

IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

Criminal Appeal Case No. HAA 19 of 2024
(Labasa Criminal Case No. 675 of 2023)

WAISALE SOGARI

APPELLANT

-v-

STATE

RESPONDENT

Counsel: Ms. R. Raj for the Appellant
Mr. T. Tuenuku for the State

Date of Hearing: 23 April 2025

Date of Judgment: 25 April 2025

JUDGMENT

1. On 29 November 2023, in the Magistrates' Court at Labasa, the appellant pleaded guilty to a charge of Cultivation of Illicit Drugs, contrary to section 5(a) of the Illicit Drugs Control Act 2004.
2. A summary of facts was read and agreed by the appellant. Those facts were that, on 25 October 2023, a team of police officers went to a farm at Lomaloma village. They uprooted 23 plants believed to be marijuana. The appellant was arrested. The 23 plants were analysed and found to be cannabis sativa, ranging in height from 9cm to 136 cm, weighing a total of 1250.4 grams. The appellant made admissions under caution.
3. The learned Resident Magistrate convicted the appellant on his own plea and adjourned for sentencing.

4. On 24 June 2024, the Resident Magistrate sentenced the appellant to 2 years' imprisonment and fixed a non-parole period of 1 year 6 months. The sentencing remarks set out clearly how the Resident Magistrate arrived at the sentence imposed ("the impugned sentence").
5. Dissatisfied with the impugned sentence, on 16 October 2024, the appellant filed a home-made document headed "Leave To Appeal Out Of Time" dated 26 September 2024, the appeal period having expired on 22 July 2024. The appellant sought to advance three substantive grounds of appeal. The gravamen of his appeal being that he did not receive a just punishment in all the circumstances.
6. When the matter was first called before this Court on 19 November 2024, the unrepresented appellant sought to abandon his appeal. I was not prepared to allow the appellant to abandon his appeal as it seemed to me at first blush that he may benefit from the recently revised guideline judgment. I ordered that the Record be compiled within 30 days.
7. On 29 January 2025, I ordered that the Legal Aid Commission file and serve amended grounds of appeal and written submissions on the appellant's behalf by 14 March 2025. The prosecution were ordered to file written submissions by 21 March 2025.
8. On 28 March 2025, Mr. Rusaqoli informed the Court that the officer in carriage had visited the appellant in prison, and that he had instructed her that he wished to withdraw his appeal. The appellant confirmed that he wished to abandon his appeal. However, when I inquired whether he had received legal advice he informed me that he was not advised about the merits of his appeal. I informed the appellant that there was no risk that the Court would increase his sentence and that there was arguable merit in his appeal. The appellant then informed the Court that he wished to pursue his appeal. The Legal Aid Commission were ordered to file and serve written submissions within 14 days, and the prosecution written submissions were to be filed by 21 April 2025.
9. Pursuant to section 248(2) Criminal Procedure Act, I enlarge time for the appeal. The appellant was unrepresented at sentencing, the required extension of time is less than 3 months, and I consider that there is arguable merit in the appeal.

10. The appellant argues that the Resident Magistrate erred in assessing that he played a '*significant*' role as prescribed in the relevant guideline judgment at the date of sentencing. The relevant guideline judgment is now *Arisi Kaitani v The State* Criminal Petition No. CAV 011 of 2023, a matter to which I shall return below.
11. At the time of the impugned sentence, the relevant guideline judgment was *Jone Seru v The State* Criminal Appeal No. AAU 115 of 2017 (25 May 2023). The Court of Appeal guideline in *Seru* looks at culpability in terms of the offender's role in the offending, ie whether it was a leading, significant or lesser role – and assesses harm by looking at the scale of the cultivation, ie was it a large, medium or small scale commercial operation or a small operation for individual use.
12. In the impugned sentence, the Resident Magistrate correctly assessed harm in category 3 of *Seru*. Category 3 extends from 10 to 50 plants. In the present case, the appellant admitted having cultivated 23 plants.
13. The starting point for category 3 '*significant*' role is 5 years with a sentencing range of 3 years' to 7 years' imprisonment. For category 3 '*lesser*' role the starting point is 18 months' imprisonment with a sentencing range of 1 year to 3 years' imprisonment.
14. Having assessed the appellant as having played a '*significant*' role, the Resident Magistrate adopted a starting point of 5 years' imprisonment, faithfully applying the *Seru* guideline.
15. The big difference in the appropriate starting point between '*significant*' and '*lesser*' roles meant that the proper assessment of role played by the appellant in this case assumed critical importance under the *Seru* guideline.
16. At the hearing of this appeal, the parties were in agreement that the Resident Magistrate erred in assessing the appellant as having played a '*significant*' role. In my view, there was insufficient material before the learned Resident Magistrate to enable her to reasonably assess that the appellant played a '*significant*' role in the cultivation of 23 plants. The summary of facts made no mention of his role. Indeed, it was not agreed that the cultivation was for commercial purposes. Under caution, the appellant said that he planted 23 plants on Mataqali land

about a month before they were uprooted. He visited every day to water his plants and to add manure to them.

17. In my view, the evidence did not support that the appellant played any more than a 'lesser' role. The appropriate starting point was 18 months' imprisonment.
18. Adopting the wrong starting point is an error of principle which caused the sentencing discretion to miscarry. I consider that a different sentence should have been passed.
19. Accordingly, I quash the impugned sentence.
20. Were I to sentence the appellant under the *Seru* guideline, the appropriate sentence would be 6 months' imprisonment. I arrive at this sentence by adopting a starting point of 18 months' imprisonment. I adopt the Resident Magistrate's approach to the appellant's effective mitigation and reduce the sentence by 9 months. I further reduce the sentence by one-third to reflect the utilitarian value of his early plea of guilty. In the result, the appropriate sentence is 6 months' imprisonment.
21. Before I finish with this appeal, I think it is worth making the observation that this case highlights the significant changes brought about in the sentencing practice for cultivation of cannabis sativa by *Kaitani*. The Supreme Court considers that, for less than 1kg, irrespective of the number of plants cultivated, "*there is no need for the State to waste its resources on this category.*"
22. For category 2, the appropriate sentencing range is 1 to 4 years' imprisonment.
23. I have considered whether I should sentence the appellant according to *Kaitani*. I agree with the parties' submissions that the first condition for retrospective application of the new guideline is satisfied. The appeal was filed before the date the Judgment in *Kaitani* was handed down (29 October 2024). However, the application of *Kaitani* would not result in a more favourable outcome to the appellant.
24. In my view, applying the *Kaitani* guideline, the appropriate starting point in all the circumstances of this case would be 18 months' imprisonment. Adopting the Resident Magistrate's approach to the appellant's effective mitigation would

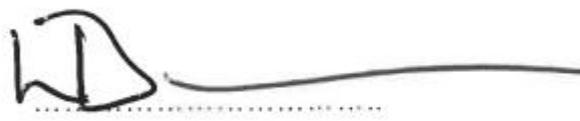
result in a reduction of 9 months. A further reduction by one-third to reflect the utilitarian value of the appellant's early plea of guilty would result in an ultimate sentence of 6 months' imprisonment.

25. The appropriate sentence under the *Kaitani* guideline would be the same as the sentence to be imposed under what I consider to be a correct application of the *Seru* guideline.
26. In the result, the appropriate sentence is 6 months' imprisonment.
27. Mr. Sogari, I allow your appeal against sentence, and sentence you to 6 months' imprisonment, with effect from 24 June 2024. By my calculation, this is a sentence that you have already served. I shall leave it to the appropriate authorities to attend to the formalities of your imminent release.

Orders:

- (i) Time for leave to appeal enlarged;
- (ii) Appeal against sentence allowed;
- (iii) Sentence of 2 years' imprisonment quashed;
- (iv) Appellant sentenced to 6 months' imprisonment with effect from 24 June 2024;
- (v) 30 days to appeal to the Court of Appeal.




Hon. Mr. Justice Burney

At Labasa

25 April 2025

Solicitors

Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the State