

IN THE HIGH COURT OF FIJI

AT LABASA

APPELLATE JURISDICTION

Criminal Appeal Case No. HAA 01 of 2025
(Savusavu Criminal Case No. 293 of 2024)

JOSAIA MATAITOGA

-v-

STATE

Counsel: Ms. M. Besetimoala for the Appellant
Mr. E. Kotoilakeba for the State

Date of Hearing: 16 April 2025

Date of Judgment: 16 April 2025

JUDGMENT

1. On 15 July 2024, in the Magistrates' Court at Savusavu, 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 13 July 2024, the police used a drone to locate a farm of green plants. They uprooted 37 green plants ranging from 43cm to 233cm in height. Upon analysis, the plants were found to be cannabis sativa, weighing a total of 928.8grams.
3. The learned Resident Magistrate convicted the appellant on his own plea and remanded him in custody pending sentencing.

4. On 15 October 2024, a different Resident Magistrate sentenced the appellant to 34 months' imprisonment, less 2 months and 25 days spent in custody, which was counted as time already served. The ultimate sentence therefore was 31 months' and 5 days' imprisonment. The learned Resident Magistrate ordered that 24 months and 5 days was to be served immediately, and 7 months was suspended for 3 years. A non-parole period was not fixed. The Resident Magistrate's reasons for sentence are set out in a written sentence dated 9 October 2024 ("the impugned sentence").
5. Dissatisfied with the impugned sentence, the appellant filed a Notice of Leave to Appeal out of Time on 22 January 2025, the appeal period having expired on 12 November 2024.
6. The matter was first called before this Court on 30 January 2025. It was ordered that the Record be compiled within 28 days and that the appellant be escorted to the Legal Aid Commission.
7. On 13 March 2025, the Legal Aid Commission filed an Amended Petition of Appeal on the appellant's behalf. The proposed appeal is advanced on two grounds:
 1. That the learned Magistrate imposed a sentence that was harsh and excessive.
 2. That the Learned Magistrate erred in law and fact when he found that the appellant played a significant role within the *Jone Seru* guideline judgment without evidence before the court to support that finding.
8. 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.
9. The gravamen of this appeal is that the Resident Magistrate erred in assessing that the appellant 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.

10. 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.
11. 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 37 plants.
12. 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.
13. 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.
14. 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.
15. In my view, there was insufficient material before the learned Resident Magistrate to enable him to reasonably assess that the appellant played a '*significant*' role in the cultivation of 37 plants. The summary of facts made no mention of his role. Indeed, it was not agreed that the cultivation was for commercial purposes. In mitigation, it was advanced that there was only one big plant and the rest were small.
16. 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.
17. 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.

18. Accordingly, I quash the impugned sentence and sentence the appellant to 7 months' imprisonment. I arrive at this sentence by adopting a starting point of 18 months' imprisonment. I consider the Resident Magistrate's approach to the appellant's effective mitigation and his early guilty plea to have been impeccable. Adopting that approach, I reduce the sentence by 3 months for his effective mitigation. I further reduce the term of 15 months' imprisonment by one-third to reflect the utilitarian value of his early plea of guilty.
19. In the result, the appropriate sentence is 10 months' imprisonment, less time in remand (which I round up to 3 months).
20. Mr. Mataitoga, I allow your appeal against sentence, and sentence you to 7 months' imprisonment, with effect from 9 October 2024. By my calculation, assuming full remission, 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.
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, as in this case, "*there is no need for the State to waste its resources on this category.*"
22. For category 1, a non-custodial sentence is to be given.
23. I have considered whether I should sentence you according to *Kaitani*. Adopting the approach in *Inoke Ratu v The State [2024] FJSC 10, at para [27]*, it is not appropriate for me to apply *Kaitani* given that your appeal against sentence was not filed before the Judgment in *Kaitani* was delivered (29 October 2024).

Orders:

- (i) Time for leave to appeal enlarged;
- (ii) Appeal against sentence allowed;
- (iii) Sentence of 31 months' and 5 days' imprisonment quashed;
- (iv) Appellant sentenced to 7 months' imprisonment with effect from 9 October 2024;

(v) 30 days to appeal to the Court of Appeal.




Hon. Mr. Justice Burney

At Labasa

16 April 2025

Solicitors

Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the State