IN THE HIGH COURT OF FIJI

AT LABASA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 15 of 2023

(Savusavu Magistrate's Court No. 612 of 2022)

BETWEEN: **APISAI DRIU MADIGIBULI**

APPELLANT

AND: **STATE**

REPSONDENT

Counsel: **Appellant in Person**

Ms. L. Latu for the Respondent:

Date of Hearing: **21st September 2023**

Date of Ruling: **3rd October 2023**

RULING ON APPEAL AGAINST SENTENCE

1. This is the ruling on an appeal against sentence from the Savusavu Magistrate's Court on a sentence delivered on the 21st February 2023.

The proceedings in the Savusavu Magistrate's Court

2. The appellant was charged in the Savusavu Magistrate's Court for the following offence: -

Statement of Offence (a)

UNLAWFUL POSSESSION OF ILLICIT DRUGS contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

Particulars of Offences (b)

> **APISAI DRIU MADIGIBULI** on the 21st day of December 2022 at Naidi village, Cakaudrove in the Northern Division, without lawful authority possessed one clear plastic bottle containing dried leaves with a total weight of 799.8 grams of Indian hemp, an illicit drug botanically known as **Cannabis Sativa.**

3. The appellant was first produced in Court on the 22nd of December 2022, and he elected to hire private counsel and he was then bailed pending his plea.

4. He entered a guilty plea on the 21st of February 2023, the summary of the facts was outlined to him, and he admitted the same. The Court therefore convicted him as charged and received his plea in mitigation.

5. Later on, that same day, the Court sentenced the Appellant to 22 months' imprisonment with a non-parole period of 15 months.

The Sentence

6. In the Learned Magistrate's sentencing remarks, he applied the tariff as set out in the case of Sulua –v- State [2012] FJCA 33; AAU 93 of 2008 (31st May 2012) where the Court divided drug offenders into the following: -

Category 1: Possession of 0 to 100 grams of cannabis sativa – a non-custodial sentence should be given for example fines, community service, counselling, discharge with a strong warning etc. Only in worst cases should a suspended prison sentence or a short sharp prison sentence be considered.

Category 2: Possession of 100 to 1000 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 to be sentenced to more than 2 years imprisonment.

Category 3: Possessing 1000 grams to 4000 grams of cannabis sativa. Tariff should be a sentence between 3 to 7 years with those possessing less than 2500 grams be sentenced to

less than 4 years imprisonment and those possessing more than 2500 grams ne sentenced to more than 4 years.

Category 4: Possessing 4000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years of imprisonment.

7. Applying the above authority, the Learned Magistrate found that the offending fell into Category 2 of drug offenders.

8. The aggravating factors identified by the Court were "weight of the drugs is too large for personal use; the method of concealing the drugs is sophisticated for detection."

9. As mitigating factors, he identified the appellant's cooperation with the Police leading to his early guilty plea and his previous good conduct as a first offender.

10. In sentencing the appellant the Court took a starting point of 24 months' imprisonment and he added 18 months for the aggravating factors and deducted 9 months for the mitigating factors so the interim sentence was 33 months' imprisonment. For the early guilty plea he deducted 11 months from the sentence leaving a final sentence of 22 months imprisonment.

11. The Court then considered the principles relating to suspension of sentences and decided that the Court would denounce the offending and apply the principle of deterrence rather than rehabilitation.

12. The final sentence is 22 months' imprisonment with a non-parole period of 15 months' imprisonment.

13. The Court also gave orders that the illicit drugs in police custody were to be destroyed in the presence of Court staff and the prosecution was to file a destruction report, including photographs of the destruction of the illicit drugs in this case.

The Appeal

14. The appellant was aggrieved at his sentence and he filed for leave to appeal against sentence and sought leave to appeal. This is a timely appeal.

15. He filed the appeal in person, and he submitted the following grounds of appeal: -

(a) I am dissatisfied with the sentence as I feel the weight of what was found on me was lesser than the 3 cases reference below. The weight of drugs found on them was more compared to what was found on me, but the sentence passed on them is lesser than this 22 months passed in the Magistrate's Court in Savusavu.

(i) State -v- Jone Avukia CF 112/22 – 917.6 grams – 9 months imprisonment.
(ii) State -v- Sitiveni Liga CF 274/22 – 944.9 grams – 13 months imprisonment
(iii) State -v Konia Tuwai CF 151/20 – 1.871 kg – 11 months imprisonment

(b) The weight of the illicit drugs which was analysed was 799.8 grams and the sentence which the Savusavu Court was 22 months with 15 months non-parole period.

(c) I feel that the sentence passed on me was harsh and excessive.

(d) The sentencing Magistrate erred in law in not properly considering the sentence passed on me with the three cases reference as he also presided on their cases.

(e) The sentencing Magistrate erred in law by imposing a non-parole period without a parole order when there is no Parole Board in place to justify the release of the Appellant at the end of or completion of his known parole period. Failure to do so has miscarried the right cause of justice in relation to the proper interpretation of parole.

(f) The appellant therefore requests the High Court to revisit and reconsider the sentence imposed on me in comparison to the three cases reference.

(g) The Appellant reserves the right to add other grounds of appeal on receipt of the record.

16. The appeal was first called on the 13th April 2023 and the Court gave directions for the settling of the copy records, set a timetable for appeal submissions and scheduled the 31st of July 2023 as the date of the hearing of the appeal.

The Hearing

17. At the appeal hearing the appellant submitted written submissions and stated that he would rely on the same.

(a) He was aggrieved at the starting point of 2 years (24 months) adopted by the Magistrate. He submitted the authority of Justice Gounder in Laisiasa Koroivuki –v- State [2013] FJCA 15; AAU 18 of 2010 (5th March 2013). His Lordship stated that, as a matter of good practice, the starting point should be picked from the lower range.

(b) The Appellant never had any history of drug addiction, or any offences related to illicit drugs moreover he was a first offender and he expressed genuine remorse in Court by an early guilty plea. He fully cooperated with the police during the investigations therefore the Magistrate could have picked the starting point from the lower end of the tariff and the final sentence could have been a short sharp and lenient sentence, which would have been more preferrable to the appellant, and it could have also been more appropriate and suitable.

(c) The appellant also felt aggrieved at the non-parole period term imposed, as the learned sentencing Magistrate chose a non-parole period too close to the head sentence and he cited the case of Paula Tora vs State Criminal Appeal No. AAU 63 of 2011; 27th February 2015.

(d) The appellant refers to the following cases and the sentences handed down in them, which was different to the sentence handed down in this case: -

(i) Jone Avukia –v- State CF 112/22 – 917.6 grams – 9 months imprisonment.
(ii) Malakai Seru Naduva –v- State CF 140/23 – 169.2 grams – 6 months imprisonment.
(iii) Samuela Qeleloa –v- State CF 602/20 – 400.2 grams – 6 months imprisonment.
(iv) Rakai Vatukatakata –v- State CF 263/16 – 600 grams – 5 months imprisonment.
(v) State vs Sitiveni Liga CF 274/22 – 944.9 grams – 13 months' imprisonment.

(e) He submits that the Court did not consider his personal circumstances in mitigation. The Magistrate also did not consider that he had pleaded guilty and saved the Court's time and resources. He is truly remorseful and is now suffering the consequences of his actions.

(f) The Appellant seeks a fairer sentence.

(g) Those were the submissions of the appellant.

The State's submissions

18. In written submissions filed, State counsel submitted that the appellant was charged with Unlawful Possession of 799.8 grams of cannabis sativa. He pleaded guilty in the Savusavu Magistrate's Court and was thereafter sentenced on the 21st of February 2023. The Appellant was sentenced to 22 months' imprisonment with a non-parole period of 15 months. Being dissatisfied with the sentence, the appellant has filed an appeal against sentence.

19. The State submits that section 246 of the Criminal Procedure Act provides for appeals against any judgment, sentence, or order of a Magistrate's Court.

20. The State submits that at the date of sentencing, the Court applied the authority of Sulua – v- State [2012] FJCA 33; AAU 93 of 2008 (31st May 2012).

21. Given that the Appellant was found in possession of 799.8 grams of Cannabis Sativa, the learned Magistrate selected Category 2 with a tariff of 1 to 3 years imprisonment for possession of 100 to 1000 grams. As he was found in possession of more than 500 grams of illicit drugs, the Appellant was liable to a sentence more than 2 years as per the Sulua authority.

22. The State concedes that the Court included the weight of the drugs in selecting the starting point of the sentence and later included the weight as an aggravating factor. This is where the Magistrate fell into error as there was double counting.

23. The State submits that section 18 of the Sentencing and Penalties Act 2009 provides that it is mandatory to impose a non-parole period if the sentence is more than 2 years and the non-parole period must be at least 6 months less than the sentence.

24. The Learned Magistrate commenced sentencing at 2 years as the starting point and arrived at a final sentence of 22 months' imprisonment with a non-parole period of 15 months. The final term is below the tariff set out above and the sentence was reasonable given all of the circumstances of the case, notwithstanding that there had been double counting.

25. The Learned Magistrate has stated the reason why he did not exercise his discretion to suspend the Appellant's sentence. The Magistrate stated that the sentence is designed as a deterrent because there were too many offenders coming before the Court with drug related offences.

26. The State submits that the suspension of a sentence under 2 years is not an automatic entitlement. The learned Magistrate has clarified as to why he decided not to suspend the sentence under the Sentencing and Penalties Act 2009, which was sufficient.

27. The State therefore concludes that there is no merit to the grounds advanced by the Appellant for the reasons set out above.

Analysis

28. In the case of Kim Nam Bae –v- State [1999] FJCA 21; AAU 15 of 1998 (26th February 1999) the Court of Appeal stated as follows: -

> "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 he 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)."

29. The Supreme Court confirmed this in the case of Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013 (20th November 2013) as follows: -

> "[19] It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in ***House v The King*** (1936) 55 CLR 499 and adopted in ***Kim Nam Bae v The State*** Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:
>
> (i) Acted upon a wrong principle;
> (ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

> [20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in ***Chirk King Yam v The State*** Criminal Appeal No.AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case."

30. In passing this sentence, the Magistrate applied the sentencing tariff applicable for such cases, the Sulua case authority.

31. The Magistrate properly commenced the sentence from the middle of the tariff, 2 years and, after making the necessary adjustments for the mitigating factors and the guilty plea, then arrived at a sentence of 22 months' imprisonment with a non-parole period of 15 months, a sentence below the tariff.

32. In assigning the aggravating factors however, the Court fell into error as he double counted by taking a higher starting point for the weight of the drugs and then identifying the weight as a separate aggravating factor.

33. After arriving at the final sentence, which is capable of being suspended, the learned Magistrate further discussed whether or not to suspend the same. Ultimately the Learned Magistrate stated that he would apply the principle of deterrence and found that the most appropriate sentence would be a custodial sentence to be served immediately.

34. The Magistrate did err in double counting i.e., by taking the weight to identify the starting point and then counting the weight as an aggravating factor. The Magistrate did err in this however pursuant to section 256 (2) (f) of the Criminal Procedure Act, I am satisfied that no substantial miscarriage of justice has occurred.

35. As to the sentence passed, after considering the charge and the quantity of the illicit drugs, I find that a more appropriate sanction in the circumstances is a partially suspended sentence, although the final sentence arrived at will remain the same.

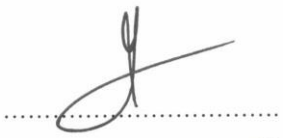
36. In the circumstances, the appeal will partially succeed in that the Court will quash the sentence pursuant to its powers under section 256 (3) of the Criminal Procedure Act 2009 and substitute a new sentence.

<u>This is the Court's ruling:</u> -

1. **The sentence handed out by the Savusavu Magistrate's Court on the 21st of February 2023 is hereby quashed and substituted by the following:**
2. **Apisai Driu Madigibuli for the offence of <u>Unlawful Possession of Illicit Drugs</u> you are sentenced to 22 months' imprisonment, you will serve 10 months in custody and the balance of 12 months is suspended for 2 years.**
3. **This sentence takes effect t from today and since you have been in custody since 21st February 2023 you are to be released from custody on the 21st of December 2023 to serve the balance of your sentence in the community.**

30 days to appeal.

So ordered.



Mr. Justice Usaia Ratuvili

<u>Acting Puisne Judge</u>

<u>Solicitors</u>:
Appellant in Person
Office of the Director of Public Prosecutions for the Respondent