

IN THE HIGH COURT OF FIJI AT SUVA
APPELLATE JURISDICTION

Appeal Case No. HAA 32 of 2023

Maciusela Tawake vs State

For the Appellant: **In Person**
For the Respondent: **Ms. P Mishra**

Date of Hearing: **26th March 2024**
Date of Ruling: **2nd May 2024**

RULING ON APPEAL

1. The Appellant was tried in the Nausori Magistrate’s Court on the charge of Unlawful Cultivation of Illicit Drugs contrary to section 5 (a) of the Illicit Drugs Control Act 2004.
2. The particulars of the offence are that “Maciusela Tawake on the 21st day of August 2023 at Waimalua Settlement, Tailevu in the Central Division, without lawful excuse, cultivated 3588 grams of Cannabis Sativa an illicit drug.”
3. He was produced in Court on the 23rd of August 2023 and he entered a plea of guilty. He admitted the Summary of facts outlined to him and the Court convicted him of the Charge against him.
4. On the 24th of August 2023 the Nausori Court sentenced him to 3 years imprisonment, with a non-parole period of 2 years imprisonment.

5. The Appellant was aggrieved at the sentence and filed a timely appeal based on the following grounds: -
 - (a) The Resident Magistrate in Nausori Magistrate's Court was unfair and unreasonable by giving a harsh penalty without carefully considering the circumstances.
 - (b) He is married with a one year old baby daughter and he is a first offender and he cooperated fully with the Authorities.
 - (c) Further grounds of appeal would be submitted once court records are supplied and legal aid assistance is provided
6. The Appellant therefore seeks the "fairness of this Honourable Court and the interest of Justice to consider the following grounds and reduce my sentence."
7. The appeal was first called on the 27th of September 2023 and he advised the Court that he was applying for Legal Aid and the Court made directions for the records to be compiled and for Legal Aid representation to be confirmed.
8. This matter was then adjourned for seven times for various reasons including the Appellant not being produced, waiting for the record and ultimately, my brother Judge no longer sitting.
9. The State has filed the appeal submissions on the 25th of January 2024.
10. The matter was then fixed for hearing on the 26th of March.

The Appeal Hearing

Appellant's Submission

11. In his written submission, the Appellant submits that the Magistrate erred in law by not deducting one third of the starting point for early guilty plea and full cooperation with the Police.

12. The same Magistrate's Court sentenced another similar offender Sakeo Bainivalu vs State CF 49/23 whereby he was sentenced to 3 months imprisonment for 5433 grams in weight.
13. The Appellant therefore seeks the Court's fairness of "this Honourable Court and the interest of justice to consider the following grounds and reduce my sentence."

State's submissions

14. The State submits that the Appellant was first produced in the Nausori Magistrate's Court on the 23rd of August 2023. He waived his right to counsel and entered a guilty plea at the earliest opportunity.
15. He admitted the summary of facts outlined to him and the Court duly convicted him and on the 24th of August 2023, he was sentenced to 3 years imprisonment, with a non-parole period of 2 years.
16. The Appellant has filed a timely appeal and he relies on three grounds of appeal as follows: -
 - (a) The Resident Magistrate in Nausori Magistrate's Court was unfair and unreasonable by giving a harsh penalty without carefully considering the circumstances.
 - (b) He is married with a one-year-old baby daughter and he is a first offender and he cooperated fully with the Authorities.
 - (c) That the analysis procedures and protocols were not properly followed.
 - (d) Further grounds of appeal would be submitted once court records are supplied and legal aid assistance is provided.
17. The State submits that the offence of Unlawful Cultivation attracts a maximum sentence of life imprisonment and/or a maximum fine of one million dollars.

18. The appellant also submits that section 246 of the Criminal Procedure Act provides a right to parties to a criminal proceeding with the right to appeal any judgment, sentence or order of a Magistrate's Court to the High Court.
19. Section 256 of the Act then sets out the powers of the High Court on appeal, specifically at section 256 (2).
20. The State refers to the authority of *Kim Nam Bae vs The State* [1999] FJCA 21 (26th February 1999 where the Court of Appeal provides that the appellant must prove that the Court below fell into error in exercising sentencing discretion by allowing irrelevant or extraneous matters to guide or to affect him. If he mistakes the facts, if he does not take into account some relevant considerations then the Appellate Court may impose a different sentence.
21. The State submits that the Court of Appeal has set out the new tariff for the offence Unlawful Cultivation in the case of *Jone Seru vs State* [2023] FJCA67; AAU 115 of 2017 (25 May 2023) however the Magistrate applied the earlier authority of *Sulua vs State*.
22. The State submits that in so doing the Magistrate erred in principle. Notwithstanding that fact, the Magistrate ended up with a sentence that fell within the tariff and the Appellant suffered no prejudice in that error of principle.
23. The State therefore submits that with respect to Ground 1, the final sentence is neither harsh nor unfair or unreasonable and the Magistrate considered all of the relevant considerations in this case.
24. For the second ground of appeal, the State submits that in the sentencing remarks, the Magistrate did consider the personal circumstances of the Appellant and his cooperation with the Police and this is reflected in the final sentence.

25. The State also contends that the Third ground of appeal is not made out as the Magistrate applied proper sentencing principles and arrived at a sentence that was permissible under the tariff.
26. The State therefore submits that the appeal grounds are not made out and the appeal should be dismissed.

Analysis

27. The right to appeal is established by section 246 of the Criminal Procedure Act and this is a timely appeal against sentence.
28. The Appellant relies on the following three grounds: -
- (a) The Resident Magistrate in Nausori Magistrate's Court was unfair and unreasonable by giving a harsh penalty without carefully considering the circumstances.
 - (b) He is married with a one-year-old baby daughter and he is a first offender and he cooperated fully with the Authorities.
 - (c) That the analysis procedures and protocols were not properly followed.
29. Section 256 (2) of the Criminal Procedure Act sets out the powers of the High Court on appeal.
30. 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).”

31. 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.”

32. In passing this sentence, the Magistrate applied the old sentencing tariff applicable for such cases, the Sulua case authority. In so doing he fell into error, applying the wrong legal principle

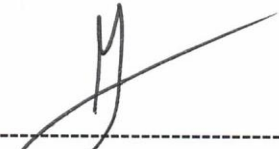
33. Notwithstanding the fact the learned Magistrate commenced the sentence from below the tariff, 2 years and, after making the necessary adjustments for the mitigating factors and the guilty plea, then arrived at a sentence of 3 year's imprisonment with a non-parole period of 1 year, a sentence within the tariff.

34. The State has conceded that the Court arrived at a sentence that was within the tariff therefore the appeal should be dismissed accordingly.
35. I have considered all of the circumstances of the appeal, the three grounds submitted by the Appellant.
36. I find that the Magistrate did consider all of the personal circumstances of the Appellant and prepared a sentence that was permissible and within the tariff of both Sulua vs State and the applicable tariff now Jone Seru vs State.
37. The Magistrate did wrongly apply the tariff of Sulua vs State, however pursuant to section 256 (2) (h) of the Criminal Procedure Act, I find that no substantial miscarriage of justice actually occurred and the appeal will fail.
38. In fact the Appellant benefited from a more lenient sentence than would otherwise be the case.

This is the Ruling of the Court: -

- 1. The appeal against the sentence handed down by the Nausori Magistrate's Court on the 24th of August 2023 is hereby dismissed. The sentence is affirmed.**

30 days to appeal



Mr. Justice Usaia Ratuveli
Puisne Judge

