

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No: HAC 161 of 2023

STATE

V

RAVIN LAL

Counsel : Ms. E. Cabemaiwai for the State.
: Mr. W. Pillay for the Accused.

Date of Submissions : 16 July, 2024
Date of Sentence : 17 July, 2024

SENTENCE

1. The accused is charged in the Magistrate's Court at Nadi with the following offences:

FIRST COUNT

Statement of Offence

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: Contrary to Section 5[a] of the Illicit Drugs Control Act 2009.

Particulars of Offence

RAVIN LAL on the 28th day of December 2021 at Nadi in the Western Division, without lawful authority cultivated 119 plants weighing 36,040 grams of Cannabis Sativa or Indian Hemp an illicit drugs.

SECOND COUNT

Statement of Offence

UNLAWFUL POSSESSION OF ILLICIT DRUGS: Contrary to Section 5[a] of the Illicit Drugs Control Act 2004.

Particulars of Offence

RAVIN LAL on the 28th day of December 2021 at Nadi in the Western Division, without lawful authority had in his possession 348 grams of Cannabis Sativa or Indian Hemp an illicit drugs.

2. On 3rd June, 2022 the accused pleaded guilty to the above mentioned charges and also admitted the summary of facts read and explained to him in his preferred language in the presence of his counsel. On 25th September, 2023 the learned Magistrate found the accused guilty and convicted him as charged.
3. After the filing of sentence submissions and mitigation by the defence counsel (at the time) the learned Magistrate proceeded to sentence the accused, however, the sentence was not delivered after the learned Magistrate realized that the sentence may be beyond the powers of the Magistrate's Court.
4. Pursuant to section 190 of the Criminal Procedure Act the file has been transferred to the High Court for sentence. On 7th December,

2023 the matter was first called in the High Court, however, before the accused could be sentenced the accused through his counsel filed two miscellaneous applications which had to be dealt with by this court.

5. On 8th July, 2024 after this court dismissed the second miscellaneous application the accused counsel was given 7 days to file and serve mitigation. This court had also informed counsel that failure to file mitigation this court would rely on the mitigation filed in the Magistrate's Court.
6. On 16th July, 2024 the accused counsel filed supplementary mitigation submissions being the accused discharge summary from Lautoka Hospital. This means the court will rely on the mitigation filed by the accused previous counsel and the current medical discharge summary.

SUMMARY OF FACTS

7. The brief summary of facts was as follows:
 - a) On 28th December, 2021 at about 3 pm at Masimasi, Sabeto, Nadi D/Cpl. Filipe Ratini received information that the accused was cultivating illicit drugs at Savalau Settlement, Nadi at his farm. This officer then informed the Fiji Detector Dog Unit based at Nadi Airport. At Nadi Airport D/Cpl. Filipe Ratini met PC Petero Saini, PC Neumi Nanuku and briefed them on the place and person of interest.
 - b) The team drove to Savalau to the accused compound and identified themselves to the accused and the reason for their presence. The accused identified himself as Ravin Lal. D/Cpl. Filipe Ratini showed the accused a copy of search warrant, the accused admitted that he was planting some green plants

believed to be marijuana. The accused then led the team to his farm.

c) In the presence of the accused, the team uprooted 119 plants believed to be marijuana measuring 0.8cm to 2.8 meters. Thereafter PC Petero Saini went with the accused and K-9 Conan to search his house. During the search, PC Petero Saini found 9 dried plant material believed to be marijuana wrapped in a red sari.

d) D/Cpl. Filipe Ratini approached the accused and arrested him after giving him his constitutional rights and reason for his arrest. The green plants and dried plant materials were taken to the Sabeto Police Station and handed over to the investigating officer and then taken to the Forensic Chemistry Laboratory for analysis. The result of the analysis came out positive for Cannabis Sativa having a total weight of 36,388 grams.

e) The accused was arrested, interviewed under caution where he admitted committing the offence of cultivation from Q. and A. 31 to 47. The accused was later charged and produced in court.

8. After considering the summary of facts read by the prosecutor and upon reading the caution interview of the accused and the analyst report the learned Magistrate was satisfied that the accused had entered an unequivocal plea of guilty on his free will. The court was also satisfied that the accused had fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted by the accused satisfied all the elements of the offences as charged.

9. In view of the above, the accused was found guilty as charged and he was convicted accordingly.

10. The state counsel filed sentence submissions and the defence counsel filed supplementary mitigation for which this court is grateful.

PERSONAL DETAILS AND MITIGATION OF THE ACCUSED

11. The counsel for the accused presented the following personal details and mitigation on behalf of the accused:
 - a) The accused is 46 years of age;
 - b) A Farmer;
 - c) The accused is married and they have two children;
 - d) Pleaded guilty at the earliest opportunity;
 - e) Is a first offender;
 - f) Has cooperated with the police during investigations;
 - g) Is taking medication for hypertension and diabetes;
 - h) He is remorseful for his actions;
 - i) Knows what he did was wrong, he will never reoffend;
 - j) Seeks forgiveness of the court;
 - k). Regrets his actions;
 - l). Has suffered a medical condition whilst in custody.

TARIFF

12. The maximum punishment for unlawful cultivation and possession of illicit drugs under section 5 (a) of the Illicit Drugs Control Act 2004 is a fine not exceeding \$1,000,000.00 or imprisonment for life or both.
13. The Court of Appeal in *Jone Seru vs. The State, Criminal Appeal No. AAU 115 of 2017 (25 May, 2023)* formulated the following sentencing guidelines for the cultivation of cannabis sativa/marijuana in Fiji from paragraphs 33 to 38 based on the culpability of the accused and the harm based on the number of plants/scale of operation from category 01 to 04:

[33] Therefore, considering the offending of cultivation of cannabis sativa/marijuana and sentencing regimes in other jurisdictions, the sentencing guidelines in UK appear most suitable for assistance in formulating sentencing tariff for cultivation of cannabis sativa/marijuana in Fiji as approved by the Supreme Court in **Tawake**. Under the Illicit Drugs Control Act 2004, the maximum punishment for Unlawful Cultivation is a fine not exceeding \$1,000,000 or imprisonment for life or both.

[34] In **Zhang v R** [2019] NZCA 507 the Court of Appeal of New Zealand made the following remarks on the importance of the role played by the offender in the matter of sentence.

‘Sentencing must achieve justice in individual cases. That requires flexibility and discretion in setting a sentence notwithstanding the guidelines expressed

‘...the role played by the offender is an important consideration in the stage one sentence starting point. Due regard to role enables sentencing judges to properly assess the seriousness of the conduct and the criminality involved, and thereby the culpability inherent in the offending. Although we do not adopt the two grid matrix (involving quantity bands and role categories) devised by the United Kingdom Sentencing Council, we record that, in assessing role, sentencing judges may find it helpful to have regard to the Council’s categorizations of role (into “leading”, “significant” and “lesser”). In considering the individual appeals before us, we make use of those categorizations.’

[35] Firstly, the court should determine the offender’s culpability (role) and then the harm caused (output or potential output). Then, the court should use the starting point given in the Sentencing Table below to reach a sentence corresponding to the role and category identified. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm could merit upward adjustment from the starting point. After

further adjustment for aggravating or mitigating features a sentence within the range in the **Sentencing Table** below should be arrived at. Thereafter, reduction for guilty pleas, time in remand, totality principle etc. would complete the sentencing process.

[36] **CULPABILITY.** Culpability is demonstrated by the offender's role as given below. In assessing culpability, the sentencer should weigh up all the factors of the case to determine role (**leading role, significant role or lesser role**). Where there are characteristics present which fall under different role categories, or where the level of the offender's role is affected by the scale of the operation, the court should balance these characteristics to reach a fair assessment of the offender's culpability. Thus, it must be borne in mind that these roles may overlap or a single offender may have more than one role in any given situation. The demarcation of roles may blur at times. The sentencers should use their best judgment and discretion in such situations.

Leading role:

Owner, organizer, initiator or principal party in the venture. Involved in setting-up of the operation, for example obtaining the lands, premises, workers and equipment with which to carry out the cultivation. May have one or more such ventures.

- Directing or organizing production/cultivation on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover

Significant role:

- Play a greater or dominant part. Running the operation.
- Operational or management function within a chain. May make arrangements for the plants to be brought in, and the crop to be distributed. They may help to run more than one operation and be

involved in making payments, such as rental payments, albeit again on instructions from those running the operation.

- Involves others in the operation whether by pressure, influence, intimidation or reward*
 - Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender's own habit), whether or not operating alone*
- Some awareness and understanding of scale of operation*

Lesser role:

- Secondary party. Sometimes as "gardeners" tending the plants and carrying out what might be described as the ordinary tasks involved in growing and harvesting the cannabis. Simply be doing their tasks on the instructions of above in the hierarchy. May get paid for the work or subsistence.*
- Performs a limited function under direction*
 - Engaged by pressure, coercion, intimidation, grooming and/ or control*
- Involvement through naivety, immaturity or exploitation*
- No influence on those above in a chain*
- Very little, if any, awareness or understanding of the scale of operation*
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)*
- Expectation of limited, if any, financial advantage, (including meeting the offender's own habit)*

[37] **HARM.** *In assessing harm, output or potential output are determined by the number of plants/ scale of operation (category 01, 02, 03 or 04). The court should determine the offence category from among 01- 04 given below:*

- Category 1** – *Large scale cultivation capable of producing industrial quantities for commercial use with a considerable degree of*

sophistication and organization. Large commercial quantities. Elaborate projects designed to last over an extensive period of time. High degree of sophistication and organization. 100 or more plants.

□ **Category 2** – Medium scale cultivation capable of producing significant quantities for commercial use i.e. with the object of deriving profits. Commercial quantities. Over 50 but less than 100 plants.

□ **Category 3** – Small scale cultivation for profits capable of producing quantities for commercial use. 10 to 50 plants (with an assumed yield of 55g per plant).

□ **Category 4** – Cultivation of small number of plants for personal use without sale to another party occurring or being intended. Less than 10 plants (with an assumed yield of 55g per plant).

38. SENTENCING TABLE (cultivation of cannabis sativa)

Culpability Harm	LEADING ROLE	SIGNIFICANT ROLE	LESSER ROLE
Category 1	Starting point 18 years' custody	Starting point 14 years' custody	Starting point 9 years' custody
	Category range 16 – 20 years' custody	Category range 12 – 16 years' custody	Category range 7 – 12 years' custody
Category 2	Starting point 14 years' custody	Starting point 19 years' custody	Starting point 5 years' custody
	Category range 12 – 6 years' custody	Category range 7 years' – 26 years' custody	Category range 3 years – 7 years' custody
Category 3	Starting point 9 years' custody	Starting point 5 years' custody	Starting point 18 months' custody
	Category range 7 – 12 years' custody	Category range 3 years' – 7 years' custody	Category range 1 year – 3 years' custody
	Starting point	Starting point	Starting point

Category 4	5 years' custody	18 months' custody	
	Category range 3 years' – 7 years' custody	Category range 1 year – 3 years' custody	Category range Non-custodial – suspended sentence

14. The accused is the owner of the farm who was cultivating the cannabis sativa plants as a principal party in the venture but without any sophistication. I have my doubts that the role of the accused can be regarded as leading role. In my considered judgment the accused was playing a significant role in nurturing the plants with an expectation of a financial return.

15. It cannot be ignored that the accused was cultivating the cannabis sativa plants on his land of varying sizes and weight whilst doing subsistence farming. The weight and height range from 0.8 cm to 2.8 meters gives an indication that the plants were healthy and well looked after. This leads me to the conclusion that the plants were for sale but falling short of a high degree of sophistication and organization in the venture itself. It is also noted that no equipment's were found at the farm to point towards an industrial operation even though the number of plants were substantial.

16. The Supreme Court in *Inoke Ratu vs. The State, criminal petition no. CAV 0024 of 2022 (25 April, 2024)* has stated that the culpability of an offender is reliant on the role played by the offender in the offending. At paragraph 18 the Supreme Court made a pertinent observation in the following words:

The degree of the offender's culpability would depend on how the role which the offender played should be characterized. Did he play a leading role or a significant role or a lesser role? The Court of Appeal identified the various factors which the sentencing judge should take into account

to determine which of these three roles the offender played. The level of harm likely to be caused would depend on the nature of the operation. There were four categories, and the Court of Appeal identified the various factors which would indicate into which category the operation in a particular case came.

17. In this case the number of plants fall in category one but the summary of facts does not fall into the factors of category one hence this court has to view the role of the accused with a degree of flexibility that would offer some relief to the accused in respect of his role which I take as significant role. At paragraph 25 of *Inoke Ratu's* case (supra) the Supreme Court has given some latitude to the sentencing court by taking into account aggravating and mitigating factors on a case by case basis:

*In my opinion, the various categories have to be approached with a degree of flexibility, without at the same time undermining one of the reasons why guideline judgments are given – namely to ensure that cases are dealt with consistently and that similar cases are treated, broadly speaking, in the same way. I think that the Court of Appeal must have included the number of plants for each category to make the selection of the appropriate category a really straightforward exercise for sentencing judges. In other words, I proceed on the assumption that the Court of Appeal thought that the number of plants should be the sole criterion for determining the appropriate category, and that they added the descriptions in *Terewi* to explain what the nature and size of the operation was likely to be with that number of plants – perhaps without giving as much thought as was necessary to the rarity of sophisticated enterprises in Fiji involving the cultivation of cannabis plants. To give effect to that, I would refine the approach adopted by the Court of Appeal as follows. If the nature and size of the operation in a particular case does not match the description of the operation in the category indicated by the number of plants, the actual size and nature of the operation*

should be reflected at the stage at which the judge looks at those factors which either aggravate or mitigate the offence so as to increase or reduce the relevant starting point within the relevant sentencing range. Having said that, if the only way in which the nature and size of the operation in a particular case does not match the description of the operation in the category indicated by the number of plants is because the operation was not as sophisticated as the category suggests, any reduction to the starting point on that account alone should be very modest.

18. The sentence would fall under category one due to the potential harm that exists on the number of plants cultivated which is over 100. From the summary of facts the accused played a significant role in the cultivation of 119 plants as opposed to a leading role and therefore the sentencing tariff in this case is a sentence which falls in the range of 12 years to 16 years imprisonment.

19. For possession of illicit drugs being 348 grams of Cannabis Sativa the tariff in *Kini Sulua and Michael Ashley Chandra vs. The State, Criminal Appeal No. AAU 0093 of 2008 and AAU 0074 of 2008 (31 May, 2012)* is a sentence between 1 year to 3 years imprisonment.

AGGRAVATING FACTORS

20. The following aggravating factors are obvious:

- a) Commercial Supply

The number of cannabis sativa plants (119) suggests that the accused was engaged in a commercial supply of the drugs. In the caution interview the accused in answer to Q. 47 stated that he wanted money to pay for his daughter's TELS loan.

b) Prevalence of the offending

There has been an increase in drug related offences which is a matter of concern for everyone. Day in and day out there is a drug related case reported around Fiji which is plaguing the society.

GUILTY PLEA

22. The accused pleaded guilty after a few mentions in the Magistrate's Court. In *Gordon Aitcheson vs. The State*, criminal petition no. CAV 0012 of 2018 (2 November, 2018) the Supreme Court offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:

[14]. In ***Rainima -v- The State*** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:

“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.”

In ***Mataunitoga -v- The State*** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:

“In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value.

The timing of the plea, of course, will play an important role when making that assessment.”

*[15]. The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.*

23. This court accepts that genuine remorse leading to a guilty plea is a substantive mitigating factor in favour of an accused, however, the guilty plea must be entered in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence (*see Manoj Khera v The State, CAV 0003 of 2016 (1 April, 2016)*).
24. When looking at this case, this court accepts that the accused has shown some remorse when he pleaded guilty. By pleading guilty the accused saved the court’s time and resources which is a factor to the credit of the accused.
25. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender’s deeds and then pleading guilty is not genuine remorse *per se* (*see Gordon Aitcheson’s case supra*). In this regard, the sentencing court has a responsibility to assess the guilty plea along with other pertinent factors such as the timing of the plea, the strength of the prosecution case etc. Here there is no doubt that the accused by pleading guilty has shown some remorse in view of the strong prosecution case against him.

26. Section 17 of the Sentencing and Penalties Act states:

“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”

27. I am satisfied that the two offences for which the accused stands convicted are offences founded on the same facts and are of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence for the two offences.

28. After assessing the objective seriousness of the offences committed I take 12 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. I increase the sentence by 3 years for aggravating factors, the accused gets a reduction of 1 year and 6 months for mitigation and good character as a first offender. The sentence is further reduced for guilty plea which I consider to be early by 1 year. The interim aggregate sentence is now 12 years and 6 months.

29. The accused has been in remand for 2 months and 3 days in accordance with section 24 of the Sentencing and Penalties Act and in exercise of my discretion the sentence is reduced by 3 months as a period of imprisonment already served. The final aggregate sentence is 12 years and 3 months imprisonment.

30. Cannabis sativa commonly known as marijuana is an addictive illicit drug which has many adverse effects. The punishment prescribed under the Illicit Drugs Control Act 2004 reflects the serious

consideration given by the law makers towards the prevention of the cultivation and possession of such drugs.

31. The accused former counsel stated in his mitigation that the accused committed this illegal activity to derive financial gain to pay off his daughter's TELS loan is not a good reason to engage in such a gross disregard of the law. In my considered judgment the accused should now be prepared to face the full brunt of the law. The society is sick and tired of drugs cases rearing its ugly face every now and then, this must stop sooner rather than later. It is for the court to impose sentences which has general and specific deterrence factor to give a warning to all those out there that any breach of the law relating to drugs will not be tolerated and no leniency will be shown to the offenders.
32. Instead of putting his efforts in such an illegal activity the accused should have directed his efforts towards something lawful and productive for which he would have received praise from his community but that was not to be. An immediate long term custodial sentence is inevitable.
33. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed I am compelled to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
34. Under section 18 (1) of the Sentencing and Penalties Act (as amended), this court has the powers to impose a non-parole period to be served before the accused is eligible for parole. It is obvious that the accused takes responsibility for his actions, had cooperated with the police during the pre-charging and by pleading guilty the accused is genuinely interested in reforming himself.

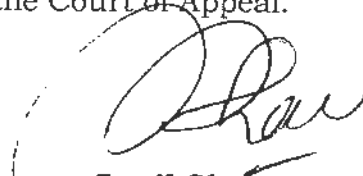
35. In this regard I have taken into consideration the principle stated by the Court of Appeal in *Paula Tora v The State* AAU0063.2011 (27 February 2015) at paragraph 2 Calanchini P (as he was) said:

[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to re-habilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.

36. The Supreme Court in accepting the above principle in *Akuila Navuda v The State* [2023] FJSC 45; CAV0013.2022 (26 October 2023)] stated the following:

Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave themselves in prison, and the advantages of incentivising good behaviour in prison by the granting of remission will be lost. The difference of only one year in this case was insufficient. I would increase the difference to two years. I would therefore reduce the non-parole period in this case to 12 years.

37. Considering the above, I impose 9 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused and also meet the expectations of the community which is just in the circumstances of this case. The accused a middle aged Farmer opted to selfishly venture into an illegal activity without much thought about its dire consequences on the society and the country is lucky that his remorse has given him the opportunity to look towards a non-parole period which is below the sentencing range. The accused pleaded guilty at the earliest and also cooperated with the police are some of the positive attributes in his favour as well.
38. In summary, I pass an aggregate sentence of 12 years and 3 months imprisonment with a non-parole period of 9 years to be served before the accused is eligible for parole. It is also recommended that the Commissioner of Corrections Service provide facilities in respect of the medical condition of the accused such as medical care and attention.
39. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka
17 July, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Gordon and Company for the Accused.