

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 14 of 2022**

**BETWEEN** : **ALVEEN ANAND**  
**APPELLANT**

**A N D** : **THE STATE**  
**RESPONDENT**

**Counsel** : Ms. L. Ravuikadavu and Mr. J. Ruben for the  
Appellant.  
: Ms. S. Naibe for the Respondent.

**Date of Submissions** : 01 September, 2022

**Date of Hearing** : 02 September, 2022

**Date of Judgment** : 06 September, 2022

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**JUDGMENT**

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**BACKGROUND INFORMATION**

1. The appellant was charged for one count of unlawful cultivation of an illicit drug contrary to section 5(a) of the Illicit Drugs Control Act 2004. It was alleged that on 24<sup>th</sup> November, 2020 the appellant without lawful authority cultivated 1 plant of marijuana an illicit drug namely cannabis sativa or Indian hemp weighing 846.2 grams.

2. On 26<sup>th</sup> November, 2020, the appellant appeared in the Magistrate's Court at Ba. His plea was deferred but he was bailed, after numerous adjournments due to no fault of the appellant on 7<sup>th</sup> March, 2022 the appellant appeared in court and in the presence of his counsel pleaded guilty. Thereafter the appellant admitted the summary of facts read and the appellant's counsel presented her mitigation as well.
3. The brief summary of facts was as follows:

*On 24<sup>th</sup> November, 2020 at about 2 pm, a team of police officers from Ba Police Station left for Tabataba, Ba to search the place of the accused on the basis of information received that he was cultivating marijuana on his farm next to his house. Upon arriving at the house of the accused he was shown the search warrant and the police officers began searching inside and outside the accused house. Thereafter police officers searched the accused sugar cane farm.*

*Whilst searching the farm police officers found a yellow 20 litre gallon cut on the side with a green plant growing inside about 2 meters in height. The said gallon with its content (1 green plant believed to be marijuana) was shown to the accused. The accused admitted that the plant belonged to him. The gallon containing the green plant was seized and he was escorted by police to Ba Police Station. Later the plant was confirmed to be cannabis sativa or Indian hemp an illicit drug weighing 846.2 grams. The accused was formally charged after he was caution interviewed.*

4. On 8<sup>th</sup> April, 2022 after hearing mitigation the appellant was sentenced to 2 years imprisonment with a non-parole period of 16 months.

## **APPEAL TO THE HIGH COURT**

5. The appellant being aggrieved by the sentence filed a timely appeal against sentence in this court upon the following grounds of appeal:

1. *That the appellant's appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.*
2. *That the learned Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the appellant and not taking into [account] relevant consideration.*
3. *That the learned Magistrate erred in law and in fact in passing sentence of imprisonment was disproportionately severe punishment contrary to section 11 (1) of the 2013 Constitution of Fiji.*
4. *That the learned Magistrate erred in law and in fact in not taking into consideration adequately the mitigating factors when sentencing the accused.*
5. *That the learned Magistrate erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Act 2009 when he passed the sentence against the appellant.*

6. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

## **APPEAL AGAINST SENTENCE**

7. From the submissions made on behalf of the appellant the main thrust of the complaint raised by the appellant is that the sentence is excessive.

Considering the current tariff for such an offending and the mitigating factors of the appellant particularly being a first offender, cooperation with the police during investigations and pleading guilty at the earliest opportunity which showed genuine remorse the appellant ought to have received a non-custodial sentence.

8. Furthermore, the appellant was charged for cultivation and not for possession of cannabis sativa, the learned Magistrate erred when he relied on the tariff established by the Court of Appeal in the case of *Kini Sulua and Micheal Chandra vs. The State, criminal appeal no. AAU 93 and 74 of 2008* which is wrong in principle.

### **LAW**

9. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.
10. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

*“It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 and adopted in *Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]*. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-*

*(i) Acted upon a wrong principle;*

*(ii) Allowed extraneous or irrelevant matters to guide or affect him;*

*(iii) Mistook the facts;*

*(iv) Failed to take into account some relevant consideration.”*

11. The maximum penalty for the offence is life imprisonment or a fine of \$1,000,000.00 or both.
12. In my judgment the arguments raised by the appellant needs to be looked at holistically. However, it has to be acknowledged that a sentencing court is faced with some difficulties in arriving at an appropriate sentence for the offence of cultivation of cannabis sativa since there is currently no guidance by the Court of Appeal for such cases. The High Court has been giving conflicting tariff judgments for cultivation of cannabis sativa (*see Emori Dibi vs. The State, HAA 96 of 2017 (19<sup>th</sup> February, 2018), State vs. Simione Nabenu, HAA 10 of 2018 (25<sup>th</sup> June, 2018 and In re Koroi, HAR 002-006 of 2012 (20 April, 2012).*
13. In my view the tariff established by the Court of Appeal in *Kini Sulua's* case (*supra*) are specific guidelines for the possession of cannabis sativa and not cultivation even though section 5 (a) of the Illicit Drugs Control Act gives a wide meaning to phrases such as unlawful possession, manufacture, cultivation and supply which was taken into consideration in *Kini Sulua's* case (*supra*).
14. In *Emori Dibi's* case (*supra*) Madigan J. adopted the U.K Sentencing Council guideline at paragraph 19 as follows:
  - (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.

15. In this appeal the analyst certificate mentions one green plant with a height of 201 cm and weight of 846.2 grams. The offending falls under category (i) above. In my view the U.K guide correctly makes specific reference to the number of plants when it comes to cultivation of cannabis sativa as opposed to weight in respect of possession of same.

### **DETERMINATION**

16. In my considered judgment the U.K Sentencing Council guideline gives a clear direction to the sentencing court about the different category that is applicable to the number of plants cultivated. In this appeal there is no doubt that the appellant had pleaded guilty at the earliest opportunity, had cooperated with the police during investigations and had expressed genuine remorse for his actions. The appellant has served about five months of his sentence which is sufficient punishment for the offending.
17. In view of the above, the appeal against sentence is allowed and in accordance with section 256 (3) of the Criminal Procedure Act and in the interest of justice the sentence of the Magistrate's Court is set aside to the extent that the non-parole period of 16 months imprisonment is now the head sentence of the offending.
18. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the final sentence since it does not exceed 3 years imprisonment. In *State vs. Alipate Sorovanalagi and others, Revisional Case*

No. HAR 006 of 2012 (31 May 2012), Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraph 23:


*"[23] In DPP v Jolame Pita (1974) 20 FLR 5, Grant Actg. CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg. CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg. CJ laid down guidelines for imposing suspended sentence at p.7:*

*"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."*

19. The following relevant special circumstances or special reasons for the suspension of the imprisonment term in my view needs to be weighed in choosing an immediate imprisonment term or a suspended sentence.
20. The accused was 34 years of age at the time of the offending, of good character, isolated offence was committed by him, he had pleaded guilty at the earliest opportunity, is genuinely remorseful, cooperated with police and he takes responsibility for his actions. These special reasons render an immediate imprisonment term inappropriate. In my considered judgment a suspended sentence will meet the ends of justice. The sentence of 16 months is suspended for three years with effect from 8<sup>th</sup> April, 2022. The effect of the suspended sentence is explained to the appellant.

### **ORDERS**

1. The appeal against sentence is allowed;
2. The appellant is sentenced to 16 months imprisonment with effect from 8<sup>th</sup> April, 2022 which is suspended for three years;
3. The appellant is to be immediately released from the Corrections Centre;
4. 30 days to appeal to the Court of Appeal.

  
**Sunil Sharma**  
Judge



**At Lautoka**

06 September, 2022

#### **Solicitors**

**Messrs S. Nand Lawyers, Lautoka for the Appellant.**

**Office of the Director of Public Prosecutions for the Respondent.**