IN THE HIGH COURT OF FIJIAT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

JONE TANALEINAMANI

Appellant

CASE NO: HAA 7 of 2018
[MC Suva Criminal Case No. 733 of 2015]

Vs.

STATE

Respondent

Counsel	:	Ms. T. Kean for Appellant Ms. S. Navia for Respondent
Hearing on	:	20 June 2018 and 09 August 2018
Judgment on	:	26 September 2018

JUDGMENT

1. The appellant was convicted by the magistrate court for one count of possession of illicit drug contrary to section 5(a) of the Illicit Drugs Control Act of 2004 upon his plea of guilty. He was sentenced on 15th November 2017 to an imprisonment term of 03 years with a non-parole period of 02 years. A period of 1 month and 20 days was regarded as a period of imprisonment already served in view of the provisions of section 24 of the Sentencing and Penalties Act 2009. The charge reads thus;

Statement of Offence
FOUND IN POSSESSION OF ILLICIT DRUG: *contrary to section 5(a) of the Illicit Drugs Act 2000.*

Particulars of Offence

JONE TANALEINAMANI, *on the 8th day of April 2015 at Tamavua in the Central Division was found in possession of 1764.6grams of illicit drugs namely Cannabis Sativa.*

2. Being aggrieved by the sentence imposed by the Learned Magistrate the appellant had taken steps to file a document through the Suva Corrections Centre indicating his intention to appeal against his sentence. The Suva Corrections Center had forwarded the said document prepared by the appellant by way of a letter dated 30/11/17. However, the date stamp on the said letter indicates that it was received by the High Court Criminal Registry on 15/01/18.

3. Subsequently, the appellant retained the services of the Legal Aid Commission and a proper petition of appeal was filed by the said commission on 13/04/18. Given the circumstances, I would consider that the appellant in this case had filed a timely appeal. The grounds of appeal raised in the said petition of appeal are as follows;

    1) *That the learned magistrate erred in law when he considered the amount of drugs found as an aggravating factor and increased the sentence.*
    2) *That the learned magistrate erred in law by making an assumption that the drugs recovered were for commercial use.*
    3) *That the learned magistrate erred in law when he stated in [paragraph 10] that a discount of 1/4th of the sentence would be given to the accused for his early guilty plea.*
    4) *That the learned magistrate erred in fact and in law in the imposition of a non-parole period which was for 1 year 10 months and 10 days and this was harsh and excessive.*

4. In the case of ***Kim Nam Bae v The State*** [AAU0015 of 1998S (26 February 1999)] the court of appeal said thus;

    "It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499)."

5. Therefore, in order for this court to disturb the impugned sentence, the appellant

should demonstrate that the Learned Magistrate in arriving at the sentence had;

a) acted upon a wrong principle;

b) allowed extraneous or irrelevant matters to guide or affect him;

c) mistook the facts; or

d) did not take into account some relevant consideration.

6. The drug, *cannabis sativa* found in the possession of the appellant was in the form of dried leaves and the quantity was 1764g. The Learned Magistrate had applied the sentencing tariff established by the majority judgment in ***Sulua v. State*** [2012] FJCA 33 in sentencing the appellant and he had correctly identified that the offending falls under the third category which is an imprisonment term between 3 years and 7 years.

7. The starting point selected by the Learned Magistrate is 3 years imprisonment. He had added 02 years in view of the aggravating factors and reduced one year in view of the mitigating factors. The Learned Magistrate had given a separate one-fourth discount for the guilty plea and the final sentence was an imprisonment term of 3 years.

8. The aggravating factors identified by the Learned Magistrate are found in the following paragraph of the impugned sentence;

> *". . . I find that the amount of drugs found in your possession clearly reflect an intention to put these drugs to commercial use. Further, the drugs have been recovered from your home. It is therefore clear that you have put your family members at risk by hiding these drugs at your house."*

9. It is alleged on the first ground of appeal that the Learned Magistrate erred by taking into account the quantity of the drug found in possession of the appellant as an aggravating factor and on the second ground of appeal it is alleged that the Learned Magistrate erred by assuming that the appellant intended to use the said drugs for commercial purposes. I propose to examine the first two grounds together.

10. It is pertinent to note that the Learned Magistrate had not directly used the quantity of the drug as an aggravating factor. The two factors he had considered as aggravating factors are; the fact that the appellant intended to use the drugs for commercial purposes and the fact that he put his family members at risk by hiding the drugs at his house. The summary of facts filed before the Magistrate Court does not specifically state that the appellant intended to put the drugs found in his possession for commercial use. It is clear that the Learned Magistrate had assumed that the said drugs were to be used for commercial purposes simply based on the weight of the drugs. However, this is not the only reasonable inference that could be drawn in view of the fact that the appellant had a relatively large quantity of cannabis sativa leaves in his possession. For example, he may have kept the drugs simply to assist a friend or whoever the individual involved in selling the drugs.

11. Therefore, I would agree with the appellant that it was not proper for the Learned Magistrate to assume that the appellant intended to put the drug found in his possession for commercial use without any evidence to support that proposition. This is the issue raised in the second ground of appeal. Nevertheless, this appeal cannot be allowed by answering this issue alone. The pertinent question is in fact the issue raised on the first ground of appeal and that is whether the Learned Magistrate erred when he enhanced the sentence taking into account the quantity of the drug found in possession.

12. It is pertinent to note that the tariff categories established in ***Sulua*** (supra) are based on the weight of the drug. Therefore, the weight of the drug found in possession should necessarily but properly be reflected in the sentence imposed for possession of illicit drugs. For example, a person found with 1500 grams of drug in his/her possession and a person found with 3000 grams should not receive the same punishment if all the other circumstances pertaining to the offending are the same. The issue then is how to properly take into account the weight of the drugs in arriving at the appropriate sentence in each case that involves possession of cannabis sativa.

13. In my judgment, in order to arrive at a just and a fair sentence and in order to

maintain parity in sentences for the offence of possession of illicit drugs when applying the sentencing tariffs established in ***Sulua*** (supra), a sentencer should make sure that the sentence properly reflects any additional weight of the drug involved beyond the minimum weight that is applicable to the relevant tariff band ("additional weight"). In this regard, the sentencer should either select the lower end of the tariff as the starting point and then consider the aforementioned additional weight as an aggravating factor and should add a term of imprisonment proportionate to the said additional weight; or should arrive at the starting point of the sentence by adding a term of imprisonment proportionate to the said additional weight to the lower end of the tariff.

14. For an example, in a case where the offender is to be sentenced for being in possession of 1500g, it should be noted that the offender had in his/her possession 500g more than 1000g which is the minimum weight that attracts the third tariff category in ***Sulua*** (supra). The weight range in the said third category is between 1000g and 4000g. The range of the sentence is 3 years to 7 years imprisonment. It is pertinent to note that for a difference of 3000g (4000g – 1000g) there is an increase of 4 years imprisonment. It could be deduced that for every additional 500grams beyond the first 1000g, there is an increase of 8 months imprisonment. Therefore to reflect the additional 500g in this example, 8 months should be added to the term of imprisonment.

15. Hence, if the sentencer is minded to arrive at a sentence that is proportionate to the offending where the weight of the cannabis sativa involved is 1500g, and therefore to see that the said weight of 1500g is properly reflected in the sentence, the sentencer should either;

    a) select 3 years as the starting point and then should consider the 'additional weight' of 500g as an aggravating factor in addition to any other aggravating factor and be mindful to ascribe 8 months imprisonment for the said 'additional weight' of 500g when the term of imprisonment to be added in view of the aggravating factors is determined; or
    b) select 3 years and 8 months as the starting point of the sentence.

16. It is pertinent to note that, if the sentencer wants to arrive at a just and a fair punishment which is proportionate to the offending, especially in applying the sentencing tariffs established in ***Sulua*** (supra), the sentencer cannot ignore proportionality which in fact is a mathematical principle. In the case of ***Markarian v The Queen*** [2005] HCA 25; (2005) 228 CLR 357 the court observed thus;

> *"The expression "instinctive synthesis" may then be understood to suggest some arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public.* ***There may be occasions when some indulgence in arithmetical process will better serve these ends.***" [Emphasis added]

17. In my judgment, indulgence in arithmetical process would above all assist the sentencer to reach a just and a fair sentence proportionate to the offending when the tariff bands pronounced in ***Sulua*** (supra) are applied, in addition to making the sentencing process transparent as highlighted in the above dictum.

18. Turning to the case at hand, I note that the appellant had 764.6g more than the minimum weight that attracts the third sentencing category, in his possession. In the circumstances, it was not wrong in principle to consider the said additional weight of the drugs as an aggravating factor. Given the said additional weight of 764.6g and the other aggravating factor considered by the Learned Magistrate which is putting the family members at risk by keeping the drugs in his house, I do not find the 2 years added by the Learned Magistrate to the appellant's sentence as excessive.

19. All in all, ground one should fail and despite the fact that the second ground of appeal should be decided in favour of the appellant the appeal cannot succeed on the second ground.

20. On ground three the appellant argues that the discount of one-fourth given by the Learned Magistrate in view of the guilty plea is not sufficient and the appellant

claims that his guilty plea was an early guilty plea. This assertion that the appellant had entered an early guilty plea is not supported by the court record. The appellant was charged on 10/04/15, but had entered his guilty plea on 10/11/17. Moreover, according to the court record, the appellant had been on bench warrant from 10/06/15 to 26/10/17. Though the appellant submitted that he was unable to attend court due to the fact that he was under arrest for another matter, the appellant was unable to place any material before this court in that regard even after he was granted sufficient time.

21. Given the circumstances in this case as revealed from the relevant court record, it is my view that the Learned Magistrate had been overgenerous in granting a one-fourth discount in view of the guilty plea.

22. Ground three is devoid of merit.

23. On ground four the appellant claims that the non-parole period imposed by the Learned Magistrate was harsh and excessive. I find this ground to be misconceived for two reasons.

24. First, it is stated that the non-parole period imposed by the Learned Magistrate is 1 year, 10 months and 10 days. The non-parole period imposed by the Learned Magistrate was in fact 2 years. The period of 1 year, 10 months and 10 days is the time remaining out of the said non-parole period in view of the time spent in custody which was considered as an imprisonment term already served pursuant to the provisions of section 24 of the Sentencing and Penalties Act.

25. Secondly, the non-parole period imposed by a sentencer cannot be successfully challenged in an appeal if the period so imposed is 6 months less than the term of the sentence given the provisions of section 18(4) of the Sentencing and Penalties Act.

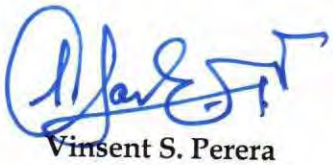
26. Ground four fails.

27. In the result, I would dismiss this appeal against the sentence imposed by the Magistrate Court in Criminal Case No. 733 of 2015 and affirm the said sentence.

Orders;

a) The appeal is dismissed;

b) The sentence imposed in Magistrate Court Suva, Crim. Case No. 733 of 2015 dated 15/11/17 is affirmed.



Vinsent S. Perera
JUDGE

Solicitors;
Legal Aid Commission for Appellant.
Office of the Director of Public Prosecutions for State.