

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 029 OF 2019LAB

STATE

V

ANARE YABAKIDRAU

**Counsels : Ms. A. Vavadakua for State
Ms. M. Tuiloma for Accused**

Hearings : 15 and 16 February, 2021

Sentence : 19 February, 2021

SENTENCE

1. In this proceeding, the accused was facing the following information:

COUNT ONE

Statement of Offence

UNLAWFUL POSSESSION OF ILLICIT DRUGS: Contrary to
Section (5) (a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

ANARE YABAKIDRAU, on the 15th day of December 2018, at Savusavu, in the Northern Division, without lawful authority, possessed 752.4 grams of cannabis sativa, an illicit drug.

COUNT TWO

Statement of Offence

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: Contrary to Section (5) (a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

ANARE YABAKIDRAU, sometime from the months of August 2018 to 17th of December 2018, at Vusasivo, in Cakaudrove, in the Northern Division, without lawful authority, cultivated 2447 plants of cannabis sativa, an illicit drug, weighing a total of 369 kilograms.

2. On 17 November 2020, in the presence of his counsel, the accused pleaded guilty to the offence in count no. 1 before His Lordship Justice Daniel Goundar. On 18 November 2020, His Lordship sentenced him to 18 months imprisonment
3. Count No. 2 was set up for trial from 15 to 19 February, 2021. On 15 February 2021, the accused appeared with his counsel. Through his counsel, he indicated he wish to change his plea to guilty. He said, he was doing so voluntarily and out of his own free will. The charge was then read and explained to him. He said, he understood the same. He pleaded guilty to count no. 2.
4. The prosecution then presented their summary of facts. They were as follows:

1. **“...ANARE YABAKIDRAU, [hereinafter referred to as “Anare”] original from Vusasivo, Natewa, Cakaudrove is charged in this matter in relation to unlawful cultivation of marijuana, or cannabis sativa.**
2. **Anare was caution interviewed in the *i-taukei* language by the Police on the 16th day of December 2018. Anare helped the Police to locate the farm, after he voluntarily admitted to them that he was cultivating marijuana in that Record of interview. [Both *the i-taukei* and the English translation of his Record of Interview are attached].**
3. **Anare then voluntarily escorted the Police Officers to Vusasivo Settlement, Cakaudrove in Savusavu on the 17th of December 2018 to show the police officers where he cultivated marijuana [also known as “cannabis sativa] plants.**
4. **The police officers, with the assistance of Anare, then uprooted marijuana plants from the farm that Anare had shown the officers that day. Anare then also voluntarily, assisted the police officers to load the plants into the police vehicle and he travelled with the Police Officers to Savusavu Police Station to have the plants analysed by a specialist. [Photographs of Anare with the police at the farm is attached]. The Expert, who attended to the analysis of the plants brought to the Savusavu Police Station that day by Anare and the police, confirmed that the plants were indeed marijuana or cannabis sativa and the expert noted that the plants had a total weight of 369 kilograms. [The report of the expert confirming the type and weight of those plants is attached].**
5. **Anare voluntarily helped the police officers in this case to locate the farm, uproot the plants and fully admitted to the allegation relating to his current cultivation charge. He fully cooperated with the police investigation in this case.**

The record of interview, government analyst report and photos of accused and police at his marijuana farm, are not included as a matter of convenience. They are in the court record...”

5. The court checked with defence counsel on whether or not he admitted the above summary facts. Defence Counsel said, the accused admitted the above summary of facts, including the particulars of the offence in the information. As a result of the above admission, the court found him guilty as charged on count no. 2 and convicted him accordingly on that count.
6. The prosecution said, he was a first offender. Defence Counsel presented his plea in mitigation. He was 37 years old, married with 5 young children aged between 10 years and 1 ½ years old. He was a farmer and planted yaqona, dalo, cassava and vegetables and earned between \$500 to \$1,000 per month. He pleaded guilty and was a first offender. He was serving 18 months imprisonment since 18 November 2020 for count no. 1. His 3 months in custody while on remand was taken into account when he was sentenced on count no. 1. He said, he was the sole bread winner. He fully co-operated with police during the investigation. He said, he knew it was wrong to plant marijuana. He said, he used to earn \$500 to \$600 per week from selling marijuana. He apologized to the court.
7. The maximum sentence for unlawful cultivation of cannabis sativa (marijuana) was life imprisonment, a fine not exceeding \$1,000,000, or both (section 5 of the Illicit Drugs Control Act 2004).
8. In **Kini Sulua & Another v The State** [2012] Fiji Law Reports, Volume 2, pages 111 to 147, a Court of Appeal authority, the sentencing tariff for the cultivation and/or possession of cannabis sativa (marijuana) were set out as follows:

(i) **Category 1:** possession of 0 to 100 grams of cannabis sativa – a non-custodial sentence to be given, for example, fines, community service, counseling, discharge with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short prison sentence be considered.

(ii) **Category 2:** possession of 100 to 1,000 grams of cannabis sativa. Tariff should be a sentence between 1 to 3 years imprisonment, with those possession below 500 grams, being sentenced to less than 2 years, and those possessing more than 500 grams, be sentence to more than 2 years imprisonment.

(iii) **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.

(iv) **Category 4:** possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment.

9. The facts of this case, brings the case within category 4. The accused was found guilty and convicted of cultivating 369 kg of cannabis sativa plants, an illicit drug, between August and 17 December 2018, at Vusasivo, Cakaudrove, in the Northern Division. The evils of illicit drugs in itaukei villages and settlements, had been well debated in Parliament during the passage of the “Illicit Drugs Control Bill 2004” in May 2004 [see paragraph 111 of **Kini Sulua & Another v The State** (supra)].

10. In this case, the aggravating factor was as follows:

(i) The amount of illicit drugs cultivated were huge, that is, 369 kg. This was 73.8 times bigger than the 5 kg of cannabis sativa found on Kini Sulua in the Court of Appeal Case mentioned in paragraph 8 hereof, where he received a sentence of 8 years imprisonment.

11. The mitigating factors were as follows:
- (i) At the age of 37 years old, this was the accused's first offence;
 - (ii) You showed genuine remorse when your offending was discovered. First, when police caution interviewed you, you admitted the offence to them voluntarily. Second, you even assisted the police in locating your cannabis sativa farm. It appeared you did so voluntarily. Thirdly, you even assisted the police to uproot your cannabis sativa plants from your farm. Fourth, you assisted police bring your cannabis sativa plants to Savusavu Police Station for the same to be analyzed by the government analyst. Fifth, although you at first pleaded not guilty to the offence, but change you plea to guilty at the first day of the trial, you nevertheless, saved the court's time. I have tried numerous cultivation of cannabis sativa charges in Fiji. This was the first case where I found genuine co-operation with the police during their investigation. You will be rewarded accordingly to encourage others to do likewise, in your type of case, where it involved 369 kg of cannabis sativa. You were going to receive life imprisonment, save your genuine co-operation with police during their investigation.
 - (iii) You were remanded in custody for 3 months, but this cannot be taken into account, because it was considered when you were sentenced for count no. 1.
12. In **Kini Sula & Another v The State** (supra), in paragraph 117, it was said that, "...The weight of the particular illicit drug will determine which category the case falls under, and the applicable penalty that will apply..." Under section 2 of the Illicit Drugs Control Act 2004, "illicit drug" is defined as "any drug listed in Schedule 1". In

Schedule 1 of the Illicit Drug Control Act 2004, “cannabis plant” is defined as “cannabis plant (whether fresh, dried or otherwise) that is, any part of the plant of the genus cannabis, except a part from which all the resin has been extracted.” The above definition makes the High Court’s comments in paragraph 23 to 25 of **Tuidama v State** (2016) FJHC 1027; HAA 29/16 (14 November 2016) untenable. The weight of the particular illicit drug involved, was used by the High Court in the cases mentioned in Appendix 1 in paragraph 124 of **Kini Sulua & Another v The State** (supra), to determine the applicable penalty that will apply. The High Court were then dealing with cases that arose under the Illicit Drugs Control Act 2004, which commenced on 9 July 2004. The High Court was not dealing with cases that arose under the Dangerous Drug Act (chapter 114), which was repealed by section 39 of the Illicit Drugs Control Act 2004.

13. **Meli Bavesi v State**, High Court Suva, Criminal Appeal No. HAA 027 of 2004 was deciding a case that arose under the Dangerous Drugs Act (chapter 114). In some of the High Court cases I’ve seen after **Kini Sulua & Another v The State** (supra), **Meli Bavesi v State** (supra) was used to undermine the sentencing guideline in **Kini Sulua & Another v The State** (supra). In none of the High Court cases that I have seen, including the **Nemani Ratuyawa v The State**, Criminal Appeal No. AAU 121 of 2014, Court of Appeal (26 February 2016), was it ever acknowledged that three Court of Appeal Justices in **Kini Sulua & Another v The State** (supra) had overruled **Meli Bavesi v The State**. The justices criticized **Meli Bavesi** (supra) for various reasons. **Meli Bavesi** was taking its cue from the New Zealand Misuse of Drugs Act 1975 and the case laws that arose thereunder. In terms of punishment from cannabis sativa type offences, the New Zealand Misuse of Drugs Act 1975 was in no comparison to section 5 (a) of the Illicit Drugs Control Act 2004, when it comes to the severity of the penalty so its use in Fiji would be flying in the face of parliament’s intention, as expressed in the words of the Illicit Drugs Control Act 2004. **Meli Bavesi** (supra) is no guidance to sentencing under the Illicit Drugs Control Act 2004.

14. In this case, 369 kg of cannabis sativa was involved. Ms. M. Tuiloma was very helpful in her written sentence submission. She outlined to the court 13 cases. I picked 4 cases where the cannabis involved were more than 100 kg. In **State v Suliasi Bola**, HAC 106 of 2016S, 134 kg of cannabis sativa was involved. He was sentenced to 14 years imprisonment, with a non-parole period of 13 years. In **State v Waisake Kaloulia & Another**, HAC 064 of 2015S, 160.6 kg of cannabis sativa was involved. He was sentenced to 19 years imprisonment, with a non-parole period of 15 years. In **State v Kurinacoba**, HAC 024 of 2019L, 198 kg of cannabis sativa was involved. He was sentenced to 17 years imprisonment with a non-parole period of 15 years. In **State v Amani Masekerei & Another**, HAC 39 of 2018S, 1,046 kg of cannabis sativa was involved. He was sentenced to 18 years imprisonment with a non-parole period of 14 years imprisonments. All the above cases were contested cases. Your case was not a contested case, although you pleaded not guilty at first.
15. Taking on board the comments mentioned above, I start with a sentence of 12 years imprisonment. I add 9 years for the aggravating factor, making a total of 21 years imprisonment. For being a first offender, I deduct 2 years leaving a balance of 19 years imprisonment. Although you pleaded guilty late at the first day of trial, you nevertheless saved the court's time, and I deduct 1 year, leaving a balance of 18 years imprisonment. It was your full co-operation with the police from the start that is worthy of comment. Never in a big case as yours had someone fully co-operated with the police. I had never seen this before in all the cannabis sativa cases I had dealt with. Your co-operation with the police showed the good side of you. That need to be encouraged, and I hope other offenders are taking note. The war on drugs cost the State a lot of money and resources. Police officers devote a lot of time and resources in catching drug offenders. Most of them with overwhelming evidence against them still go to trial, and a further waste of taxpayers' resources. For being co-operative with the police, I reward you by making a deduction of 8 years imprisonment, leaving a balance of 10 years imprisonment.

16. Mr Anare Yabakidrau, for cultivating cannabis sativa plants, an illicit drugs, between August and 17 December 2018, at Vusasivo, Cakaudrove in the Northern Division, I sentence you to 10 years imprisonment, with a non-parole period of 5 years imprisonment, effective forthwith.
17. The drugs are to be destroyed immediately by the Chief Registrar's Office, with the assistance of the police.
18. You have 30 days to appeal to the Court of Appeal.




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JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Labasa**
Solicitor for the Accused : **Office of the Legal Aid Commission, Labasa**