

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 184 of 2019**

**STATE**

**V**

**SAMUELA TIQE NASILA**

**Counsel** : Ms. R. Uce for the State.  
: No appearance for or by the Accused.

**Date of Sentence Hearing:** 24 February, 05 March, 2020

**Date of Sentence** : 06 March, 2020

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**SENTENCE**

[In absentia]

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1. The accused is charged with the following offences:

**FIRST COUNT**

***Statement of offence***

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

***Particulars of Offence***

**SAMUELA TIQE NASILA** on the 18<sup>th</sup> day of November, 2013 at Nadi in the Western Division without lawful authority cultivated 3085 plants of an Illicit Drug namely Cannabis Sativa or Indian hemp.

**SECOND COUNT**

***Statement of offence***

**GIVING FALSE NAME AND ADDRESS TO A POLICE OFFICER:** Contrary to section 24 of the Police Act, Cap 85.

***Particulars of Offence***

**SAMUELA TIQE NASILA** on the 18<sup>th</sup> day of November, 2013 at Nabou, Nadi in the Western Division when being asked to give his name to a Police Officer namely D/Cpl. 2724 Seruvi Caqusau did give his name as SAIYASI TURA which he knew to be false.

2. The accused was first produced in the Magistrate's Court at Nadi on 22<sup>nd</sup> November, 2013, on this day he was bailed with two sureties to appear in court on 6<sup>th</sup> March, 2014. The accused did not appear in court and on this day a bench warrant was issued.
3. After numerous adjournments the accused did not appear in court and was not apprehended as well. Upon the application of the prosecution the Magistrate's Court proceeded to trial in absentia on 1<sup>st</sup> October, 2018. The prosecution called 4 witnesses to prove both counts against the accused.
4. On 11<sup>th</sup> October, 2019 the Magistrate's Court found the accused guilty for both counts and convicted him as charged. On this date in accordance with

section 190 of the Criminal Procedure Act the file was sent to this court for sentencing.

5. The brief facts were as follows:

- (a) On the 18<sup>th</sup> of November, 2013, PC Seruvi Caqusau (PW1), Senitiki Natatosau (PW2) and Penaia Drauna (PW3) received information that the accused was cultivating marijuana at Nabou. The three witnesses attended to the information, met their informer and proceeded to where the marijuana was planted which was about one hour's walk from the main road. They managed to arrest the accused who gave his name as Saiasi Tuva. Upon questioning, the accused admitted planting marijuana at Nabou, the farm was photographed and the police uprooted the marijuana in the presence of the accused.
- (b) The accused and the uprooted plants were taken from the farm to the Nadi Police Station. The plants were sent to the Fiji Police Forensic Chemistry Laboratory for analysis which tested positive for marijuana. The plants were of varying height namely:
  - (i) 4-19cm;
  - (ii) 3-54cm;
  - (iii) 13-16cm; and
  - (iv) 15-65cm.
- (c) The total number of plants uprooted was 3,085 weighing 9,105.9 grams. At the police station the police came to know that the accused real name was Samuela Tiqe Nasila and not Saiasi Tuva. The accused was caution interviewed and charged.

## **LAW**

6. The offence of cultivation of illicit drugs contrary to section 5 (a) of the Illicit Drugs Control Act 2004 reads:-

### *Unlawful possession, manufacture, cultivation and supply*

5. Any person who without lawful authority-

(a) acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or

(b) engages in any dealings with any other person for the transfer, transport, supply, use, manufacture, offer, sale, import or export of an illicit drug;

commits an offence and is liable on conviction to a fine not exceeding \$1,000,000 or imprisonment for life or both.

7. The offence of giving false name and address to a police officer contrary to section 24 of the Police Act, Cap 85 reads:

### *Persons furnishing false name and address*

24. Any person who having been asked by a police officer in the execution of his duty to give his name and address refuses to do so or gives to such police officer a false name or address shall be guilty of an offence and liable to a fine not exceeding forty dollars or to imprisonment for a period not exceeding three months or to both such fine and imprisonment; and any police officer may without warrant arrest such person.

## **MAXIMUM SENTENCE**

8. The maximum penalty for the offence of cultivation of illicit drugs is a fine not exceeding \$1,000,000 or imprisonment for life or both. The maximum penalty for the offence of giving false name and address to a police officer is

a fine not exceeding \$40 or imprisonment for a period not exceeding 3 months or to both such fine and imprisonment.

9. In *Sevanaia Bati vs. The State*, criminal case no. HAC 04 of 2018 (21 August, 2018) Goundar J. made an important comment in respect of cultivation of marijuana at paragraph 5 as follows:

*[5] In sentencing, the Court must have regard to the gravity of the offence you committed. The maximum punishment prescribed for cultivation of an illicit drug is discretionary life imprisonment. There is no guideline judgment especially for cultivation of marijuana. I am mindful that the guideline set by the majority in *Sulua v State* [2012] FJCA 33; AAU0093.2008 (31 May 2012) is solely based on the weight of the drugs. The gravity of the offence, however, depends on the weight and the purpose of possession or cultivation. As the Court of Appeal said in *Koroivuki v State* [2013] FJCA 15; AAU0018.2010 (5 March 2013) at [23]:*

*If there is evidence led by the prosecution regarding the purpose for which the offender had the drug in his possession, then that purpose becomes relevant in assessing the culpability of the offender. If the drug is of a small quantity and was intended for personal use, the court can take that into account in reducing the offender's culpability when passing sentence. If the drug was possessed with the intention to keep for another, that intention is relevant in assessing the offender's culpability and role in the joint enterprise. If the drug is intended for distribution or sale, a higher culpability is imputed on the offender. The list is not exhaustive. Further, the court can impute various degrees of culpability based on commercial aspects involved. If the drug is kept in possession for sale, the degree of culpability will be much higher than if the drug was possessed for supply for no remuneration but as a favour for another. The criminality that is involved in each case will depend on the evidence led by the prosecution or facts admitted by the offender.*

10. The state counsel filed sentence submissions for which this court is grateful.

**PERSONAL DETAILS AND MITIGATION OF THE ACCUSED**

11. Since the accused was absent the following details have been taken from the court file:
  - a). The accused is a first offender;
  - b). He was 24 years at the time of the offending;
  - c). Educated up to Form 6;
  - d). Cooperated with the police during investigations.
12. The Court of Appeal in *Kini Sulua and Michael Ashley Chandra vs. The State, Criminal Appeal No. AAU 0093 of 2008 and AAU 0074 of 2008 (31 May, 2012)* by majority decision formulated the following sentencing guidelines for offences committed under sections 5 (a) and 5 (b) of the Illicit Drugs Control Act:

*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.*

*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.*

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.

Category 4: possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment”.

13. It is apparent from *Kini Sulua’s* case (supra) that the quantity of the illicit drugs will determine the tariff applicable in respect of possession of cannabis sativa. The current case is about cultivation of cannabis sativa where the weight and height is determined by taking into account the plants uprooted. The analyst report does not state anything about the roots and stems of the plants not being included in the weight of the plants or whether the plants had reached a certain stage of maturity. In this case the weight of the cannabis cultivated by the accused is 9,105.9 grams for 3,085 plants. In accordance with *Sulua’s* case (supra) by weight category 4 will apply.
14. The applicable sentencing tariff for category 4 is a sentence between 7 and 14 years imprisonment.
15. Furthermore, there have been a number of commentaries at the High Court level in regards to the applicable tariff for cultivation of cannabis sativa as opposed to possession. It is important to state briefly what the High Court has said about this issue. I wish to add here that so far there is no guideline judgment from the Court of Appeal in respect of this issue.
16. Perera J. in *Tuidama v State* [2016] FJHC 1027; HAA29.2016 (14 November 2016) in his observations as to why the guidelines in *Sulua’s* case does not apply in respect of cultivation of cannabis sativa from paragraphs 23 to 26 stated as follows:

*“My attention was drawn to the fact that in Sulua (supra), the court dealt with cannabis sativa that was in the form of dried leaves. The weight that was used to identify the four different categories in the majority decision of that case therefore is the weight of dried cannabis sativa leaves.*

*The quality and the state of the cannabis sativa involved in this case at the time the weight was recorded is different from that of Sulua’s case. According to the Government Analyst Report available in the Magistrate Court Case Record in this case, the weight recorded was of 13 ‘green’ plants of cannabis sativa. Therefore, the weight (2.68kg) mentioned in the charge against the appellant seems to include the weight of the stems and the weight of water content in the plants. Further, the report does not indicate whether or not the roots were excluded. Therefore, this weight of 2.68kg mentioned in the charge in this case cannot be used as the basis to decide the sentencing tariff in line with the Sulua case as the categorisation in the said case is based on the dry weight of cannabis sativa leaves. It is very unlikely that this offence would fall under the 3<sup>rd</sup> category in Sulua’s case if the dry weight of the leaves in the 13 plants was taken into account.*

*In my view, if weight is to be used as the decisive factor in forming a general tariff for an offence under section 5 of the Illicit Drug Control Act in relation to cannabis sativa, it is necessary that regulations are also put in place pertaining to the nature and state of the drug at the time the weight considered for sentencing should be recorded.*

*Having considered all the circumstances, I am inclined to take the view that the categorisation set out in the case of Meli Bavesi v State [2004] FJHC 93; HAA 0027.2004 is the appropriate method to identify the seriousness of offending for the purpose of sentencing in cases of this nature that involves cultivation of cannabis sativa. According to the categorisation*



*provided in Bavesi (supra), the tariff is determined based on the scale of the cultivation.”*

17. In the same case Perera J. at paragraph 28 came up with the following sentencing tariff for the offence of cultivation of cannabis sativa plants:
  - i. *The growing of a small number of plants for personal use by an offender on a non-commercial basis - 1 to 2 years imprisonment;*
  - ii. *Small scale cultivation for a commercial purpose with the objective of deriving a profit - 3 to 7 years imprisonment;*
  - iii. *Large scale commercial cultivation- 7 to 14 years imprisonment.*
  
18. Madigan J. in *Dibi v State [2018] FJHC 86; HAA96.2017 (19 February 2018)* held that the sentencing guidelines in *Sulua’s case (supra)* do not apply to the offence of cultivation of cannabis sativa, his Lordship at paragraphs 8 and 9 said this:

*“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.”*

*Cultivation of illicit drugs is a far more serious offence than mere possession in that the latent risk to consumers and potential consumers is dramatically increased.”*
  
19. The tariff in *Dibi (supra)* at paragraph 13 is as follows:
  - i. *Cultivating less than 5 plants of a weight less than 100 grams of narcotic, a non-custodial sentence at the discretion of the sentencing tribunal.*

- ii. *Cultivating 5 to 50 plants of a weight of narcotic between 100 to 1000 grams, a term of 1 to 6 years.*
- iii. *More than 50 plants with weight of over 1000 grams, imprisonment of 6 years or more.*

20. In *State v Vuicakau* [2018] FJHC 12; HAC01.2018 (19 January 2018) Goundar J. has commented at paragraph 6 that the number of plants and the maturity of the plants are relevant in respect of the offence of cultivation and not the weight in the following words:

*“I am further guided by the majority decision of the Court of Appeal in *Sulua v State* [2012] FJCA 33; AAU0093.2008 (31 May 2012) that recommends a tariff of 7 to 14 years imprisonment for unlawful possession of more than 4 kg of Cannabis Sativa. But I am careful in determining your culpability solely on the weight of the illicit drug. Weight of Cannabis Sativa plants can be affected by whether the plants are in green or dried state and whether the stems and roots were detached before the weight was determined. In the case of cultivation, it is not the weight but the number of plants and maturity of the plants that are relevant.”*

21. In *State v Nabenu* [2018] FJHC 539; HAA10.2018 (25 June 2018) Aluthge J. also discussed about the difficulties at paragraphs 43 to 46 and 80 in applying the *Sulua* guidelines in sentencing offenders for the offence of cultivation of cannabis sativa as follows:

*“In the process of establishing the tariff in *Sulua* (supra), the Court had considered about 50 previous cases involving possession of cannabis sativa. Temo JA, with the concurrence of K.P. Fernando JA, extended the ambit of the tariff established for possession to other types of offending under Section 5(a) and stated:*

*“Section 5(a) of the Illicit Drugs Control Act 2004 treated the verbs "acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug" equally. All the verbs are treated equally. In other words, all the offending verbs or offending actions are treated equally. "Supplies, possesses, manufactures and cultivates" are treated equally, and none of the offending actions are given any higher or lower standing, as far as section 5(a) of the Illicit Drugs Control Act 2004 was concerned.”*

*“It appears that it is on this very basis that the tariff established for possession was extended to other types of offending under Section 5(a) of the IDCA, including cultivation”.*

*“The Section covers a wide range of illicit drugs from less harmful drugs like cannabis sativa to most dangerous hard drugs like heroine and also a wide range of criminal acts such as acquisition, supply, possession, production, manufactures, cultivation, etc. Therefore, the legislature in its wisdom has prescribed the maximum sentence of life imprisonment, leaving the discretion with the judiciary to select the sentence appropriate to each individual case, considering the nature of the drug and circumstances of the case.”*

*“It is my considered view that possession and cultivation of cannabis are two distinct offences and therefore should be treated differently when imputing the criminal liability and punishment. As correctly observed by Madigan J in Emori Dibi (supra), the offence of cultivation of cannabis sativa is a far more serious offence than that of mere possession, and therefore the need to apply a different tariff in cultivation cases is highly warranted notwithstanding the fact that both offences carry the same maximum penalty under the IDCA, that is life imprisonment.”*

*“Therefore, having distinguished the facts in Sulua, I prefer to adopt the tariff proposed by Perera J in Sailosi Tuidama (supra) for the offence of cultivation*

*of cannabis sativa with slight modifications to accommodate Madigan J's concern for planters of small number of cannabis plants. Accordingly, the tariff for cultivation of cannabis sativa should be as follows:*

- a. *The growing of a small number of plants (less than 9 plants with assumed yield of 40g per plant) for personal use by a first offender - non- custodial sentence or a fine at the discretion of the court.*
- b. *Small scale cultivation (10 to 30 plants with assumed yield of 40g per plant) for a commercial purpose with the objective of deriving a profit - 1 to 3 years imprisonment, with or without a fine at the discretion of the court.*
- c. *Medium scale commercial cultivation (30 -100 plants) - 3 to 7 years imprisonment with or without a fine at the discretion of the court.*
- d. *Large scale cultivation capable of producing industrial quantities for commercial use (more than 100 plants) 7 – 14 years imprisonment with or without a fine at the discretion of the court.*

22. Looking at the above case authorities, I accept that the number of plants involved in this matter comes under category D as per *State v Nabenu* (supra) which has a term of imprisonment from 7 years to 14 years. In respect of *Sulua's* case the weight of the plants fall under category 4 which also attracts a sentence from 7 years to 14 years.

### **AGGRAVATING FACTORS**

23. The number of cannabis sativa plants (3,085) suggests that the accused had cultivated these plants for the commercial market. As per his caution interview the accused knew what he was cultivating was illegal but he continued regardless. The cultivation was carried on a farm which was at an isolated location away from the passing public to avoid detection. The

plants were nurtured well which were from 4 cm to 65 cm in height in a short time.

24. Bearing in mind the objective seriousness of the offence committed I select a middle range of the tariff as a starting point being 10 years imprisonment. For the aggravating factors I add 7 years bringing the interim total to 17 years imprisonment.
25. I reduce the sentence for the mitigating factors and good character by 1 year arriving at 16 years imprisonment. The accused also faces a second count of giving false name and address to a police officer, for this offence the accused is sentenced to one month imprisonment which is to be served concurrently with count one.
26. The accused was not remanded since he was given bail on first call by the Magistrate's Court. The final sentence is 16 years imprisonment which is above the accepted tariff for the following reasons:
  - a). The number of plants are substantial;
  - b). The plants have been nurtured and looked after well in a short time;
  - c). Commercial cultivation;
  - d). Farm situated at an isolated location to avoid detection.
27. Cannabis sativa commonly known as marijuana is an addictive illicit drug which has many adverse effects both socially and personally. The punishment prescribed under the Illicit Drugs Control Act 2004 reflects the serious consideration given by the legislature to stop the cultivation of such drugs.
28. There is no doubt the legislature had viewed cultivation of illicit drugs as a very serious offence which is reflected in the punishment. The accused in

his greed to make money by illegal means should be prepared to face the full brunt of the law.

29. The society is tired of drugs cases rearing its ugly face every now and then this must stop sooner rather than later. It is for the court to impose sentences which has general and specific deterrence factor to serve as a warning to all those out there that any breach of the law relating to drugs will not be tolerated and no leniency will be shown to the offenders. The quantity of plants up rooted is probably the highest so far which shows that despite the court dishing out heavy punishments people are bold and undeterred.
30. Instead of using his efforts in such an illegal cultivation the accused should have put his labour to good use and engaged himself in a cultivation for the betterment of himself and his family. An immediate long term custodial sentence is inevitable in this case, from the substantial number of plants uprooted one can say with certainty that there is a lucrative market for such drugs. If action is not taken now the society will suffer and the future generations will no doubt pay a huge price.
31. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed I am compelled to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
32. Under section 18 (1) of the Sentencing and Penalties Act, I impose 14 years imprisonment as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused.

## **CONCLUSION**

33. The accused is sentenced to 16 years imprisonment with a non-parole period of 14 years to be served before he is eligible for parole. The sentence will begin from the time the accused is apprehended.
34. 30 days to appeal to the Court of Appeal.



**Sunil Sharma**  
**Judge**

**At Lautoka**

06 March, 2020

### **Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Accused in absentia.**