

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal
Case No. 18/3372 SC/CRML

**PUBLIC PROSECUTOR
v.
KASTON NIAWIYE**

Coram: Justice D. V. Fatiaki
Counsel: Ms. B. Ngwele for the State
Ms. L. Bakokoto for the Defendant
Date of Sentence: 1 March 2019

SENTENCE

1. On 11 December 2018 the defendant pleaded guilty ("*hemi tru*") to three offences involving the possession (**174.07gms**), cultivation (**10 plants**), and sale (**VT20,000**) of cannabis.
2. The brief prosecution facts which were admitted by the defendant are that on 11 October 2018 police acting on information, searched the property where the defendant and a co-accused (not before the court) lived at Teouma Avoca bush area outside Port Vila, Efate.
3. During the search of the house the following items were found and seized as recorded in the police **Property Search Record**:

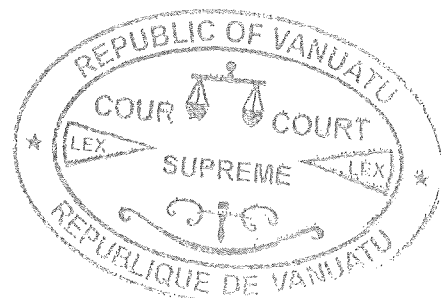
"(1) An empty jam jar containing 11 marijuana joints rolled with Talio and VT800 cash made up as follows:

- 2 x VT200 notes; and
- 4 x VT100 coins.

(2) 18 x small marijuana packages rolled in aluminium foil;

(3) Cash notes comprising:

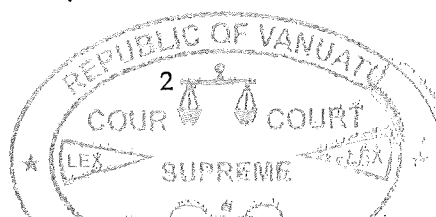
		<u>VT</u>
VT5,000 x 2	=	10,000
VT1,000 x 8	=	8,000
VT500 x 4	=	<u>2,000</u>
TOTAL	=	<u>VT20,000;</u>



(4) A second empty jam jar containing coins as follows:

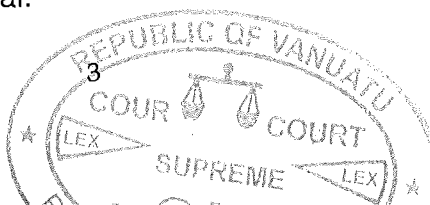
	<u>VT</u>
• VT20 x 14 =	280
• VT10 x 2 =	20
• VT50 x 3 =	150
• VT100 x 16 =	<u>1,600</u>
TOTAL =	<u>VT2,050</u>

4. The police search party also up-rooted ten (10) cannabis plants found in the back yard of the compound where the defendant lived and which the defendant admitted planting with his co-accused. The seized plant materials were later weighed, chemically tested, examined morphologically and botanically and positively identified to be: "*Cannabis*".
5. The defendant was arrested and under police caution he voluntarily made a statement admitting to selling cannabis rolls to the neighbourhood youths for his co-accused (not before the court) who was the owner of the cannabis ("*Long Monday long week ia 8th October 2018 Markwin ibin go karem sam package blong marijuana long ship long wharf. I karem ikam mo talem long mi se bae mi stap salem. So mi stap salem Mi salem VT100 long wan joint blong marijuana. Follem price we Markwin igat over VT20,000 weh mi salem marijuana mo winim. Ol mani ia hemi blong Markwin*").
6. Upon his conviction the Court ordered a pre-sentence report on the defendant and sentencing submissions to be filed by counsels. I am grateful for the assistance provided.
7. The first task of the Court in sentencing an offender is to set a starting point which reflects the seriousness of the offending and the culpability of the offender.
8. In this latter regard I consider that the cannabis materials may be separated and considered from two different perspectives – Firstly, the shipment of dried marijuana and secondly, the 10 marijuana plants. The shipment was plainly intended for sale and would have been reconstituted into smaller rolls and packages for that purpose. Although the shipment belonged to the defendant's co-accused who collected it from the wharf and also fixed the retail price for the rolls, the defendant frankly admits to being the "*salesman*" and as such he too would have had possession of the shipment.
9. Secondly, as for the ten (10) uprooted marijuana plants, the defendant accepts, they were cultivated by him and his co-accused. Unfortunately, the plants were not photographed, measured, weighed, or chemically tested, as they should have been, nor is it known how much useable dried marijuana could be obtained from the ten (10) plants and whether it would be a commercial quantity or merely sufficient for personal consumption. There is no suggestion that the plants were

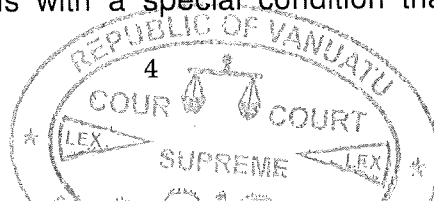


intended for commercial purposes (see: the observations of the Court of Appeal in Wetul's case).

10. The defendant's degree of culpability is similarly variable in so far as although he admits being the "salesman" of the cannabis rolls for his elder co-accused, there is no suggestion that he shared or personally profited from the proceeds of the sales he made beyond having a place to stay. I accept defence counsel's sentencing submissions in this regard which are uncontested.
11. Having said that, I cannot ignore the defendant's admission in his caution statement: "*Mi save gud se law blockem people blong smokem, planem mo salem marijuana*". In other words the defendant was fully aware that what his co-accused told him to do ("*mo talem long mi se bae mi stap salem*") was prohibited by law yet he continued regardless. Neither should I ignore the VT20,000 profit figure achieved from the sales which represents a significant turnover or sale volume of 200 rolls of cannabis at VT100 each.
12. I have also considered the guidance provided in the Court of Appeal judgments in Naio v Public Prosecutor [1999] VUCA 1; Wetul v Public Prosecutor [2013] VUCA 36 and Taviti v Public Prosecutor [2016] VUCA 41.
13. In Wetul which was a cannabis cultivation case the Court of Appeal divided the offence into 3 broad categories as follows:
 - (1) growing a small number of cannabis plants for personal consumption without any sale occurring or intended – "*invariably dealt with by a fine or non-custodial measure*";
 - (2) small scale cultivation for commercial purposes with the object of deriving profit – a custodial sentence is called for with "*(a) starting point ... generally between 2 and 4 years*";
 - (3) large-scale commercial growing – "*the starting point will generally be four years or more*".
14. In Wetul's case the offender had cultivated nine (9) cannabis plants that had been planted for commercial purposes and had an average height of 2.7 metres and a total weight of 6.8 kilograms. The Court of Appeal set aside an immediate custodial sentence of 2 years and 4 months imprisonment and substituted a sentence of 7 months imprisonment suspended for 2 years together with sentences of supervision and community work. Unlike Wetul's case, there is no evidence in this case that the ten (10) plants uprooted from the defendant's backyard, whatever their height or weight, were grown for commercial purposes. Accordingly, in my view this case comes within the least serious first category identified by the Court of Appeal.



15. Of even greater similarity and relevance to the present facts is Taviti's case where the defendant was convicted on charges of possession and sale of 145 grams of cannabis. The Court of Appeal in allowing the appeal and setting a lower starting point of 2 years imprisonment, recognised that "*someone who cultivates cannabis for a commercial purpose is at a higher level of offending than a low level "street seller"*". Prosecuting counsel conceded the similarity of the present case and the Taviti case and accepts that a suspended prison sentence and supervision is "... open to the Court".
16. In light of the foregoing, I adopt a starting point of 24 months imprisonment in respect of all 3 offences which may be collectively viewed as comprising one incident or activity, before considering mitigating factors.
17. From the defendant's pre-sentence report I extract the following personal details:
- The defendant comes from the Whitesands Area in Tanna and was 18 years of age at the time of offending;
 - The defendant is single and the eldest child. He lives with his parents and helps out with cutting firewood and planting food crops;
 - He came to Port Vila to "*make his fortune*" find paid employment and after working for a time return home with his savings to help his parents;
 - The defendant is a first offender and was held in police custody for one night;
 - He admitted under caution to being a "*street-seller*" of the cannabis for his elder cousin and co-accused.
18. For his relative youth; early admission and assistance to the police and his unblemished past, I deduct 9 months leaving a mid-sentence of: $(24 - 9) = 15$ months imprisonment. That figure is further reduced by one-third (ie. 5 months) for the defendant's early guilty pleas leaving an end sentence of $(15 - 5) = 10$ months imprisonment on each offence to be served concurrently.
19. In light of Section 54 of the Penal Code and the Court's view that it is not appropriate to immediately incarcerate the defendant, the sentence is ordered to be suspended for 2 years. This means that for all 3 offences the defendant is sentenced to 10 months imprisonment but he will not have to serve his sentence in prison if he keeps out of trouble for the next 2 years. However if he re-offends any time within the next 2 years, then he will have to serve this 10 months sentence of imprisonment along with any other sentence that may be imposed for his re-offending. Whether that happens or not is entirely in the defendant's hands but if he does re-offend then he can expect little sympathy from the court.
20. To assist the defendant keep out of trouble he is ordered to serve a sentence of Supervision for 12 months with a special condition that he undertakes and



satisfactorily completes any drug awareness, rehabilitation, and counselling programs that is directed by his probation officer.

21. For completeness and in exercise of the Court's powers under Section 18 of the Dangerous Drugs Act and Section 58ZC of the Penal Code, the ten (10) cannabis plants uprooted from the defendant's compound and the items of dried cannabis and cash seized by the police during the search of the premises occupied by the defendant, are ordered condemned for destruction and/or forfeited and confiscated to the State after the expiry of 14 days.
22. The defendant is advised that he has a right to appeal within 14 days against his sentence to the Court of Appeal if he does not agree with it.

DATED at Port Vila, this 1st day of March, 2019.

BY THE COURT



D. V. FATIAKI
Judge.

