IN THE HIGH COURT OF FIJI

AT LABASA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 12 of 2023

IN THE MATTER OF application for leave to file appeal out of time in Criminal Appeal No. HAA 12 of 2023

BETWEEN: **KALAVETI TUINAKAUVADRA**

APPELLANT

AND: **STATE**

RESPONDENT

Counsel: **Appellant in person**

Ms M Lomaloma for the Respondent

Date of Hearing: **25th August 2023**

Date of Ruling: **12th October 2023**

RULING ON APPEAL AGAINST SENTENCE

1. This is the ruling on an appeal against sentence from the Savusavu Magistrate's Court on a sentence delivered on the 25th May 2022.

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

Particulars of Offences (b)

> **KALAVETI TUINAKAUVADRA** on the 28th day of September 2020 at Wainigata Settlement, Nagigi, Cakaudrove in the Northern Division, without lawful authority cultivated 65 plants and plant materials weighing 701.3 grams of Indian hemp, an illicit drugs botanically known as **Cannabis Sativa.**

3. The appellant was first produced in Court on the 30th of September 2020, and he was remanded in custody until 14th October 2020, when he was bailed with sureties.

4. He ultimately pleaded guilty on the 13th of May 2022, the summary of facts was outlined to him, and he admitted the same. He was then duly convicted, and the Court received his plea in mitigation.

5. On the 25th of May 2022, he was sentenced to 2 years 3 months and 16 days imprisonment, with a non-parole period of 18 months imprisonment.

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.

<u>Category 4</u>: 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. The tariff for Category 2 ranges from 1 to 3 years with drugs more than 500 grams to be sentenced to more than 2 years imprisonment.

8. He identified the following aggravating factors for the offending in this case: -

- Height and the number of marijuana plants are likely for commercial use.
- The drug farm is strategically located away from the village so it is hidden from the members of the public.

9. As mitigating factors, he identified the following factors: -

- First offender
- He confessed to the Police.
- He cooperated with the Police

10. In sentencing the appellant, the Court took a starting point of 2 years imprisonment and he added 2 ½ years for the aggravating factors. For the early guilty plea he deducted 1 year for the mitigating factors and deducted a further 14 months for the early guilty plea leaving a final sentence of 2 years 4 months imprisonment (28 months).

11. The Court took into account that the Appellant was remanded from 30th September 2020 to 14th October 2020, a period of 14 days therefore this period was deducted from the sentence as time already served in custody.

12. The finals sentence therefore was 2 years 3 months and 16 days imprisonment. Since the offence is prevalent in the Northern Division, a non-parole period of 18 months was appropriate.

13. 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

14. The appellant was aggrieved at his sentence and he filed for leave to appeal against sentence and sought leave to appeal. He filed his appeal on the 1st of February 2023 therefore he was out of time by 7 months and 6 days.

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

(a) 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) Sitiveni Liga vs State CF 214/22 – 944.9 grams – 9 months imprisonment
(ii) Jone Avukia –v- State CF 112/22 – 917.6 grams – 5 months imprisonment
(iii) Matorina Raogo –v- State CF 140/23 – 2.66 kg – 13 months' imprisonment
(iv) Vosamana Salevuwai –v- State CF 2/13 – 16 kg – 3 years imprisonment
(v) Lui Lalakobouma –v- State CF 263/16 – 3 kg – 4 years imprisonment

(b) The Accused is sort of confused as to how the learned trial judge is basing his sentence. Is there a guideline that he is working out his sentence from or is it just up to him or how his mood is for the particular day that he imposed the sentence that he feels is okay.

(c) The sentencing magistrate erred in law by imposing a non-parole period greater than the parole period pursuant to section 24 of the Sentencing and Penalties Act.

(d) The sentencing Magistrate erred in law by imposing a non-parole period without a parole order when there is no Parole Board to justify the release of the Appellant at the end of or completion of his term. Failure to do so has miscarried the right cause of justice in relation to the proper interpretation of parole.

(e) The Appellant is a young first offender who confessed to the Police at the earliest opportunity.

(f) He cooperated with the Police and pleaded guilty as charged saving the Court's time to run a full trial.

(g) Please take on board and consider all of the above valuable points and the appellant's urgent request to reconsider and revisit the sentence passed by the learned magistrate as it is considered severe, excessive and rather harsh compared to the above reference who have far more weights to the drugs found on them and their sentence is far too lenient compared to what has been imposed on the appellant by the very same learned magistrate.

(h) I pray that the High Court will intervene and consider all of the above factors before passing a fairer and final judgment on the appellant.

16. The appeal was first called on the 3rd of March 2023 and the Court gave directions for the settling of the copy records, set a timetable for appeal submissions, and after various adjournments, the appeal hearing was scheduled for the 14th of July 2023 as the date of the hearing. The Court directed that the application for enlargement of time and the substantive appeal would be heard together.

The Hearing

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

(a) As he was out of time, he blamed the authorities at the Labasa Corrections Centre for not filing his grounds of appeal on time. He offered no other explanation for the delay in filing.

(b) He submitted that the Magistrate did not consider that he was a first offender, had no pending cases and no previous convictions.

(c) The Magistrate also did not consider that the appellant pleaded guilty at the earliest opportunity, saving the Court and Police resources. He was a first and young offender of 26 years.

(d) The number of plants was only 65 with the weight of 701.3 grams and he was sentenced to 2 years 3 months and 16 days imprisonment, with a non-parole period of 18 months' imprisonment.

(e) 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: -

- Alipate Vuicakau –v- State HAC 1/18 – 17.1 kg 121 plants – 4 years imprisonment
- Jone Uluiviti –v- State CF 205/22 – 352 grams – 11 months 27 days imprisonment

(f) He submits that the Court must revisit and reconsider his sentence considering the cases cited above.

(g) The Magistrate also did not give reasons why he decided to deprive the appellant of an opportunity to earn the one third good behaviour remission in prison under the Corrections Services Act by fixing the non-parole period too close to the head sentence. He was a young first offender and he has expressed genuine remorse. He submits that these factors weighed in favour of rehabilitation of the offender.

The State's submissions

18. In written submissions filed, State counsel submitted that the appellant was charged with Unlawful Cultivation of 65 plants weighing 701.3 grams of cannabis sativa. He pleaded guilty in the Savusavu Magistrate's Court and was thereafter sentenced on the 25th of May 2022. The Appellant was sentenced to 2 years 3 months and 16 days imprisonment. Being dissatisfied with the sentence, the appellant has filed an appeal against sentence, however the appeal is out of time by 7 months and 6 days however he has not stated the reasons for the delay in filing his grounds of appeal.

19. He was initially represented by Legal Aid however he then waived his right to counsel and he pleaded guilty. He was supposed to appeal within 28 days of the sentence and since he is now out of time, he has to seek leave to appeal as provided for at section 248 of the Criminal Procedure Act.

20. The State submits the authority of Kumar vs State; Sinu vs State [2012]; CAV 1 of 2009 (21 August 2012) where the Court provided the following criteria for granting leave: -

- The reason for the failure to file within time
- The length of the delay
- Whether there is a ground of merit justifying the appellate Court's consideration.

- Whether there has been substantial delay, nonetheless, is there a ground of appeal that will probably succeed.
- If time is enlarged, will the Respondent be unfairly prejudiced?

21. The State submits that there is no guideline sentence for cultivation of illicit drugs as highlighted in the case of Tomasi Tawake vs State Criminal Appeal No. AAU 63 of 2016 (3 March 2022).

22. The State submits that at the date of sentencing, the Court recognised this position and shared his difficulty in sentencing cultivation offenders. He therefore applied the existing authority of Sulua –v- State [2012] FJCA 33; AAU 93 of 2008 (31st May 2012).

23. Given that the Appellant was found in possession of 701.3 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.

24. The Learned Magistrate commenced sentencing at 2 years as the starting point and arrived at a final sentence of 2 years 3 months and 16 days imprisonment, with a non-parole period of 18 months. The final term was within the tariff set out above and the sentence was reasonable given all of the circumstances of the case.

25. The Learned Magistrate complied with section 18 of the Sentencing and Penalties Act in allocating the non-parole period.

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

Analysis

27. Section 246 of the Criminal Procedure Act 2009 provides for appeals from the Magistrate's Court. Section 246 (1) provides as follows: -

> "Division 1 — Appeals Appeal to High Court
>
> 246.-(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 judgment and sentence."

28. All appeals from the Magistrate's Court must be filed within 28 days from the date of the decision being appealed against (section 248 (1) Criminal Procedure Act).

29. The Act also gives this Court the power to enlarge the time and this is provided at section 248 (2) of the Act. This is a discretionary power to be exercised if the Court finds "good cause."

> Good cause is also defined at section 248 (3) as follows: -
>
> "(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"

30. In this case, the main reason for the delay in appealing is that the authorities at the Corrections Centre did not file his petition of appeal and grounds of appeal in time. The appellant was further directed to provide the details of when and where he first filed his appeal however this has not been filed to date.

31. The appellant therefore has not provided a good cause why his appeal must be allowed even though he is well out of time. Notwithstanding that fact, the Court will see whether the grounds of appeal have any merit or not.

32. 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)."

33. 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."

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

35. 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 2 years 3months and 16 days imprisonment, a sentence within the tariff.

36. After arriving at the final sentence, he considered the non-parole period to be assigned to the sentence and he arrived at a non-parole period of 18 months, 9 months 16 days from the head sentence.

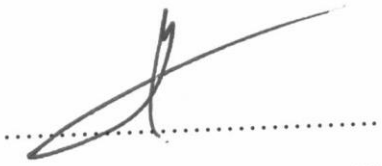
37. I find that the Magistrate was entitled to arrive at the final sentence – he did not fall into error and the sentence is within the current tariff. He considered the relevant factors and made the necessary adjustments for the plea, for his previous good conduct and the Court will not interfere with the sentence.

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

1. **The sentence handed out by the Savusavu Magistrate's Court on the 25th of May 2022 is hereby affirmed.**

2. **The appeal against sentence fails.**

So ordered.



Mr. Justice Usaia Ratuvili

<u>Acting Puisne Judge</u>

<u>Solicitors</u>:

Appellant in Person

Office of the Director of Public Prosecutions for the Respondent