IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No. 24/3154 COA/CRMA

BETWEEN: **MARCEL MELTHERONGRONG**
Appellant

AND: **PUBLIC PROSECUTOR**
Respondent

Date of Hearing:	***11th November 2024***
Before:	***Hon. Justice M. O'Regan*** ***Hon. Justice R. White*** ***Hon. Justice O. A Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice V. M. Trief*** ***Hon. Justice E. Goldsbrough*** ***Hon. Justice M. A. MacKenzie***
Counsel:	***M. J. Hurley and C. Hurley for the Appellant*** ***T. Karae for the Respondent***

JUDGMENT OF THE COURT

Introduction

1. The Appellant was sentenced for the offence of cultivating cannabis, in contravention of s.4 of the Dangerous Drugs Act. He now appeals against the severity of the sentence and its non-suspension.

2. The maximum penalty for cultivating cannabis in contravention of s.4 of the Dangerous Drugs Act is the penalty which applies to all contraventions of that Act, viz., imprisonment for 20 years or a fine of VT100 million or both.

Circumstances of the Offence

3. The appellant pleaded guilty to cultivating 66 cannabis plants in his yard at Erakor Village. He was arrested on 19 February 2024, but the evidence indicated that the cultivation had commenced with the planting of seeds in mid-2023. The plants were well established at the time of the appellant's arrest, and had a net weight of 6.14kg.

4. When interviewed by police, the appellant admitted that he had been cultivating cannabis since Cyclone Pam, which was in March 2015. He also admitted that he had known that the cultivation of cannabis was illegal and had expected that one day he would be detected.

5. The appellant, aged 49 at sentence, told the Police, and by his counsel repeated in the sentencing submissions, that he had been growing the cannabis for personal use and to make medicine.

The sentence

6. The sentencing Judge identified three aggravating factors in the offending: the appellant's knowledge that what he was doing was illegal, the number of plants, and the weight of the plants.

7. The Judge considered that the appellant's offending was within the second category discussed by this Court in *Wetul v Public Prosecutor* [2013] VUCA 26 and on that basis fixed a starting point of imprisonment for 3 years. He reduced that starting point by 33⅓% on account of the appellant's early plea of guilty and by a further 4 months on account of the appellant's personal mitigating factors. The Judge identified those factors as the appellant's clean record at the age of 49, the contribution he had made to Vanuatu's cultural life through the production of films, music and books, his good reputation in Vanuatu, his remorse and the apology made in the sentencing submissions to the people of Vanuatu.

8. These deductions totalled 16 months so that the end sentence should have been 20 months. However, by reason of an arithmetical error, the Judge's end sentence was 22 months. He declined to suspend that sentence.

The starting point

9. Mr Hurley contended that the Judge's starting point of 3 years had been too high and represented an overstatement of the appellant's culpability. He supported that submission by contending that the Judge had been incorrect in regarding this case as being within the second of the categories outlined in *Wetul v Public Prosecutor*. In that case, this Court identified three categories of offences involving cannabis cultivation:

> *Category 1* consists of the growing of a small number of cannabis plants for personal use by the offender without any sale to another party occurring or being intended. Offending in this category is almost invariably dealt with by a fine or other non-custodial measure. Where there have been supplies to others on a non-commercial basis the monetary penalty will be greater and in more serious cases or for persistent offending a term of community work and supervision or even a short custody term may be merited. (It is to be noted in this connection that there is no separate offence in relation to a section 4 offence of cultivation for supplying or possession for supply, as opposed to importation, sale, supply or possession.(s.2).

> *Category 2* encompasses small-scale cultivation of cannabis plants for a commercial purpose, i.e. with the object of deriving profit. The starting point for sentencing is generally between two and four years but where sales are infrequent and of very limited extent a lower starting point may be justified.
>
> *Category 3* is the most serious class of such offending. It involves large-scale commercial growing, usually with a considerable degree of sophistication and organisation. The starting point will generally be four years or more.

10. Mr Hurley noted that Category 2, with the suggested starting point of imprisonment for between 2 and 4 years, was said to be appropriate for small-scale cultivation of cannabis plants for a commercial purpose. He submitted that the appellant in this case had not grown the cannabis for a commercial purpose with the effect that Category 2 was inapplicable.

11. The number of plants grown by the appellant would have made it unsurprising if the Judge had rejected the claim of no commercial purpose. The fact that the Pre-Sentence Report before the Judge contained an assessment that the appellant's cultivation of cannabis was a "way of generating income" adds to that impression. However, the Judge made no express finding to that effect and, as already seen, did not include commerciality as a factor aggravating the offending.

12. Moreover, the prosecution had not in its sentencing submissions alleged a commercial purpose and did not at the sentencing hearing contest the submission of the appellant's counsel that, while the appellant had provided cannabis juice to others for medicinal purposes, he had not done so for profit.

13. On the appeal, Mr Karae for the Public Prosecutor accepted that there had been no commercial element in the appellant's offending. He submitted, nevertheless, that the high number of plants being cultivated warranted, by itself, the appellant's offending being treated as Category 2.

14. It is necessary to keep in mind that the *Wetul* categories are not to be regarded as fixed or inflexible or as though contained in a statute. *Wetul* itself recognised that this is so as the Court described the categories as *"broad"* and noted that the borderline between them may in specific cases be "indistinct and sometimes incapable of exact demarcation". The Court went on to say that the number and size of plants are relevant matters.

15. The present case did not fit easily within Category One because on any view it was not the growing of a small number of cannabis plants. On the other hand, it did not fit easily within Category Two given the prosecution concession that there was no commercial element. This placed it at the borderline of Categories One and Two.

16. On this view of the matter, we are satisfied that the Judge's starting point of imprisonment for three years, being the mid-point of the suggested range for Category 2 offences, was too high. This has resulted in a sentence which is too high and warrants appellate intervention. This Court must re-sentence.

17. Some 11 years have now elapsed since *Wetul*. As was noted by MacKenzie J. in *Public Prosecutor v Tatao* [2024] VUSC 306 at [12], some hardening of approach is discernible in the sentences

imposed in the Supreme Court for the offence of cultivating cannabis. See the sentences to which reference was made in *Tatao*. This reduces the significance which can be attached now to sentences imposed about 10 years ago.

18. There are some exceptions to the apparent hardening of approach. The sentence in *Public Prosecutor v Bule* [2024] VUSC 65 on which Mr Hurley placed reliance is one instance. The sentence in that case appears to have been very merciful and may have been attributable to factors not apparent on the face of the record.

19. It is appropriate to keep in mind that the appellant was supplying cannabis products to others, even if he was not doing so for profit.

20. Nevertheless, the appellant is not to be sentenced on the basis that he was cultivating the cannabis with a view to profit. Moreover, the appellant is to be sentenced only for the offence with which he was charged and to which he had pleaded guilty. He is not to be sentenced for any earlier cultivation of cannabis.

21. In the re-sentencing, we consider that a starting point of 2 years imprisonment is appropriate.

The reduction for personal factors

22. As noted, the Judge allowed a reduction of 4 months (just over 11%) from the starting point for personal factors. Mr Hurley submitted that a reduction of 6 months is appropriate.

23. In addition to the personal matters to which the Judge referred, Mr Hurley emphasised the appellant's role as bread winner for his family, the support for the appellant from his Custom Chief, and to three testimonials which were received by the Court by consent during the appeal hearing. We will not recount those testimonials in detail but accept that they do speak very favourably of the appellant and of his contribution to Vanuatu society. We note at the same time that none of the testimonials mentions awareness by the author that the appellant had been engaging in unlawful conduct since Cyclone Pam. That diminishes to some extent the weight which can be attached to them.

24. It is commonly the case that the imprisonment of offenders will result in hardship for their families. However, it is not usually a matter of which account can be taken in the sentencing. Those who choose to engage in criminal conduct must accept responsibility for the hardship they bring upon their families.

25. A reduction of 4 months from the starting point of 2 years is a reduction of 16⅔%. That is the reduction we consider appropriate. It means that the overall reduction from the starting point will be 50%. This is a significant reduction.

26. That results in a sentence of 12 months. Giving the appellant the benefit of the brief time he spent in custody before being sentenced, the end sentence is imprisonment for 11 months and 28 days. That is the sentence we impose.

Suspension

27. Mr Hurley urges this Court to suspend wholly or partly the sentence.

28. We do not consider that any suspension is appropriate. The appellant's offending was serious, involving as it did, significant cultivation of cannabis in a deliberate flouting of the law. Moreover, while the appellant is not to be sentenced for his earlier unlawful conduct, the fact that he has been cultivating cannabis since Cyclone Pam means that he does not come to the Court with an otherwise unblemished character. This is a case in which the offender knew that what he was doing was unlawful and chose to take the chance of detection. These circumstances in combination make suspension, whether in whole or in part, inappropriate.

Disposition of the appeal

29. For the reasons given above:

(a) The appeal is allowed;

(b) The sentence imposed on 24 September 2024 is set aside;

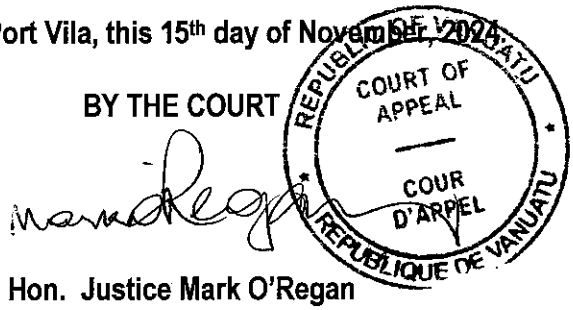
(c) In its place the appellant is sentenced to imprisonment for 11 months and 28 days;

(d) The sentence is to be taken to have commenced on 24 September 2024;

(e) A new warrant of commitment reflecting the above sentence will be issued.

DATED at Port Vila, this 15th day of November, 2024.

BY THE COURT



Hon. Justice Mark O'Regan