IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 003 OF 2019S

BETWEEN: VILIKESA TAGINAKALOU

APPELLANT

AND: THE STATE

RESPONDENT

Counsels : Appellant in Person
Ms. S. Swaztika and Ms. S. Serukai for Respondent
Hearing : 17 June, 2019.
Judgment : 8 November, 2019.

JUDGMENT

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1. On 10 September 2018, the appellant first appeared in the Nausori Magistrate Court on the following charge:

> ***"Count 1***
>
> ***Statement of Offence (a)***
>
> ***FOUND IN POSSESSION OF ILLICIT DRUGS:*** ***Contrary to section 5 (a) of the Illicit Drug Control Act, 2004.***
>
> ***Particulars of Offence (b)***
>
> ***VILIKESA TAGINAKALOU on the 7th day of September, 2018 at Naiyala Bus Shelter, Tailevu in the Central Division without lawful authority was found in possession of 41.6 grams of Cannabis Sativa or Indian hemp an Illicit Drug.***

Count 2

Statement of Offence (a)

<u>UNLAWFUL CULTIVATION OF ILLICIT DRUGS:</u> Contrary to section 5 (b) of the Illicit Drug Control Act, 2004.

Particulars of Offence (b)

VILIKESA TAGINAKALOU on the 7th day of September, 2018 at Nadra Farm, Nabulini, Tailevu in the Central Division, without lawful excuse cultivated 6302 grams of Cannabis Sativa or Indian hemp an Illicit Drug."

2. The Nausori Magistrate Court recorded the proceeding as follows:

"IN THE RESIDENT MAGISTRATE S COURT

AT NAUSORI

Tailevu Criminal Case No. 122 of 2018

10/09/18

Prosecution: WPC Asenaca

Accused: Present defending himself

Charge sheet is read in itaukei

Summary statement was filed charge is understood and pleaded guilty. Accordingly convicted.

Mitigation

50 years married, 2 children, 3 daughters, Farmer. Forgiveness. Promise not to reoffend. Sole breadwinner.

Number of plant found cultivating in the Accused farm is 201 plants of cannabis sativa. It is fallen within the 2nd category in Sulua v. State. Therefore there is high probability that the Accused shall not be present in court on the next day if you are released on bail. Therefore the bail application is refused on public interest.

Adjourned for Sentence 20/09/18

Sgd: L Chaminda (Mr)
Resident Magistrate

20/09/18

Prosecution: Sergeant Shailend
Accused: Present Mr. Radrole

The Sentence is pronounced in open court. A production order is issued. Mention for review on 20/10/18.

Sgd: L Chaminda (Mr)
Resident Magistrate

Prosecution: Fasim PC
Accused: Not present Mr. Kumar

Fine is not paid. Accordingly an Order of Commitment is served on the Accused for 20 days of imprisonment as per order dated 20/09/2018.

Sgd: L Chaminda (Mr)
Resident Magistrate"

3. On 20 September 2018, the learned Magistrate sentenced the appellant. His sentencing remark contained 7 pages. I had carefully read and considered the same. On count no. 1, the appellant was fined $200, presumably to be paid on 20 October 2018, in default, 20 days imprisonment. On count no. 2, the appellant was sentenced to 7 years imprisonment, with a non-parole period of 6 years 3 months.

4. The appellant was not happy with his sentence, and he filed the following appeal grounds on 9 November 2018:

> ***"1. <u>THAT</u> the learned magistrate erred in law in not considering other sentence options such as the principles of rehabilitation set out in Section 15, 16 and 44 of the Sentencing and Penalties Decree 2009.***

2. ***THAT*** *the learned magistrate erred in law and fact when he failed to deduct one third from the 9 years for the appellant's early guilty plea.*

3. ***THAT*** *the learned magistrate failed to deduct also a one third on the fact that the Appellant honestly cooperated with the police officers and led them to where the 201 plants were uprooted. Otherwise the Appellant would only be charged for the first count which the punishment is $200.00 fine or a 20 days imprisonment if fine fails to pay.*

4. ***THAT*** *the Appellant humbly submits the mitigation factors justify the court to show mercy to the Appellant since the Appellant is a first offender, pleaded guilty at the earliest opportunity saving time and money of the court, showed the police officers where the 201 plants are planted, was remorseful and prayed for forgiveness of the court. Therefore such failure by the learned magistrate to consider the Appellant's condolence would be a prejudice of justice in the eyes of the law.*

5. ***THAT*** *as a first offender, the imprisonment does not and will not rehabilitate the Appellant. The longer sentence imposed will only expose the Appellant to the influence of the hardened criminals. In view of this, I seek the court's indulgence to consider the case authority of "Viliame –vs State (2008) FJHC 12, HAA 131-132/2007 (8th February, 2008)", hence my humble plea for leniency.*

6. ***THAT*** *the learned magistrate erred in law and in fact in sentencing the Appellant when he imposed the non-parole period too close to the head sentence as denying or discouraging the rehabilitation. In view of this, I seek the court's indulgence to consider the case authority of "Nariva-vs-State (2006) FJHC 6, HAA 01481/2005S (9th February, 2006) where the Learned Judge Nazhat Shameem stated: "Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measure in preference to imprisonment".*

7. ***<u>That</u> the Appellant reserve his right to argue and/or file Additional Grounds of Sentence Appeal upon the first call in this matter".***

5. The appellant's appeal appear to be 22 days out of time, and in terms of section 248 (1) of the Criminal Procedure Act 2009, he had no right of appeal unless the High Court permits an extension of time, for "good cause". "Good cause" could mean the case involved "a question of law of unusual difficulty".

6. After perusing the magistrate court record and the learned magistrate's sentencing remark on 20 September 2018, the case calls into question the learned magistrate's understanding and application of the binding authority of the Court of Appeal decision in **<u>Kini Sulua & Another</u>** v **<u>The State</u>** [2012] Fiji Law Reports, Volume 2, page 111 to 147. Ever since the passing into law of the Illicit Drugs Control Act 2004, the courts in Fiji had struggled for a guideline judgment on how to deal with the cannabis sativa (commonly known as "marijuana") type offences in Fiji. **<u>Kini Sulua</u>** v **<u>The State</u>** [supra] was the answer to the above.

7. The learned magistrate correctly identified the four categories mentioned in paragraph 115 of **<u>Kini Sulua</u>** v **<u>The State</u>** [supra], when he said the following in paragraph 4 of his sentencing remarks:

> ***"In Sulua v State [2012] FJCA 33; AAU 0093.2018 (31 May 2012), for the purpose of imposing punishments for those who are convicted for having cannabis sativa in their possession, the Accused are categorized into 4 groups as follows:***
>
> ***i. Category 1:***
>
> ***Possession of 0 to 100 grams of cannabis sativa- a non-custodial sentence to be given, for example, fines, community service, counseling, discharge with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.***

ii. Category 2:

> ***Possession of 100 to 1,000 grams 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.***

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."***

8. However, the learned magistrate failed to connect the above to paragraphs 118 and 119 of **Kini Sulua** v **The State** [supra], which reads as follows:

> ***"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.***
>
> ***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."***

9. Of the two counts in the charge, the more serious of the two was count no. 2, which involved 6,302 g (6.3 kg) of illicit drugs. This makes count no. 2 a category 4 offence, and in accordance with the directives mentioned in paragraph 8 above, the case ought to be dealt with in the High Court. What the learned magistrate should have done at this point was to transfer the whole case to the High Court for trial. Because he did not do so, he respectfully erred.

10. Furthermore, he was further led into error by considering the authorities in **Auton** [2011] EWCA Crim 76, English Court of Appeal; **re Koroi**, HAR 002-006/2012 (20 April 2012), High Court, Suva and **Dibi v State** [2018] HAA 96/2017 (19 February 2018), High Court, Lautoka. I have carefully read the two Fiji authorities. The decision in **re Koroi & Others**, HAR 002-006 of 2012, High Court, Suva was delivered on 20 April 2012. This was before the Court of Appeal decision in **Kini Sulua** v **The State** [supra] which was delivered on 31 May 2012. In terms of the law on precedent, a Court of Appeal decision prevails over a High Court decision, and because of the above, **re-Koroi** [supra] must, with respect, be disregarded and **Kini Sulua** v **The State** [supra] followed.

11. **Dibi v State** [supra] was decided on 19 February 2018, after the **Kini Sulua** v **The State** [supra] decision on 31 May 2012. In **Dibi v State** [supra], His Lordship Mr. Justice P.K. Madigan, in paragraph 8, said as follows:

> ***"The tariffs for possession and dealing in illicit drugs have been set by the Court of Appeal in Kini Sulua and anor AAU0093 of 2003 (31 May 2012), and of course these guidelines should continue to be used but not for sentences involving cultivation."***

12. His Lordship relied on **Auton** [2011] EWCA Crim 76, as authority for his views on cultivation. **Auton** [supra] is an English Court of Appeal authority speaking on the United Kingdom Misuse of Drugs Act 1971 and its amendments. The history of the above Act in comparison to Fiji's Illicit Drugs Control Act 2004 had been expounded on by Justice Marshall in **Sulua** v **State** [supra], pages 113, 114, 116 to 122. The United Kingdom

Misuse of Drugs Act 1971 and its amendment is completely different from Fiji's Illicit Drug Control Act 2004. I refer to His Lordship Justice Marshall's dissenting judgment in **Kini Sulua** v **The State** [supra], pages 113 to 140, to highlight the English approach to cannabis sativa type offences. In England, cannabis sativa offences does not carry the type of sentence imposed by section 5 of the Illicit Drug Control Act 2004, that is, a $1,000,000 fine, or life imprisonment or both. In my respectful view, to follow **Auton** [supra], an English decision based on legislation completely different from Fiji's Illicit Drug Control Act 2004, would be, with respect, fly in the face of Parliament's intention as expressed in the Illicit Drug Control Act 2004. I had said so, while sitting in the Court of Appeal and delivering the majority judgment in **Kini Sulua** v **The State** [supra], paragraphs 110 to 119, pages 141 to 144. Furthermore **Dibi v State** [supra] is a High Court authority, and with respect, cannot prevail over **Kini Sulua** v **The State** [supra], a Court of Appeal authority.

13. Furthermore, section 6 (1) and 6 (2) of the Sentencing and Penalties Act 2009, reads as follows:

> ***"(1) On hearing and considering an appeal against sentence the Court of Appeal and the Supreme Court may, on its own initiative or on an application made by a party to the appeal, consider whether to give a guideline judgment or to review a guideline judgment that has already been given.***
>
> ***(2) A guideline judgment given by the Court of Appeal or the Supreme Court shall be taken into account and applied by the High Court and the Magistrates Court when considering cases to which the guideline judgment applies."***

14. Pursuant to section 6 (2) of the Sentencing and Penalties Act 2009, Parliament had commanded the High Court and Magistrates Court to follow any guideline judgments issued by the Court of Appeal or the Supreme Court. As judicial officers, it is our duty to follow the commands of Parliament, as expressed in the words of section 6 (2) of the Sentencing and Penalties Act 2009. It is not our function to circumvent the intention of Parliament as expressed in the words of section 6 (2) of the Sentencing and Penalties Act 2009. This meant that on the facts of this case, the guideline judgment in **Kini Sulua** v **The**

State [supra] should have been followed by the learned magistrate. Because, he did not do so, he erred. He should, with respect, not been misled by High Court authorities that advocated unjustified departures from the **Kini Sulua** v **The State** [supra] decision. Those High Court authorities, with respect, were decided per incuriam, and should not be followed. Those decisions, with respect, fly in the face of section 6 (2) of the Sentencing and Penalties Act 2009.

15. As a result of the above, the learned magistrate's conviction and sentence of the appellant on 10 and 20 September 2018 are set aside. I grant leave to the appellant to appeal out of time.

16. I make the following orders and directions:

(i) The appellant is to report to the Nausori Magistrate Court on 22 November 2019 at 9.30 am for mention;
(ii) The appellant is to be re-tried according to law;
(iii) If the prosecutor intends to still charge the appellant with count no. 2, case to be transferred to the High Court for trial;
(iv) Appellant is released on $2,000 bail and the normal High Court bail form to be filled in.

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JUDGE

Solicitor for the Appellant : In Person
Solicitor for the Respondent : Office of the Director of Public Prosecution, Nausori.