

**IN THE HIGH COURT OF FIJI**

**AT LABASA**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 11 OF 2023**

**BETWEEN** : ILAITIA NAVUASE

**AND** : STATE

**For the Appellant** : In person

**For the Respondent** : Ms. Thaggard

**Date of Hearing** : 13<sup>th</sup> April 2023

**Date of Ruling** : 28<sup>th</sup> April 2023

**RULING ON APPEAL**

1. This is the ruling on an appeal against sentence from the Savusavu Magistrate's Court on a sentence delivered by the Learned Magistrate on the 17<sup>th</sup> of October 2022.

**The proceedings in the Savusavu Magistrate's Court**

2. The appellant was charged in the Savusavu Magistrate's Court for the following offence: -

***Statement of Offence (a)***

**Unlawful Cultivation of Illicit Drugs** contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

***Particulars of Offences (b)***

**Ilaitia Navuase** on the 28<sup>th</sup> day of April 2020 at Naweni village in the Northern Division, without lawful authority cultivated 52 green plants weighing 15.4 grams, an illicit drugs botanically known as **Cannabis Sativa**.

3. The appellant was first produced in Court on the 30<sup>th</sup> of April 2020 and he waived his right to counsel and he was granted bail on his own recognizance. He did not appear on the next mention date and a bench warrant was issued for his arrest however he appeared in custody on the 20<sup>th</sup> of April and he was again warned to appear in Court on the next date to take his plea.
4. Thereafter from the 20<sup>th</sup> of May 2020, pursuant to the Hon Chief Justice's directions in light of the Covid 19 pandemic, this case was not called again until the 3<sup>rd</sup> of May 2022 when the appellant advised the Court that he now wished to apply for Legal Aid.
5. The appellant entered a plea of guilty to the charge on the 30<sup>th</sup> of June 2022 however the prosecution was not ready with the Summary of facts to be outlined to the appellant and the matter was adjourned to the 8<sup>th</sup> of July 2022. On the adjourned date the summary of facts was still not ready so the matter was further adjourned to the 9<sup>th</sup> of September 2022.
6. On the 9<sup>th</sup> of September the appellant was not present and so the prosecution made an application for trial in absentia pursuant to section 171 (1) (a) of the Criminal Procedure Act 2009 and section 14 (2) (h) (i) of the Constitution. The Court heard submissions and the matter was adjourned to the 19<sup>th</sup> of October 2022 for ruling on the application for Trial in absentia.
7. On the 19<sup>th</sup> of September 2022 however, the Accused was present and the summary of facts was put to him and he admitted the same. He was then convicted and pronounced guilty as charged.
8. He is a first offender and he offered the plea in mitigation on his own behalf. He pleaded in mitigation as follows: -
  - He is 32 years of age, married with 3 children and is a private contractor earning \$200 to \$250 a week.
  - He is remorseful and seeks forgiveness
  - He was not employed at the time
  - He promises not to reoffend.

## The Sentence

9. In the Learned Magistrate's sentencing remarks, he applied the tariff as set out in the case of State –v- Nabenu [2018] FJHC 539; HAA 10 of 2018 (25<sup>th</sup> June 2018) where Justice Aluthge suggested the following tariff for cultivating marijuana plants as follows: -
- The growing of a **small number of plants** (less than 9 plants with assumed yield of 40 grams per plant) for personal use by a first offender – non custodial sentence of a fine at the discretion of the Court
  - **Small scale cultivation** (10 – 30 plants with assumed yield of 40 grams per plant) for commercial purpose with the objective of deriving a profit – 1 to 3 years imprisonment with or without a fine at the discretion of the Court.
  - **Large scale cultivation** capable of producing industrial quantities for commercial use (more than 100 plants) – 7 to 14 years imprisonment with or without a fine at the discretion of the Court.
10. Applying the above authority the Learned Magistrate found that the appellant fell into the medium scale cultivation as he had cultivated 52 plants. He identified the aggravating factor as being “the drug farm is strategically hidden away from the public.” As mitigating factors, he identified the appellant's status as a first offender and the fact that his guilty plea saved the Court from a full trial and he was granted a one third discount for his guilty plea.
11. In sentencing the appellant the Court took a starting point of 3 years imprisonment and he added 9 months for the aggravating factors leading to an interim sentence of 3 years 6 months imprisonment. He then deducted 9 months for the mitigating factors so the interim sentence was 33 months. For the early guilty plea he deducted 11 months from the sentence leaving a final sentence of 22 months imprisonment.
12. The Court then considered the principles relating to suspension of sentences and directed that the appellant serve 12 months his sentence in custody and the balance of 10 months was suspended for 3 years.

## The Appeal

13. The appellant was aggrieved at his sentence and he filed for leave to appeal against sentence and sought leave to appeal.
14. He filed the appeal in person and he submitted the following grounds of appeal: -
  - “1Jone Avukia  
Case No. 112/22  
917.6 grams  
Sentence: 9 months imprisonment
  1. Sitiveni Liga  
Case No. 274/22  
944.9 grams  
Sentence: 13 months imprisonment
  2. Konia Tuwai  
Case No. 151/20  
1.871 kg  
Sentence: 11 months imprisonment
15. The above three reference cases got far more weights than what was found on me, 15.4 grams, but they got very less sentence compared to the sentence that was imposed on me, 22 months’ imprisonment.
16. For fairness and for justice to prevail I urge that my sentence be reconsidered and revisited. The sentencing magistrate serve in law by not taking into consideration that the accused is a first offender and should have given him a far more sentence than what was imposed in this case.
17. The sentencing magistrate erred in law by not suspending the sentence as it is less than 2 years. The sentencing magistrate erred in law in not considering the accused’s early guilty plea, confessed to the Police in the first instance making things easy and avoiding the running of a full trial thus saving the Police and Court’s time.
18. Please take on board and consider all of the above valuable points and the appellant’s urgent request to revisit and reconsider the sentence passed by the learned magistrate

as it is considered severe, excessive and rather harsh compared to the three reference cases who have far more weights to the drugs found on them and their sentence is far too lenient compared to what has been imposed on the appellant.

19. I pray that the High Court will intervene and consider all of the above before passing a fairer and final judgment on the appellant.
20. Humbly submitted for your very kind consideration, thoughtful appreciation and I the accuse (SIC) will file submissions upon receipt of the Court date.

Kindly submitted  
Ilaitia Navuase  
(Accused in person)  
Dated 25<sup>th</sup> January 2023”

21. The appeal was first called on the 1<sup>st</sup> of March 2023 and the Court gave directions for the settling of the copy records and scheduled the 13<sup>th</sup> of April 2023 as the date of the hearing.

#### The Hearing

22. At the appeal hearing the appellant submitted written submissions and stated that he would rely on the same. Upon perusal of the written submissions, the submissions are identical to the initial appeal papers submitted by the appellant.
23. To summarise the appellant’s submissions the main grounds for the appeal are: -
  - The sentence is harsh and excessive and not consistent with the other cases that he has referred to, where the quantity of the illicit drugs was greater, yet the Accused persons received a less severe sentence.
  - The Court did not consider that the appellant was a first offender and that he had cooperated with the police and pleaded guilty thus saving the Court’s time and police resources.
  - The Court erred in law in picking a starting point of 3 years and there was double punishment for the aggravating factors which did not make sense,

thus the Magistrate gave a harsh sentence without considering the matters above.

- The Magistrate imposed a partially suspended sentence whereas such sentences are always given to offenders in worst case scenarios whereby the sentence imposed to the appellant is manifestly harsh and excessive in all circumstances of the case.

24. Those were the submissions of the appellant.

#### The State's submissions

25. In her oral submissions, State counsel submitted that the appellant was charged with Unlawful Cultivation of 52 green plants of cannabis sativa weighing 15.04 grams. He pleaded guilty in the Savusavu Magistrate's Court and was thereafter sentenced on the 17<sup>th</sup> of October 2022 to 22 months' imprisonment out of which he is to serve 12 months in prison and the balance of 10 months' imprisonment is suspended for 3 years. Being dissatisfied with the sentence, the appellant has filed an appeal against the same which is dated 25<sup>th</sup> January 2023, 2 months, and 18 days out of time.
26. The sole ground that he has raised in his appeal ground is that the sentence imposed was harsh and excessive compared to certain other cases which he listed thereafter where the drugs found on the Accused persons were much higher. In the sentence, the Magistrate relied on tariff suggested by His Lordship Justice Aluthge in the case of State -v- Nabenu where this offending was placed in category 3 of drug offenders.
27. The State submits that section 6 of the Sentencing and Penalties Act is clear that guideline judgments in terms of sentencing tariffs are developed by the Court of Appeal and Supreme Court. The State relies on the authority of Tomasi Tawake -v- The State Criminal Appeal No. AAU 63 of 2016 where the Court of Appeal acknowledged that to date, there is no guideline judgment in terms of cultivation of illicit drugs. In that judgment the Court of Appeal discusses several High Court cases that set out different tariffs for cultivation charges. For the instant case, the State acknowledges that the guideline judgment of Kini Sulua remains and according to that tariff, the instant case fell into category 1 of drug offender and the appropriate sentence should have been a non-custodial sentence.

28. The State therefore concedes that the appellant's sentence was harsh and excessive and he ought to have been granted a non-custodial sentence.

Court's findings

29. The State has conceded the appeal and admitted that the sentence was manifestly harsh. In this case the Magistrate fell into error in applying the wrong tariff and thereby imposed a sentence that was manifestly harsh bearing in mind all of the circumstances of this case.
30. Accordingly, I exercise my authority under section 256 (3) of the Criminal Procedure Act and quash the sentence handed down in the Savusavu Magistrate's Court on the 17<sup>th</sup> of October 2022 and the Court will re sentence the appellant.
31. The appellant was sentenced to an immediate custodial sentence on the 17<sup>th</sup> of October 2022 therefore to date he has served 7 months and 11 days imprisonment.
32. As submitted by the State, the authority of Sulua (supra) is still good law and it sets out the following categories of drug offenders: -

“(i) **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

(ii) **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

(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.”

33. Under the above authority, the appellant fell into Category 1 of drug offender with the tariff being a non-custodial sentence with fines, community service, counselling, or discharge with a strong warning. A sentence of imprisonment, either a short sharp term or suspended, would be reserved for the most serious offending of this kind.
34. As the appellant has already served 7 months and 11 days imprisonment, I find that he has served his sentence and he is to be released forthwith, subject to any other sentence that he is serving.
35. If this is the only sentence that he is serving, then he is to be released from custody immediately.

**This is the Court’s ruling: -**

- 1. The sentence handed out by the Savusavu Magistrate’s Court on the 17<sup>th</sup> of October 2022 is hereby quashed.**
- 2. As the appellant Ilaitia Navuase has already served 7 months and 11 days in prison, I find that he has served his sentence and, subject to any other sentence imposed on him, he is to be released from custody forthwith.**

**So ordered.**



  
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**Mr. Justice Usaia Ratuveli**  
**Acting Puisne Judge**  
**Labasa High Court**