IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 019 OF 2013S

BETWEEN 1. SAIMONI MATA

2. TOMASI KOROITUKU

APPELLANTS

AND THE STATE

RESPONDENT

Counsels	:	Mr. I. Romanu for the Appellants
		Mr. Y. Prasad for Respondent
Hearings	:	22 September and 19 December, 2014
Judgment	:	22 April, 2016

JUDGMENT

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1. On 18 February 2013, in the Nausori Magistrate Court, both appellants waived their rights to counsel, and the following charges were read and explained to them:

FIRST COUNT

Statement of Offence

UNLAWFUL CULTIVATION OF DRUGS: Contrary to section 5(a) of Illicit Drug Control Act, 2004.

Particulars of Offence

SAIMONI MATA and TOMASI KOROITUKU on the 16th day of February, 2013 at Batiki Settlement, Nausori in the Central Division, without lawful excuse cultivated 18.6 kilograms of Cannabis Sativa or Indian Hemp an Illicit Drug.

SECOND COUNT

Statement of Offence

UNLAWFUL POSSESSION OF ILLICIT DRUGS: Contrary to section 5(a) of the Illicit Drug Control Act No. 9 of 2004.

Particulars of Offence

SAIMONI MATA on the 16th day of February, 2013 at Batiki Settlement, Nausori in the Central Division without lawful authority, possessed 209.7 grams of Cannabis Sativa or Indian Hemp an Illicit Drug.

2. Both appellants said they understood the charges. Both appellants pleaded guilty to count no. 1. Appellant No. 1 also pleaded guilty to count no. 2.

3. The prosecution's summary of facts were read to them. They were basically as follows. On 16 February 2013, the Eastern Division Drug Unit based at Nausori raided the appellants' farm at Batiki Settlement, Naitasiri. The police went to the appellants' house, which was near their farm. The police questioned the appellants. They admitted unlawfully cultivating illicit drugs. They led the police to their farms. Thirty plants of cannabis sativa were identified and uprooted. Some dried leaves were also found in the appellants' house. The plants and leaves were later analysed. They were found to be cannabis sativa plants and dried leaves. The plants weighed a total of 18.6 kg while the leaves weighed 209.7 grams.

4. The appellants admitted the above summary of facts. They were found guilty as charged. The two appellants gave their verbal plea in mitigation. Appellant No. 1 was 30 years, married with no child. He was a farmer and earns $30 per week. Appellant No. 2 said he was 19 years old, single and a farmer. He said he earned $30 to $45 per week. Both appellants ask for leniency.

5. On 19 February 2013, the Nausori Magistrate Court sentenced both appellants. On count no. 1, the court sentenced them to 7 years imprisonment, with a non-parole period of 5 years. On

count no. 2, the first appellant was sentenced to 1 year imprisonment, this was to be concurrent to the sentence in count no. 1. So, in total, both appellants were sentenced to 7 years imprisonment, with a non-parole period of 5 years imprisonment each.

6. Both appellants were not happy with the above decision. They filed a petition of appeal in the Nausori Magistrate Court on 18 March 2013. The matter first came before the High Court on 9 August 2013.

7. The appellants' ground of appeal were as follows:

> "...**(a)** **THAT** the Learned trial Magistrate erred in law and in fact in convicting and sentencing the appellants as he did; and
>
> **(b)** **THAT** the Learned Magistrate erred in law and in fact in convicting the 2nd Appellant as an adult when he was a juvenile.
>
> **(d)** **THAT** the Learned Magistrate erred in law in failing to properly consider the appellants' plea in mitigation holistically.
>
> **(e)** **THAT** the Learned Magistrate erred in law and in fact in failing to properly consider the appellants' early guilty plea.
>
> **(f)** **THAT** in all circumstances of the case the Learned Magistrate erred in upholding the Appellants' conviction and sentence.
>
> **(g)** **THAT** the Learned Magistrate erred in law and in fact in not calling for submissions on sentencing from the Appellants..."

8. The parties were called upon to make their appeal submissions. The respondent had already filed their appeal submission on 6 August 2013. On 30 June 2014, the second appellant filed an amended petition of appeal and his appeal submission. His amended petition of appeal were in the following grounds:

> "...**(a)** **THAT** the Appellant was in fact 17 years 3 months at the time of conviction, hence, should have been convicted as a juvenile;
>
> **(b)** **THAT** the Appellant was in fact 17 years 3 months at the time of sentence, hence, should have been sentenced as a juvenile..."

9. On 1 July 2014, the matter came before the High Court. Counsel for Appellant No. 1, Mr. I. Romanu., sought leave to withdraw his appeal. Mr. Y. Prasad, for the Respondent, did not object. The court granted leave to Appellant No. 1 to withdraw his appeal. However, the case had come to the knowledge of the High Court. The High Court was now exercising its revision powers under section 260 (1) and 262 (1) of the Criminal Procedure Decree 2009.

10. The High Court then asked the parties to make submissions on whether or not the Learned Resident Magistrate had erred in applying the binding decision of **Kini Sulua, Michael Ashley Chandra v The State**, Criminal Appeal No. AAU 0093 and AAU 0074 of 2008, Court of Appeal, Fiji, which was decided on 31 May 2012. In this case, the Nausori Magistrate Court sentenced the appellants on 19 February 2013. At this particular time, the **Kini Sulua, Michael Ashley Chandra v The State** (supra) decision had been in operation for approximately 8 months 19 days. The learned Resident Magistrate referred to the Court of Appeal decision when he sentenced the appellants. However, did the learned Resident Magistrate follow the Court of Appeal decision?

11. On 11 August 2014, the Respondent filed his written submissions. On 22 September 2014, Saimoni Mata (Accused No. 1) filed his written submission. I have carefully read and considered the parties' written submissions.

12. In my view, the problem for the Nausori Magistrate Court on 18 February 2013 when the charges came before it, was jurisdiction. Did it have the jurisdiction to deal with the case according to law. After reviewing 50 cases decided under the Illicit Drugs Control Act 2004, the majority in **Kini Sulua, Michael Asley Chandra v The State** (supra) set up the following sentencing guidelines:

> "...(i) **Category 1:** possession of 0 to 100 grams of cannabis sativa – a non-custodial sentence to be given, for example, fines, community service, counselling, discharge with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.
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> (ii) **Category 2:** possession of 100 to 1,000 gram of cannabis sativa. Tariff should be a sentence between 1 to 3 years imprisonment, with those possessing below 500 grams, being sentenced to less than 2 years, and those possessing more than 500 grams, be sentenced to more than 2 years imprisonment.
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> (iii) **Category 3:** possessing 1,000 to 4,000 grams of cannabis sativa. Tariff should be a sentence between 3 to 7 years, with those possessing less than 2,500 grams, be sentenced to less than 4 years imprisonment, and those possessing more than 2,500 grams, be sentenced to more than 4 years.
>
> (iv) **Category 4:** possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment..."

13. In paragraphs 118 and 119 of the above decision, the majority in the Court of Appeal said:

"...118. Categories numbers 1 to 4 merely sets the tariff for the sentence, given the weight of the illicit drugs involved. The actual sentence will depend on the aggravating and mitigating factors, in the particular circumstances of the case, and it may well fall below or above the set tariff

119. Furthermore, the time has come for the State to conserve its time, energy and resources. Categories numbers 1 to 3 are to be tried in the Magistrate Courts, which has jurisdiction, by virtue of sections 5(1) and 5(2) of the Criminal Procedure Decree 2009. Category 4 is to be tried in the High Court, in addition to overseeing appeals and revisions, on Categories 1 to 3 cases from the Magistrate Courts. In the 50 cases examined, the High Court's time was "bogged down" with Category 1 cases. This was a waste of scarce resources. The time has also arrived for the State to increase prosecution in Categories 3 and 4 cases. This would be consistent with the purpose and intent of the 2004 Act, as highlighted in paragraph 111 hereof..."

14. The facts of this case brought it within Category 4. Count No. 1 involved an allegation that both appellants were cultivating 18.6 kilograms of cannabis sativa plants. The Learned Resident Magistrate was then required to send the case up to the High Court for trial. By virtue of the majority decision in **Kini Sulua, Michael Ashley Chandra v The State** (supra), the Learned Resident Magistrate had no jurisdiction to deal with the case. Consequently, all his decision on conviction and sentence on 18 and 19 February 2013 were null and void.

15. What should then be done? In my view, the case should be remitted back to the Nausori Magistrate Court, with the following directions:

(i) Given that Count No. 1 makes the case a Category 4 case in terms of the guidelines in **Kini Sulua, Michael Ashley Chandra v The State** (supra), the Nausori Magistrate Court is to transfer this case to the High Court for trial as soon as possible;

(ii) Appellant No. 1 is to be remanded in custody, while Appellant No. 2 is to remain on bail;

(iii) When it is brought to the High Court, the matter is to be tried afresh and given priority since it was a 2013 case.

16. As of today, Appellant No. 1 had been in custody since 18 February 2013, that is, 3 years 2 months 4 days ago. Appellant No. 2 was in custody from 18 February 2013 to 19 December 2014, when he was released on bail pending this judgment. So, in a sense, Appellant No. 2 had been in custody for 1 year 8 months 1 day. The above time spent in custody will be taken into account when the case is dealt with in the High Court. In a sense, for Appellant No. 2, given the above, it would appear he had already served his time. However, these are matters to be considered by the High Court when the case is brought before it.

17. Given the above, I make the following orders:

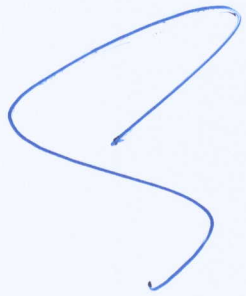
(i) The Nausori Magistrate Court decisions on 18 and 19 February 2013, when convicting and sentencing both Appellants are quashed and set aside;

(ii) The case is remitted to the Nausori Magistrate Court, and to be called on 6 May 2016 at 9.30 am, for the Magistrate Court to remit this matter to the Suva High Court, not later than 20 May 2016, for the matter to be tried afresh;

(iii) Appellant No. 1 is to be remanded in custody until further orders of the High Court; while Appellant No. 2 is to remain on bail, pending the fresh High Court trial;

(iv) The case is to be tried as soon as possible and given priority since it's a 2013 case.

18. I order so accordingly.



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JUDGE

Solicitor for Appellants : Tuifagalele Legal, Barristers & Solicitors, Suva.
Solicitor for Respondent : Office of the Director of Public Prosecution, Suva.