IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 96 of 2017

EMORI DIBI

V

STATE

Counsel	:	**Ms Narara (L.A.C.) for the Appellant** **Mr. A. Singh for the State**
Date of Hearing	:	**8th February 2018**
Date of Judgment	:	**19th February 2018**

JUDGMENT

(Sentencing illicit drugs)

1.] On the 5th June 2017 at the Magistrates Court at Tavua, the Appellant ("accused") was convicted on his own plea of one charge of Cultivation of an Illicit Drug, contrary to section 5(a) of the Illicit Drugs Control Act 2004. On the 27th June of 2017 he was sentenced to a term of imprisonment of 3 years with no minimum term

2.] The Appellant is appealing against the sentence on the following grounds:

(i) That the learned Magistrate gave insufficient credit to the accused for his plea at the first opportunity

(ii) That there was no credit allowed for time spent in remand.

3.] The facts agreed to in the Court below were that on the 12th January 2017 at Matalevu, Tavua, police officers found 23 marijuana plants growing on the accused's farm and some loose marijuana seeds.

4.] The Government Chemist certified that the seizures were 23 plants of cannabis sativa with a weight of 29.7 grammes and the weight of the seeds 2.7 grammes in all a total of 32.4 grammes.

5.] The accused is 47 years old, married with 4 children. He is the sole breadwinner for the family. He has a hitherto clear record, co-operated with the Police and expressed remorse.

The Law

6.] The maximum penalty for the offence is life imprisonment or a fine of $1,000,000 or both.

7.] A sentencing Court is presented with difficulties in arriving at a sentence for drug offences because of a failure of some courts to distinguish between possession offences and cultivation offences and because of conflicting tariff judgments in cultivation offences.

8.] The tariffs for possession and dealing in illicit drugs have been set by the Court of Appeal in ***Kini Sulua and anor*** AAU0093 of 2003 (31 May 2012), and of course these guidelines should continue to be used but not for sentences involving cultivation.

9.] Cultivation of illicit drugs is a far more serious offence than mere possession in that the latent risk to consumers and potential consumers is dramatically increased.

10.] It was said by the English Court of Appeal in ***Auton*** [2011] EWCACrim76:

> *"Cultivation is further widening and socializing the use of an illegal drug and making it available in the circumstances where the risk of detection is reduced.*

11.] And also:

> *"A defendant who embarks upon cultivation even exclusively for his own use is avoiding the risk of being caught buying on the open market and making available to himself large quantities of strong cannabis. The total drug available in the community is appreciably increased by that operation"*

12.] Pursuant to the dicta in that case, and with the assistance of the U.K. Sentencing guidelines, this Court set tariffs for the offence of cultivation in ***In re Koroi et al*** HAR002-006.2012 (20 April 2012).

13.] These categories were:

(i) Cultivating less than 5 plants of a weight less than 100 grammes of narcotic, a non custodial sentence at the discretion of the sentencing tribunal.

(ii) Cultivating 5 to 50 plants of a weight of narcotic between 100 to 1000 grammes, a term of 1 to 6 years.

(iii) More that 50 plants with weight of over 1000 grammes, imprisonment of 6 years or more.

14.] In the case of ***Sailosi Tuidama*** HAA 29 of 2016, Perera J. without reference to ***Koroi,*** set new and more stringent tariffs for cultivation, relying on the discredited earlier case of ***Meli Bavesi*** [2004] FJHC 93; HAA 0027.2004.

15.] Unfortunately ***Meli Bavesi*** was decided before the illicit Drugs 2004 was enacted and the categories adopted by Winter J. in that case cannot be relied upon since the decision of the Supreme Court in ***Vakalabure*** (2006)FJSC8. In that Appeal case the Court decided that:

> *"it is a fundamental principle of our criminal law that a person must not be punished except for offences for which he has been convicted".*

16.] Any categories that include words such as "for commercial purposes" cannot stand in the light of the Supreme Court's decision.

17.] It is very unfortunate that counsel in the ***Tuidama*** case did not remind Perera J. of the discrediting of the ***Meli Bavesi*** case, a case on which he relied in coming to his high tariffs.

18.] With the greatest respect to my brother Judge, this Court maintains that the tariffs set out in the ***Koroi*** case are still applicable for sentences of cultivation and nothing else. They make no mention of commercial purposes, sale, supply or any other presumption: simply possession and quantity, in terms of the Supreme Court's decision in **Vakalabure.**

19.] For ease of reference those tariffs as suggested by the U.K. Sentencing Council and adopted by this Court in Koroi are:

(i) Possession of up to 100 grammes or cultivation of no more than 5 plants, non custodial sentences at the discretion of the Court

(ii) Possession of 100-1000 grammes and cultivation of 5-50 plants; custodial sentences in the range of one year to six years

(iii) Possession of more than 1000 grammes and cultivation of more than 50 plants, custodial sentences of six years or more

(iv) Possession of very large quantities (5kg or more) custodial sentences in the range of 10 to 15 year

20.] There will be times when the plants are many, but small, yielding a minimal weight (as in the present appeal) and a balance will have to be struck between use of the above categories.

This Appeal

20.] In the light of these sentencing guidelines, the sentence passed on the Appellant is excessive. Although he was cultivating 23 plants, the weight was but 32.4 grammes. The number of plants would put him in category (ii) but the weight in category (i). The appellant is correct in that the Magistrate below did not make sufficient allowance for his plea of guilty nor did he allow for time spent in custody.

21.] This Court therefore sets aside the sentence passed below and would sentence the appellant afresh in terms of section 256(3) of the Criminal Procedure Act 2009.

22.] Twenty three plants attract a sentence in the range of one to six years and the small weight of 32.4 grammes leads to a starting point at the lower end of the scale. I would take a starting point of 30 months imprisonment. He has a clear record, is remorseful and co-operated with the Police. He spent 22 days in custody awaiting trial. For all of that I would deduct 10 months' imprisonment. For his plea of guilty I deduct 6 months from that interim total leaving a total term of imprisonment of 14 months. He has already served 8 months of his original sentence and this Court declines to impose a minimum term.

23.] I have considered the question of suspension of sentence and decide that it would only be in extraordinary circumstances that sentences for cultivation would be suspended.

24.] This appeal against sentence succeeds.

25.] **Order:**

1. The Appellant is to serve a sentence of 14 months imprisonment dated from 27 June 2017.
2. No minimum term is imposed.

P.K. Madigan

Judge

HIGH COURT OF FIJI LAUTOKA

At Lautoka

19th February 2018