

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 041 of 2015

[CRIMINAL JURISDICTION]

STATE

V

LAISA TAVAILAGI

Counsel : Mr. M. Vosawale for State  
Ms. S. Prakash for Accused

Date of Sentence : 18<sup>th</sup> November 2016

SENTENCE

1. Laisa Tavailagi, you were charged with two others with the following offence;

*Statement of offence*

**UNLAWFUL CULTIVATION OF ILLICIT DRUGS:** Contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

*Particulars of offence*

LAISA TAVAILAGI, ILIESA NABANA, VERAMU NAIVALUVOU on the 14<sup>th</sup> day of January 2015, at Lowalevu Farm, Gasele Village, Kadavu in the Southern Division, without lawful authority cultivated 264 plants of cannabis sativa an illicit drug, weighing 43.9 kilograms.

2. You pleaded guilty to the charge on the first day of the trial. After the voir dire hearing, the prosecution discontinued to the proceedings against the other two accused.
3. The maximum penalty for committing an offence under section 5 of the Illicit Drugs Control Act 2004 ("Illicit Drugs Control Act") is a fine not exceeding \$1,000,000 or imprisonment for life or both.
4. Both parties submitted that the majority decision in the case of *Sulua v State* [2012] FJCA 33 is the present authority that sets out the tariff for offences under section 5 of the Illicit Drugs Control Act 2004. However, the defence counsel pointed out that the drug, *cannabis sativa* involved in the said decision was in the form of dried leaves and the drugs involved in this case were decomposed but fresh *cannabis sativa* plants. The counsel submitted that, if the same tariff band is to be applied in every case under section 5(a) of the Illicit Drugs Control Act, the drugs involved should be weighed in the same state.
5. I fully endorse the above submission of the defence counsel. As I have discussed in the case of *Tuicama v State* (HAA029-2016; delivered on 14-11-16), when relatively fresh plants of *cannabis sativa* are weighed, that weight would include the weight of the water content, that of the stems and other plant material. However, the weight of the drugs considered in *Sulua* (supra) was the dry weight of *cannabis sativa* leaves. Therefore, in my view, it would not be fair to apply the sentencing tariff established in *Sulua* to sentence an offender based on the weight of *cannabis sativa* which is in a form other than that of dried leaves.
6. During the hearing, the counsel for the prosecution drew my attention to the Definitive guideline issued by the Sentencing Council of the United Kingdom for drug offences. It is pertinent to note that the said guideline which appear to have been formed after careful consideration and thorough research, deals with the cultivation of *cannabis sativa* separately and the weight is not taken into

consideration in categorising the offending. In the guideline it is also noted that the assumed yield per plant of *cannabis sativa* is 40g.

7. Therefore, in my view, the categorisation in *Sulua* case (supra) cannot be applied for the purpose of sentencing in this case where the drug is in the form of plants and a categorisation which is not based on weight is required to determine the appropriate tariff. For this same reason, in the aforementioned case of *Tuicama* (supra) I opted to follow the categorisation devised by this court in the case of *Meli Bavesi v State* [2004] FJHC 93; HAA 0027.2004 in order to decide the seriousness of the offending. However, I decided to apply the tariff bands pronounced in *Sulua* case where appropriate. In this case, I wish to apply the said categorization which is as follows;
  - a) The growing of a small number of plants for personal use by an offender on a non-commercial basis - 1 to 2 years imprisonment;
  - b) Small scale cultivation for a commercial purpose with the objective of deriving a profit - 3 to 7 years imprisonment;
  - c) Large scale commercial cultivation - 7 to 14 years imprisonment.
8. In my view, cultivating up to 10 plants can be considered as non-commercial cultivation if there is no other evidence to the contrary. Cultivating more than 10 plants up to 100 plants can be considered as a small scale commercial cultivation and cultivating more than 100 plants can be considered as a large scale commercial cultivation. In each case, the number of plants above the lower end of the range can be considered as a factor that would aggravate the offending.
9. In the guideline issued by the United Kingdom Sentencing Council, offences involving the cultivation of *cannabis sativa* are divided into four categories and there are three tariff bands on each category depending on whether the offender's role was leading, significant or lesser.



10. The characteristics provided in the aforementioned guideline to determine the offender's role is as follows;

**LEADING role:**

- *directing or organizing production on a commercial scale;*
- *substantial links to, and influence on, others in a chain;*
- *expectation of substantial financial gain;*
- *uses business as cover;*
- *abuses a position of trust or responsibility.*

**SIGNIFICANT role:**

- *operational or management function within a chain;*
- *involves others in the operation whether by pressure, influence, intimidation or reward;*
- *motivated by financial or other advantage, whether or not operating alone;*
- *some awareness and understanding of scale of operation.*

**LESSER role:**

- *performs a limited function under direction;*
- *engaged by pressure, coercion, intimidation;*
- *involvement through naivety/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).*

11. In my view, the offender's role determined based on the characteristics given above can be used to select the starting point of the sentence. I would select the lower end of the tariff if the offender had a 'lesser' role; mid-range if the role is 'significant'; and between mid-range and the higher end if the role is 'leading'.

12. You were involved with the cultivation of more than 100 plants of *cannabis sativa*. Therefore the offending falls under the 3<sup>rd</sup> category mentioned above and the applicable tariff should be 7 to 14 years imprisonment.

13. The prosecution has agreed according to the summary of facts that you were only involved in uprooting the plants with others. Considering the facts made

known to the court, I find that your role was a lesser role. Therefore, I select 7 years as the starting point of your sentence.

14. Considering that you were involved with an operation that cultivated 264 plants where there are 164 plants more than the number of plants which is used to determine the tariff, I increase your sentence by 6 years.
15. I consider the following as your mitigating factors and deduct 4 years in view of those factors;
  - a) You are a first offender; and
  - b) You have cooperated with the police during the investigation.
16. Now your sentence is 9 years imprisonment. You indicated that you wish to plead guilty just before the trial commenced. The trial had to anyway proceed against the other two accused. Though your decision to plead guilty at the last moment did not assist in saving time and resources substantially, in recognition of your decision to take responsibility to your action even at the last moment, I would grant you a discount of 1 year and 10 months which is around one-fifth of the above sentence.
17. Accordingly, your final sentence is an imprisonment term of 07 years and 02 months. Considering all circumstances, I order that you are not eligible to be released on parole until you serve 05 years of your sentence pursuant to the provisions of section 18 of the Sentencing and Penalties Decree 2009.
18. Section 24 of the Sentencing and the Penalties Decree reads thus;

*“If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.”*

19. I note that you have spent around 07 months in custody in relation to this case. The said period you were in custody shall be regarded as a period of imprisonment already served by you in view of the provisions of section 24 of the Sentencing and Penalties Decree.

20. In the result, you are sentenced to an imprisonment term of 07 years and 02 months with a non-parole period of 05 years. Considering the time spent in custody, the time remaining to be served is as follows;

Head Sentence - 06 years, 07 months

Non-parole period - 04 years, 05 months

21. 30 days to appeal to the Court of Appeal.



Vinsent S. Perera  
JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.  
Solicitor for the Accused : Legal Aid Commission, Suva.