IN THE HIGH COURT OF FIJI
AT SUVA
APPELATE JURISDICTION

CRIMINAL APPEAL NO. HAA 011 of 2018
[Magistrates' Court Criminal Case No. 697 of 2016)

BETWEEN	:	YAVALA BARAVILALA *Appellant*
AND	:	THE STATE *Respondent*
Before	:	Hon. Mr Justice Daniel Goundar
Counsel	:	Mr L Qetaki for the Appellant Mr E Samisoni for the Respondent
Date of Hearing	:	29 March 2018
Date of Judgment	:	12 April 2018

JUDGMENT

[1] This is a timely appeal against sentence only. On 28 April 2016, the appellant was charged with one count of unlawful possession of an illicit drug contrary to section 5(a) of the Illicit Drugs Control Act. The charge alleged that the appellant on 4 April 2016 without lawful authority had in possession 4 grams of Cannabis Sativa or Indian Hemp (marijuana). After numerous adjournments, on 20 November 2017, the appellant pleaded guilty to the charge in the Magistrates' Court after waiving his right to counsel. On 24 November 2017, the learned magistrate sentenced the appellant to 15 months' imprisonment.

[2] The appellant filed the initial notice of appeal in person. In that notice the appellant advanced three grounds of appeal. At the hearing, the appellant was represented by counsel. The main complaint is that the sentence is excessive and outside the tariff set by the Court of Appeal in *Sulua v State* [2012] FJCA 33; AAU0093.2008 (31 May 2012).

[3] In the case of *Sulua*, the Court of Appeal by a majority judgment set a tariff for sentencing for possession of marijuana based on four categories of weight as follows:

> **Category 1:** possession of 0 to 100 grams of cannabis sativa - a non-custodial sentence to be given, for example, fines, community service, counselling, discharge with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.
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> **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.
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> **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.
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> **Category 4:** possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment.

[4] The learned magistrate in his sentencing remarks said the appellant's case fell within category 1 tariff. When the appellant committed the offence, he was in custody on remand for another case. On 4 April 2016, when the appellant returned to the remand facility after attending court, he was found in possession of marijuana wrapped in foil and concealed inside his rectum after he went through the cell censor metal detector. The learned magistrate took into account the fact that the appellant tried to smuggle an

illicit drug into the Fiji Corrections Service facility as an aggravating factor. He further said that a custodial sentence was warranted to deter others. He used 12 months as a starting point and then added another 12 months to reflect the aggravating factor. The sentence was reduced by 9 months to reflect the appellant's guilty plea and mitigation.

[5] The starting point of 12 months' imprisonment was outside *Sulua's* category one tariff for the offence of possession of marijuana. The learned magistrate did not give any reasons for choosing a starting point term outside the tariff. But since the learned magistrate picked the starting point immediately after he identified the aggravating factor, it could be inferred that he was influenced by the aggravating factor to select a starting point outside the established tariff. He then added another 12 months to reflect the same aggravating factor. In doing so the sentence was enhanced twice using the same fact. Enhancing sentence twice using the same fact in starting point and as an aggravating factor is an error of principle in the exercise of the sentencing discretion (*Koroivuki v State* [2013] FJCA 15; AAU0018.2010 (5 March 2013). For these reasons, the appeal against sentence succeeds.

[6] At the appeal hearing, the court was referred to two other cases where the offenders committed the offence of possession of marijuana in circumstances similar to the present case. In *Roy v State* [2018] FJHC 210; HAA19.2017 (19 March 2018) a sentence of 9 months' imprisonment was upheld on appeal for possession of 1.4 grams of marijuana within the precincts of the Suva Remand Centre. In *State v Tokivadua* Cr Case No 1473 of 2015 a sentence of 4 months' imprisonment was imposed on an offender who tried to smuggle 9.3 grams of marijuana into the Suva Remand Centre.

[7] The sentence of 15 months' imprisonment imposed for possession of 4 grams of marijuana on the appellant is manifestly excessive and disproportionate when compared to other similar cases. The appellant has nearly served 5 months' imprisonment, which reflects the criminality involved.

[8] The sentence imposed in the Magistrates' Court is set aside and substituted with a sentence of 5 months' imprisonment effective from 24 November 2017.

[9] The appeal against sentence is allowed.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent