

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Criminal Appellate Jurisdiction)

CRIMINAL APPEAL CASE No.04 OF 2013

BETWEEN: COLUMBUS WETUL
Appellant

AND PUBLIC PROSECUTOR
Respondent

CRIMINAL APPEAL CASE No.05 OF 2013

BETWEEN: JASON BOE
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John Von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Robert Spear
Hon. Justice Raynor Asher
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

Counsel: -Ms Jane Tari for the Appellant in both Appeals
-Mr Leon Malantugun for the Public Prosecutor in Criminal Case No. 04 of 2013
-Mrs Losana Matariki Timakata in Criminal Case No. 05 of 2013

Date of hearing: 16th July 2013

Date of judgment: 26th July 2013

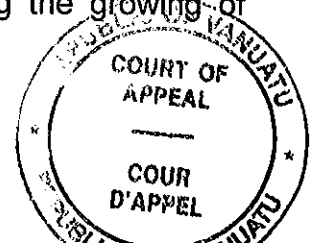
JUDGMENT

The Court has heard argument successively on two appeals against sentences for offending against the Dangerous Drugs Act [Cap12].

Both Mr Columbus and Mr Boe have been convicted of cultivation of cannabis plants.

We take this opportunity to consider sentencing guidance to cultivation of cannabis cases in the light of developments since this Court Judgment in Naio –v- Public Prosecutor [1998] VUCA 1; Criminal Appeal Case 07 of 1997.

In considering the sentencing levels, we are conscious that there has been an increase in cannabis cultivation and dealing, particularly involving the growing of plants in the Islands of the Republic for purposes of sale.



We also consider the need for guidance to sentencing Courts as this Court noted in the case of **Naio** that:

“Parliament had fixed the punishment for all drug offences ranging from a fine up to 100 Million Vatu or a term of Imprisonment up to 20 years. The Legislature clearly intends to give the Court a wide range of room within which to move in order to impose appropriate penalties for drug offences based on the circumstances of the particular cases before the Courts. There are offences much more serious than those which the appellants were convicted of. For such offences the Courts will no doubt consider meeting them with severe sentences.” (page 4).

We consider appropriate to divide cannabis cultivation offending into three broad categories:

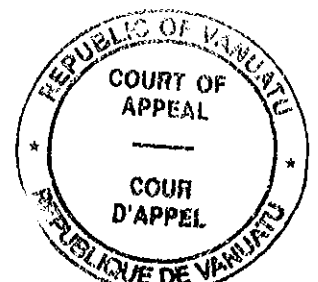
Category 1 consists of the growing of a small number of cannabis plants for personal use by the offender without any sale to another party occurring or being intended. Offending in this category is almost invariably dealt with by a fine or other non-custodial measure. Where there have been supplies to others on a non-commercial basis the monetary penalty will be greater and in more serious cases or for persistent offending a term of community work and supervision or even a short custody term may be merited. (It is to be noted in this connection that there is no separate offence in relation to a section 4 offence of cultivation for supplying or possession for supply, as opposed to importation, sale, supply or possession.(s.2).

Category 2 encompasses small-scale cultivation of cannabis plants for a commercial purpose, i.e. with the object of deriving profit. The starting point for sentencing is generally between two and four years but where sales are infrequent and of very limited extent a lower starting point may be justified.

Category 3 is the most serious class of such offending. It involves large-scale commercial growing, usually with a considerable degree of sophistication and organisation. The starting point will generally be four years or more.

It is to be understood that the border-line between each category may in specific cases be indistinct and sometimes incapable of exact demarcation. The numbers and sizes of plants are relevant factors for each category depending on the circumstance of each case. However, although relevant, they may not be an adequate guide were intensive cultivation methods are being employed with a view to enhancing the yield of usable cannabis for example by producing plants with higher narcotic levels.

We consider that it will be helpful to sentencing Judges if prosecutors bring evidence of likely amounts of annual gross revenue, or turnover, obtained by the offender from a cannabis growing operation or which the offender must have anticipated deriving from the activity. That will reflect crop cycles and yields and will be a better measure of the size of an operation than simple reference to the number of plants which have been found. The sentence should take into account the period over which the offending has continued.



When relevant, the Prosecution should produce likely price figures for the particular situation as an indication of potential yields and profit from production methods.

The division between the categories is merely a means to give a guide to penalty in relation to a particular position on the scale of offending.

We stress also that these indicators relate to the starting point before aggravating features (like previous drug offending) or mitigating features (like guilty plea).

As with any drug offending for the purpose of profit making, the personal circumstances of the offender whose activities fall within categories 2 and 3 are to be given much significance in the sentencing process, save for a guilty plea. The fundamental requirement is that the sentence imposed should act as a deterrent to the other persons minded to engage in similar activity.

We turn now to the appeals before the Court.

Mr Columbus

Mr Columbus Wetul pleaded guilty to one count of cultivation of cannabis. He was sentenced to 2 years and 4 months imprisonment.

The brief facts of the offending are that Mr Columbus is 33 years of age and is a plantation worker of the Milai Plantation, Santo. He admitted of planting 9 cannabis seeds into the soil at his vegetable garden in an area near the USA River known as Eagan's Hill on an afternoon on 5 September 2012. These 9 seeds grew and Mr Columbus cultivated them until they were all around 2.5 meters each in height when the police removed them on 2 February 2013.

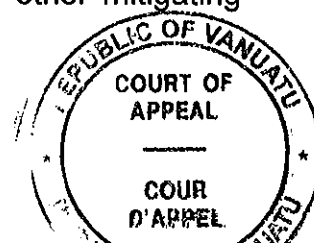
On one occasion during December 2012 Mr Columbus led four other plantation workers to his cannabis garden where he showed them the plants and told them that they were his and were planted by him.

On 2 February 2013 one Erman Bong, whom was shown the cannabis plants by Mr Columbus during December 2012, took it upon himself to report the matter to the police in Luganville. On the same day the police reach the garden and remove the 9 plants. The plants were tested and were found to be cannabis plants. The height of the 9 plants are between 2.60-2.80 meters. The total net weight of the cannabis plants is 6.8 kilograms.

Mr Columbus was subsequently arrested. He freely admitted his offending.

The Judge saw the invitation by Mr Columbus of his 4 fellow workers, showing them the plants and telling them that they were his plants and that he intended to sell the plants because he knew they were cannabis plants and he knew their value for money as aggravating factors.

The Judge applied the starting point of 5 years imprisonment relying on the case of **Public Prosecutor –v- Samuel Nasanal [2009] VUSC**. He accepted that Mr Columbus is entitled to 1/3 reduction for his early admission and other mitigating factors that:



- He is first time offender with no previous history
- He cooperated well with the police
- He is a family main with 5 children and a wife and he is the only breadwinner

The Judge sentenced Mr Columbus with an end sentence of 2 years and 4 months.

This sentence is now appealed before the Court by Ms Jane Tari on behalf of the Appellant. The principal ground of appeal on behalf the Appellant is that the sentence is too excessive as the starting of 5 years imprisonment is not appropriate.

We heard submissions in response by the Public Prosecution taking the Court through the background of the Dangerous Drugs Act. We do not intend to go that far.

We consider that in the present case, the circumstance of the offending brings this case within the lower end of category 2.

We agree with the Submissions of the Appellant's counsel that the starting point of 5 years is not appropriate for this case. The starting point of 5 years imprisonment applied in PP –v- Nasanal is more toward the top scale of category 2.

We allow the appeal and we sentence Mr Columbus afresh. We note that Mr Columbus has already served 2 months and half in custody.

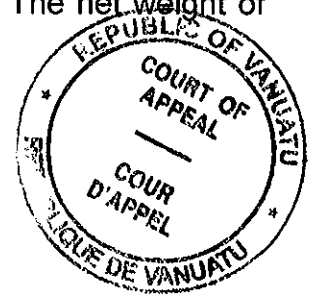
We consider that 1 year imprisonment is the appropriate starting point. We reduce the sentence by 3 months for his guilty plea and a further 2 months for his good character. Mr Columbus received an end sentence of 7 months which should be suspended for a period of 2 years. Mr Columbus shall be released immediately from custody.

In addition, Mr Columbus is sentenced to 25 hours community work and 6 months supervision.

Mr Boe

Mr Boe pleaded guilty to one count of cultivation of cannabis plants. He was sentenced to 2 years imprisonment. The brief facts are that he is 22 years of age. He is married and unemployed. He resides at Jubilee Farm, Santo. Mr Boe admitted that he cultivated 6 plants of cannabis seeds near his family home at Jubilee Farm. Mr Boe replanted the 6 plants. They grew and reached height between 94 to 140 centimeters.

Prior to discovery by the Police, one Chief Joseph Johnny of Jubilee Farm decided to check the gardens and bush surrounding Mr Boe's home on March 15, 2013 as he and others suspected that Mr Boe was smoking cannabis. Upon discovering the 6 cannabis plants, Chief Joseph reported the matter to the Police. The net weight of the cannabis was 293.37 grams.



The Judge said that Mr Boe did not intend to sell the plants to make money but the fact that he was seen smoking the substance with his friends indicate and imply that he was the one who supplied the substance. The Judges sentenced Mr Boe with a starting point of 5 years imprisonment. He reduced the sentence to 1/3 for his guilty plea. He reduced the sentence further for being a first time offender, good cooperation with the police, he sentenced Mr Boe with an end sentence of 2 years.

Counsel for the Appellant appealed against the sentence of Mr Boe on the ground that it was excessive.

During the course of arguments, it was pointed to the Court in essence that not only the starting point of the sentence of 5 years is not appropriate but also there is no factual material to justify the basis upon which the Judge found that Mr Boe was seen smoking the substance with his friends and that Mr Boe was the one who supplied the substance.

We are satisfied that the Judge was wrong in his assessment of fact leading to the end sentence he passed on Mr Boe as there was no evidence based for sharing the cannabis around with friends.

We note that Mr Boe was charged and convicted with one count of cultivation of cannabis. He pleaded guilty to cultivating 6 plants of cannabis. He is a first time offender with no previous conviction. He has good cooperation with the police.

This case is with the lower end of the scale of the first category. There is no need for an imprisonment sentence. Therefore, a starting point is not appropriate in this case.

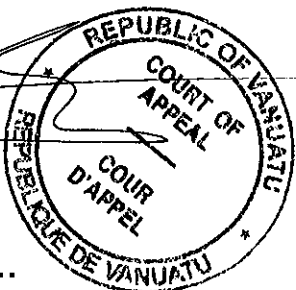
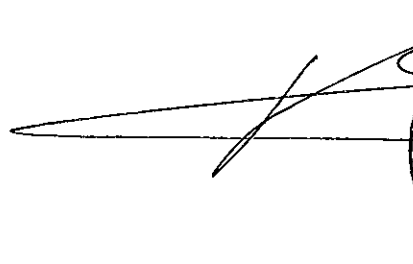
We quash the sentence of two years imprisonment imposed by the supreme court.

We also note that he has already served part of his sentence in custody. We consider that is sufficient.

We therefore, allow the appeal. Mr Boe shall be immediately released from custody.

DATED at Port-Vila this 26th day of July 2013

ON BEHALF OF THE COURT



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. In the center, it reads "COURT OF APPEAL" and "COUR D'APPEL".

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Vincent LUNABEK
Chief Justice