved by the sentence filed a timely appeal against sentence in this court upon the following grounds of appeal:
 - a). *That the Learned Sentencing Magistrate may have fallen into an error of law when he selected a starting point towards the middle range of the tariff.*
 - b). *That the Learned Magistrate erred in principle in selecting a starting point of 4 years which might have reflected some aggravating factors despite the absence of any aggravating factors in the sentencing.*
7. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful. The appellant's appeal is in respect of the imprisonment term under the second count.

LAW

8. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.

9. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

*“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. AAU0015 at [2]*. 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.”*


10. The maximum penalty for the offence committed is life imprisonment or a fine of \$1,000,000.00 or both.

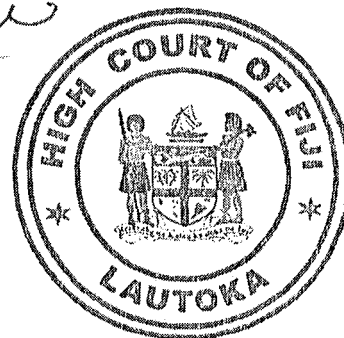
DETERMINATION

11. Although not argued by any of the counsel after hearing the submissions of both counsel this court referred counsel to the summary of facts in the copy record. The summary of facts mentions that there were only three plants that were uprooted beside the appellant’s house and there were 55 newly germinated plants found in one of the rooms inside the house in an aluminum tray.
12. Unfortunately, the charge does not mention the number of plants under the second count of cultivation but states green plants and materials weighing 8.9 grams of cannabis sativa. As per the Analyst Report exhibited in court the weight of 55 green plants were 4.8 grams, two green plants

were 2.6 grams and the weight of plant materials were 1.5 grams all to the total weight of 8.9 grams.

13. The summary of facts read does not satisfy the charge of cultivation as per count two. The summary of facts read mentions about the cultivation of three plants growing beside the house which were uprooted. The 55 newly germinated plants were found inside the house in an aluminum tray which does not fall under the charge of cultivation. The summary of facts does not state that the newly germinated plants were planted in the aluminum tray. The plea taken by the appellant was equivocal which cannot be allowed to continue.
14. The learned Magistrate fell in error when he convicted the appellant for an offence whose elements were not supported by the summary of facts read and admitted by the unrepresented appellant. The error is fatal to the conviction entered against the appellant in respect of count two.
15. In view of the above and in accordance with section 256 (2) (a) and (e) of the Criminal Procedure Act and in the interest of justice the conviction of the appellant in respect of count two is quashed and set aside. The Fiji Corrections Services is to immediately release the appellant. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka
21 December, 2022

Solicitors
Office of the Legal Aid Commission for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.