IN THE HIGH COURT OF FIJI

AT LABASA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 36 of 2023

BETWEEN: **EPELI TAMANITOAKULA**

APPELLANT

AND: **STATE**

RESPONDENT

Counsel: **Appellant in person**

Ms. L. Latu for the Respondent

Date of Hearing: **3rd August 2023**

Date of Ruling: **27th September 2023**

RULING ON APPEAL

1. This is the ruling on an appeal against sentence from the Savusavu Magistrate's Court on a sentence delivered on the 16th June 2023.

The proceedings in the Savusavu Magistrate's Court

2. The appellant was charged in the Savusavu Magistrate's Court for the following offence: -

Statement of Offence (a)

UNLAWFUL POSSESSION OF ILLICIT DRUGS contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

Particulars of Offences (b)

> **EPELI TAMANITOAKULA** on the 23rd day of March 2023 at Nawi village, Cakaudrove in the Northern Division, without lawful authority possessed dried leaves and seeds weighing 108 grams of Indian hemp, an illicit drugs botanically known as **Cannabis Sativa.**

3. The appellant was first produced in Court on the 24th of March 2023 and he waived his right to counsel and he was bailed pending his plea.

4. He entered a guilty plea on the 9th of June 2023, the summary of the facts was outlined to him and he admitted the same. The Court therefore convicted him as charged and received his plea in mitigation.

5. On the 16th of June 2023, the Learned Magistrate in Savusavu sentenced the Appellant to 19 months imprisonment, to be served in custody.

The Sentence

6. In the Learned Magistrate's sentencing remarks, he applied the tariff as set out in the case of Sulua –v- State [2012] FJCA 33; AAU 93 of 2008 (31st May 2012) where the Court divided drug offenders into the following: -

Category 1: Possession of 0 to 100 grams of cannabis sativa – a non-custodial sentence should be given for example fines, community service, counselling, discharge with a strong warning etc. Only in worst cases should a suspended prison sentence or a short sharp prison sentence be considered.

Category 2: Possession of 100 to 1000 grams 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 to be sentenced to more than 2 years imprisonment.

Category 3: Possessing 1000 grams to 4000 grams of cannabis sativa. Tariff should be a sentence between 3 to 7 years with those possessing less than 2500 grams be sentenced to less than 4 years imprisonment and those possessing more than 2500 grams ne sentenced to more than 4 years.

Category 4: Possessing 4000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years of imprisonment.

7. Applying the above authority the Learned Magistrate found that the offending fell into Category 2 of drug offenders. He did not find any aggravating factors as these "are subsumed in the elements of the offence." As mitigating factors, he identified the appellant's cooperation with the Police leading to his early guilty plea.

8. In sentencing the appellant the Court took a starting point of 2 years imprisonment and he deducted 6 months for the mitigating factors so the interim sentence was 1 year 6 months. For the early guilty plea he deducted 6 months from the sentence leaving a final sentence of 12 months imprisonment.

9. The Court then considered the principles relating to suspension of sentences and decided that the Court would denounce the offending as abuse of marijuana is prevalent and is affecting the society. There is an increase in the number of marijuana cases in the Northern Division. The Court therefore ruled that the sentence would be custodial.

10. The Accused was bailed at the first appearance therefore there was no further deduction for any time spent in remand so the final sentence was 12 months imprisonment to be served immediately.

11. The Court also gave orders that the illicit drugs in police custody were to be destroyed in the presence of Court staff and the prosecution was to file a destruction report, including photographs of the destruction of the illicit drugs in this case.

The Appeal

12. The appellant was aggrieved at his sentence and he filed for leave to appeal against sentence and sought leave to appeal. This is a timely appeal.

13. He filed the appeal in person, and he submitted the following grounds of appeal: -

    (a) That the learned Magistrate failed to adequately appropriately analyse the proper tariff in using the Kini Sulua guidelines on this instant matter.

    (b) That the starting point of 2 years is inclusive to the seriousness and objective of the offence and there is miscounting in place.

    (c) The learned magistrate overlooked the fact that the appellant could have possessed a full suspended sentence as the final outcome of the sentence was below 2 years.

    (d) The sentence is manifestly harsh and excessive in all the circumstances of the case.

(e) The Appellant reserves his rights to add or amend further grounds whilst receiving the Court records.

14. The appeal was first called on the 30th of June 2023 and the Court gave directions for the settling of the copy records, set a timetable for appeal submissions and scheduled the 3rd of August 2023 as the date of the hearing.

The Hearing

15. At the appeal hearing the appellant submitted written submissions and stated that he would rely on the same.

(a) He was aggrieved at the starting point of 2 years adopted by the Magistrate. He submitted the authority of Justice Gounder in Laisiasa Koroivuki –v- State [2013] FJCA 15; AAU 18 of 2010 (5th March 2013). His Lordship stated that, as a matter of good practice, the starting point should be picked from the lower range.

(b) The appellant refers to the following cases and the sentences handed down in them, which was different to the sentence handed down in this case: -

(i) Jone Avukia –v- State CF 112/22 – 917.6 grams – 9 months imprisonment
(ii) Malakai Seru Naduva –v- State CF 140/23 – 169.2 grams – 6 months imprisonment
(iii) Samuela Qeleloa –v- State CF 602/20 – 400.2 grams – 6 months imprisonment
(iv) Rakai Vatukatakata –v- State CF 263/16 – 600 grams – 5 months imprisonment

(c) He submits that the Court must issue a short sharp lenient sentence.

(d) Those were the submissions of the appellant.

The State's submissions

16. In written submissions filed, State counsel submitted that the appellant was charged with Unlawful Possession of 108 grams of cannabis sativa. He pleaded guilty in the Savusavu Magistrate's Court and was thereafter sentenced on the 16th June 2023. The Appellant was sentenced to 12 months' imprisonment. Being dissatisfied with the sentence, the appellant has filed an appeal against sentence.

17. The State submits that section 246 of the Criminal Procedure Act provides for appeals against any judgment, sentence, or order of a Magistrate's Court.

18. The State submits that at the date of sentencing, the Court applied the authority of Sulua -v- State [2012] FJCA 33; AAU 93 of 2008 (31st May 2012).

19. Given that the Appellant was found in possession of 108 grams of Cannabis Sativa, the learned Magistrate selected Category 2 with a tariff of 1 to 3 years imprisonment for possession of 100 to 1000 grams.

20. The Learned Magistrate commenced sentencing at 2 years as the starting point and arrived at a final sentence of 12 month imprisonment. The final term was within the tariff set out above and the sentence was reasonable given all of the circumstances of the case.

21. The Learned Magistrate has stated the reason why he did not exercise his discretion to suspend the Appellant's sentence. The Magistrate stated that the sentence is designed as a deterrent because there were too many offenders coming before the Court with drug related offences. The State however rightfully pointed out a problematic statement made by the Magistrate where he stated as follows: -

> *"...you had in your possession dried leaves and seeds. It can only be said that you intended to plant the seeds in order to get more cannabis sativa and marijuana."*

22. The Learned Magistrate did not base his decision not to suspend the sentence on the above factor alone. The Appellant was not a first offender as he had two active previous convictions.

23. The State submits that the suspension of a sentence under 2 years is not an automatic entitlement. The learned Magistrate has clarified as to why he decided not to suspend the sentence under the Sentencing and Penalties Act 2009, which was sufficient.

24. The State therefore concludes that there is no merit to the grounds advanced by the Appellant for the reasons set out above.

Analysis

25. In the case of Kim Nam Bae –v- State [1999] FJCA 21; AAU 15 of 1998 (26th February 1999) the Court of Appeal stated as follows: -

> "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) 55 CLR 499)."

26. The Supreme Court confirmed this in the case of Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013 (20th November 2013) as follows: -

> "[19] 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) 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.
>
> [20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in ***Chirk King Yam v The State*** Criminal Appeal No.AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case."

27. In passing this sentence, the Magistrate applied the sentencing tariff applicable for such cases, the Sulua case authority.

28. The Magistrate properly commenced the sentence from the middle of the tariff, 2 years and, after making the necessary adjustments for the mitigating factors and the guilty plea, then arrived at a sentence of 12 months imprisonment, a sentence within the tariff.

29. After arriving at the final sentence, which is capable of being suspended, the learned Magistrate further discussed whether or not to suspend the same. Ultimately the Learned Magistrate stated that

he would apply the principle of deterrence and found that the most appropriate sentence would be a custodial sentence to be served immediately.

30. In the above analysis on whether or not to suspend the sentence, the Magistrate made the following remarks; -

> *"...you had in your possession dried leaves and seeds. It can only be said that you intended to plant the seeds in order to get more cannabis sativa and marijuana."*

31. From a perusal of the records, there is no evidence or fact that could have possible led the Magistrate to that conclusion. His observations were without any basis from the material before him and he considered this as one of the reasons for not suspending the sentence.

32. In doing so the learned Magistrate fell into error however I am satisfied that the above was not the only issue that the Court considered when deciding whether to suspend the sentence or not and pursuant to section 256 (2) (f) of the Criminal Procedure Act, I am satisfied that no substantial miscarriage of justice has actually occurred.

33. As to the sentence passed, after considering the charge and the quantity of the illicit drugs, I find that a more appropriate sanction in the circumstances is a partially suspended sentence, although the final sentence arrived at will remain the same.

34. In the circumstances, the appeal will partially succeed in that the Court will quash the sentence pursuant to its powers under section 256 (3) of the Criminal Procedure Act 2009 and substitute a new sentence.

<u>This is the Court's ruling:</u> -

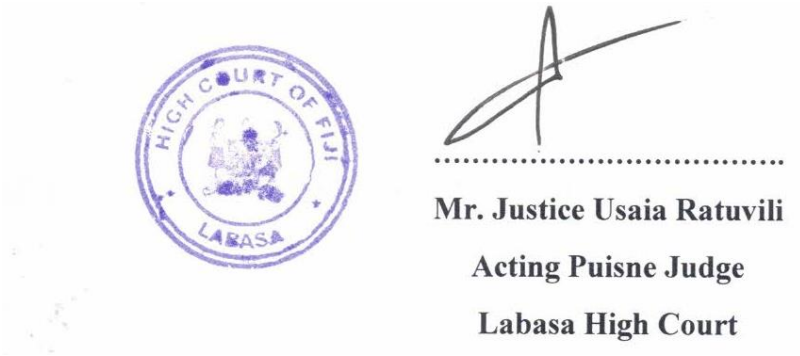
1. The sentence handed out by the Savusavu Magistrate's Court on the 16th of June 2023 is hereby quashed and substituted by the following:

(i) Epeli Tamanitoakula for the offence of <u>Unlawful Possession of Illicit Drugs</u> you are sentenced to 12 months' imprisonment, you will serve 6 months in custody and the balance of 6 months is suspended for 2 years.

(ii) This sentence takes effect from today and the period served so far will be deducted from the new sentence, therefore you will serve 3 additional months

before you are released from custody to serve the balance of your sentence in the community.

So ordered.



.....

Mr. Justice Usaia Ratuvili

Acting Puisne Judge

Labasa High Court

Solicitors:

Appellant in person

Office of the Director of Public Prosecutions for the Respondent