

IN THE HIGH COURT OF FIJI AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No. 33 of 2023

IN THE MATTER of an appeal from the
decision of the Nausori Magistrate's Court
in Criminal Case No. 153 of 2023

BETWEEN: **KEVERIELI SEIBOUMA KAICOLO**

APPELLANT

AND: **STATE**

RESPONDENT

For the Appellant: **Mr. S Ravu**
For the Respondent: **Ms. A Lal**

Date of Hearing: **10th May 2024**
Date of Ruling: **21st June 2024**

RULING ON APPEAL AGAINST SENTENCE

1. The Accused was charged and produced in the Tailevu Magistrate's Court on the following charge: -

CHARGE
(COMPLAINT BY PUBLIC OFFICER)

First Count

Statement of Offence (a)

FOUND IN POSSESSION OF ILLICIT DRUGS: Contrary to section 5 (a) of
the Illicit Drugs Control Act, 2004

Particulars of Offence (b)

KEVERIELI SEIBOUMA KAICOLO on the 27th day of July 2023 at Nananu
Tailevu in the Central Division without lawful excuse was found in possession of
4.5 grams of Cannabis Sativa, an illicit drug

Second Count

Statement of Offence (a)

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

Particulars of Offence (b)

KEVERIELI SEIBOUMA KAICOLO on the 27th of July 2023 at Nananu, Tailevu in the Central Division without lawful excuse cultivated 15.6 grams of Cannabis Sativa an illicit drug.

2. He was first produced in the Tailevu Magistrate's Court on the 28th of July 2023. He waived his right to counsel and he pleaded guilty to both counts.
3. The Summary of Facts was outlined to him and he admitted the same. He was convicted as charged on both counts and he presented his plea in mitigation personally. He was then remanded awaiting sentence.
4. On the 11th of August 2023, the Court pronounced an aggregate sentence on the Appellant of 6 years imprisonment with a non-parole period of 2 years. The Court then made a destruction order for the disposal of any remaining drugs in police custody.

The Original Ground of Appeal

5. The Appellant initially filed his Notice of Appeal in person on the 18th of August 2023 and he appealed on the following grounds: -
 - (i) The analysis was unfair and not proper.
 - (ii) The sentence is too harsh in regard to the nature of the circumstances and weight, size and maturity of the Cannabis.
 - (iii) I was not treated with dignity, integrity and respect as a citizen of this country.
 - (iv) Proper and further factual and lawful submissions will be submitted once the court record is received and the assistance of a Legal Aid lawyer

The Amended Grounds of Appeal

6. The Appellant then managed to secure legal representation from Legal Aid and filed the following amended Grounds of Appeal on the 26th of January 2024: -
 - (i) That the Learned Magistrate erred in law and in fact when she deemed the Appellant as a person who played a leading role as opposed to a person who played the lesser role which led to the selection of a higher starting point in sentencing. This had ultimately led to the final sentence being harsh and excessive.
 - (ii) That the Learned Magistrate erred in principle and erred in exercising her sentencing discretion by putting too much weight on certain factors which led to the sentencing being harsh.
7. The Appeal was first called on the 16th of October 2023, and directions were made for the Court records to be compiled and for the Appellant to be produced in Court.
8. There was a delay as the Appellant applied for, and obtained Legal Aid representation. New counsel then sought time to go through the records and they then filed the Amended Petition of Appeal on the 26th of January 2024.
9. The Court then directed both parties to prepare written submissions for the appeal hearing on the 10th of May 2024. The parties have agreed that the appeal can be decided on the submissions as filed and waived an oral hearing.
10. The parties have both filed their respective submissions and the matter is now adjourned for Ruling on the Appeal against Sentence.

Submissions for the Appellant

11. The Appellant cites the authority of Kim Nam Bae vs The State Appeal No. AAU 0015 of 1998S (26th February 1999) where the Court of Appeal formulated the criteria that the Appellant must establish that the Learned Magistrate -

- (a) Acted upon a wrong principle;
- (b) Allowed extraneous matters or irrelevant matters to guide or affect him;
- (c) Mistook the facts; or
- (d) Did not take into account some relevant consideration.

12. In terms of the sentence, the Appellant concedes that the Learned Magistrate correctly identified Category 3 within which the level of harm is categorised as per Jone Seru vs State Appeal No. AAU115/2017, which is the guiding judgment on cultivation. However, it is noteworthy to note that she had failed to give her reasoning on why she deemed the level of culpability of the Appellant as the person who played a leading role thus the selection of the starting point of 9 years which is without basis. The case of Seru cited above had categorised the level of culpability with their respective starting points as shown in the table.

“The Court of Appeal formulated the following sentencing guideline for cultivating illicit drugs: -

- A. Culpability – demonstrated by the offender’s role in the offending – leading role, significant role, or lesser role) and more particularly explained as follows: -

Leading Role

- Owner, organiser, initiator or principal party in the venture. Involved in setting up of the operation, for example obtaining the lands, premises, workers and equipment with which to carry out the cultivation. May have one or more such ventures.
- Directing or organizing production/cultivation on a commercial scale.
- Substantial links to, and influence on others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage
- Uses business as cover.
- Abuses a position of trust or responsibility.

Significant Role

- Play a greater or dominant part. Running the operation
- Operational or management function within a chain. May make arrangements for the plants to be brought in, and the crop to be distributed. They may help to run more than one operation and be involved in making payments, such as rental payments, albeit again on instructions from those running the operation.
- Involves others in the operation whether by pressure, influence, intimidation or reward.

- Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender’s own habit) whether or not operating alone.
- Some awareness and understanding of scale of operation.

Lesser Role

- Secondary party, sometimes as “gardeners” tending the plants and carrying out what might be described as the ordinary tasks involved in growing and harvesting the cannabis. Simply be doing their tasks on the instructions of above in the hierarchy. May get paid for the work or subsistence.
- Performs a limited function under direction.
- Engaged by pressure, coercion, intimidation, grooming and/or control.
- Involvement through naivety, immaturity, or exploitation
- No influence on those above in a chain
- Very little if any, awareness or understanding of the scale of the operation.
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)
- Expectation of limited if any, financial advantage, (including meeting the offender’s own habit.)

B. Harm

The second sentencing consideration is to assess the harm, output or potential output as determined by the amount of plants/scale of operation. The Court should determine the offence category from among the 4 categories given below: -

- Category 1 – Large scale cultivation capable of producing industrial quantities for commercial use with a considerable degree of sophistication and organisation. Large scale commercial quantities. Elaborate projects designed to last over an extensive period of time. High degree of sophistication and organisation. 100 or more plants.
- Category 2 – Medium scale cultivation capable of producing significant quantities for commercial use i.e., with the object of deriving profits. Commercial quantities. Over 50 but less than 100 plants.
- Category 3 – Small scale cultivation for profits capable of producing quantities for commercial use. 10 to 50 plants (with an assumed yield of 55 grams per plant).
- Category 4 – Cultivation of small number of plants for personal use without sale to another party occurring or being intended. Less than 10 plants (with an assumed yield of 55 grams per plant).

1. The Court of Appeal then sets out the sentencing table for the offence of cultivation of illicit drugs as follows: -

Culpability/Harm	Leading Role	Significant Role	Lesser role
Category 1	Starting Point 18 years custody Category Range 12 – 16 years custody	Starting Point 14 years custody Category Range 12 – 16 years custody	Starting Point 9 years custody Category Range 7 – 12 years custody
Category 2	Starting Point 14 years custody Category Range 12 – 16 years custody	Starting Point 14 years custody Category Range 12 – 16 years custody	Starting Point 5 years custody Category Range 3 – 7 years custody
Category 3	Starting Point 9 years custody Category Range 7 – 12 years custody	Starting Point 5 years custody Category Range 3 – 7 years custody	Starting Point 18 months custody Category Range 1 – 3 years custody
Category 4	Starting Point 5 years custody Category Range 3 – 7 years custody	Starting Point 18 months custody Category Range 1 – 3 years custody	Starting Point Category Range Non-custodial–suspended sentence

2. The Court of Appeal also set out the aggravating and mitigating features (not an exhaustive list.)

Statutory Aggravating Factors: -

- Previous convictions having regard to
 - (a) Nature of the offence to which conviction relates and relevance to the current offence; and
 - (b) Time elapsed since conviction (see Naureure vs State [2022] FJCA 149; AAU 151 of 2020 (12 December 2022) paragraphs 32 -39 for a detailed discussion on this aspect.)
- Offence committed on bail.

Other aggravating factors include: -

- Exploitation of children and/or vulnerable persons to assist in drug related activity.
- Exercising control over the home of another person for drug related activity.
- Nature of any likely supply.
- Level of any profit element.

- Use of premises accompanied by unlawful access to electricity/other utility supply of others, where not charged separately.
- Ongoing/large scale operation as evidenced by presence and nature of specialist equipment.
- Exposure of drug user to the risk of serious harm over and above that expected by the user, for example through the method of production/cultivation.
- Exposure of third parties to the risk of serious harm, for example, through the location of the drug related activity.
- Attempts to conceal or dispose of evidence where not charged separately.
- Presence of others, especially children and/or non-users.
- Presence of weapons, where not charged separately.
- Use of violence (where not charged as separate offence or taken into account at step one.)
- Failure to comply with current court orders.
- Offence committed on license or post sentence supervision.
- Offending took place in prison (unless already taken into consideration at step 1).
- Established evidence of community impact.
- Use of sophisticated methods or technologies in order to avoid or impede detection.
- Use of indoor growing system (hydroponic method) to increase growth and harvesting period and THC in the plants.
- Growing for personal use but supplying to others on a non-commercial basis.
- Period over which the offending has continued.
- Estimated value of the crop, if available.
- Assumed yield or the weight of the dried cannabis.
- Supply to others on a non-commercial basis in Category 4.

Factors reducing seriousness or reflecting personal mitigation.

- Involvement due to pressure, intimidation or coercion falling short of duress (as opposed to being a willing party), except where already taken into account at step one. Acting under duress or undue influence.
- Isolated incident.
- No previous convictions or no relevant or recent convictions.
- Offender's vulnerability was exploited.
- Remorse.
- Good character and/or exemplary conduct.
- Determination and/or demonstration of steps having been taken to address addiction (whose offending sits at the lower end of the scale in terms of seriousness) or offending behaviour.
- Serious medical conditions requiring urgent, intensive, or long-term treatment.
- Age and/or lack of maturity.
- Mental disorder, impairment, or diminished responsibility short of insanity or learning disability.
- Personal circumstances, sole or primary carer for dependent relatives only in relation to Category 4
- Assumed yield or the weight of dried cannabis.
- Sales are infrequent and of limited extent in Category 3.”

13. The Appellant does not dispute that he is the sole owner of the farm. The fact that he is the sole owner of the farm does not necessarily mean that he should be deemed to be a person who has played a leading role.
14. The Appellant cites the case of State vs Tikotikoca [2023] FJHC 386; HAC 16 of 2023 (15th June 2023) where the quantity of the drugs was 6.1948 kilograms, and the Accused was sentenced to 3 years imprisonment with a non-parole period of 2 years.
15. In this case, the Appellant was convicted of cultivating 10 plants of marijuana weighing 15.6 grams. In terms of his personal culpability, the sentencing Court found that he played a leading role which led to the selection of the corresponding starting point of 9 years.
16. The Appellant submits that the Magistrate failed to provide a reason why she found the personal culpability of the Appellant to be a person who played a leading role. The Appellant contends that he instead falls into the category of a person who plays a significant role as discussed in the Tikotikoca case above.
17. The Appellant therefore submits that the sentence as it stands should be set aside and varied so that he is considered to have played a significant part and the starting point to be selected accordingly.
18. Those were the submissions of the Appellant.

The Submissions for the Respondent

19. The State, as Respondent submits that any person aggrieved with a decision of the Magistrate's Court may appeal to the High Court pursuant to section 246 of the Criminal Procedure Act.
20. Section 247 also restricts appeals from guilty pleas only to appeals against the extent, appropriateness or legality of the sentence imposed by a lower Court.

21. The Respondent also cited the cases of Kim Nam Bae vs State (supra) and submits that the appeal here is only against the final sentence and not how the Learned Magistrate arrived at the final sentence.
22. The Respondent submits that the Learned Magistrate followed the guideline judgment of Jone Seru vs State (supra) and she correctly identified that the offending here fell into Category 3 of harm caused.
23. The Respondent also submits that the Magistrate correctly identified the fact that the Appellant played a leading role and the final sentence of 6 years imprisonment with a non-parole period of 2 years, fell within the range recommended by the case of Jone Seru vs State (supra).
24. The Respondent finally contends that the grounds of appeal have not set out how the Magistrate erred in handing down the sentence and the impugned sentence of 6 years with a non-parole period of 2 years is neither harsh nor excessive as claimed in the appellant therefore the appeal against sentence should be dismissed.
25. Those were the submissions for the State as Respondent.

Analysis

26. This appeal has been filed as the Appellant is aggrieved at the sentence handed down by the Tailevu Magistrate's Court. As he had pleaded guilty, the appeal is restricted to only an appeal against sentence, as set out at section 247 of the Criminal Procedure Act.
27. Section 256 sets out the powers of the High Court on appeal, more specifically at section 256 (2) and (3), which provides as follows: -

“(2) The High Court may—

- (a) confirm, reverse or vary the decision of the Magistrates Court; or
- (b) remit the matter with the opinion of the High Court to the Magistrates Court; or
- (c) order a new trial; or
- (d) order trial by a court of competent jurisdiction; or
- (e) make such other order in the matter as to it may seem just, and may by such order exercise a power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed.”

28. In the case of Kim Nam Bae –v- State [1999] FJCA 21; AAU 15 of 1998 (26th February 1999) the Court of Appeal stated as follows: -

“It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*House v The King* (1936) 55 CLR 499).”

29. The Supreme Court confirmed this in the case of Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013 (20th November 2013) as follows: -

“[19] 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) 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”

30. In the Amended Grounds of Appeal, the Appellant relies on the following two grounds of appeal: -

- (i) That the Learned Magistrate erred in law and in fact when she deemed the Appellant as a person who played a leading role as opposed to a person who played the lesser role which led to the selection of a higher starting point in sentencing. This had ultimately led to the final sentence being harsh and excessive.
- (ii) That the Learned Magistrate erred in principle and erred in exercising her sentencing discretion by putting too much weight on certain factors which led to the sentencing being harsh.

31. In looking at the sentence, from page 9 of the records, it appears to be an *ex-tempore* sentence handed down from the bench on the 11th of August 2023 after the conviction was earlier entered on the 28th of July 2023.

32. After the guilty plea was recorded and the summary of facts read out and confirmed, the matter was adjourned however no sentence was prepared and the sentencing remarks were in the handwritten minutes of the Court.

33. Section 142 of the Criminal Procedure Act sets out the requirements for the content of a judgment or sentence and, with respect to sentences, section 142 (2) provides: -

“(2) Where the accused person has admitted the truth of the charge and has been convicted, it shall be a sufficient compliance with the provisions of this section if the judgment contains only the finding and sentence or other final order and it is signed and dated by the Judge or Magistrate at the time of pronouncing it.”

34. The Magistrate in her remarks, did not specifically state that she was imposing an aggregate sentence although in the sentencing remarks, the first heading was titled “Sentence in Aggregate” and she recited the maximum sanctions for each count – Count 1 - \$1, 000, 000 fine/life imprisonment and Count 2 \$1 million – height 14.5 cm, 10 plants, weight 20.01 grams. She also wrote – leading role 7 – 12 years in custody.

35. The Learned Magistrate did not specifically state why she was imposing an aggregate sentence and under which provision of section 17 of the Sentencing and Penalties Act she was doing so.

36. She did not specifically state which tariff she is relying on, although the Category 3 and tariff that she applied corresponds with the categories set out in the case of *Jone Seru vs State* (supra). The Magistrate however did not state why she considered the Appellant as having played the leading role and why she selected 9 years as the starting point.
37. Having selected the starting point of 9 years, she enhanced the sentence by 6 months as this was a prevalent crime and for the mitigating factors which she identified as personal factors, remorseful and first offender, to decrease the sentence by 6 months leaving an interim sentence of 9 years.
38. From that she then wrote “non parole period is 2 years.” She then made a final deduction of 3 years for the guilty plea. She then made a destruction order for the disposal of the drugs.
39. Turning to the grounds of appeal, I make the following findings: -

- (i) *That the Learned Magistrate erred in law and in fact when she deemed the Appellant as a person who played a leading role as opposed to a person who played the lesser role which led to the selection of a higher starting point in sentencing. This had ultimately led to the final sentence being harsh and excessive.*

The Magistrate in her very brief sentencing remarks never made any specific mention of what sentencing tariff that she was relying on. She also did not identify what criteria she had applied to find that the Appellant played a leading role in the offending. I find that this ground of appeal is made out and this led to the final sentence being disproportionately harsh and excessive.

- (ii) *That the Learned Magistrate erred in principle and erred in exercising her sentencing discretion by putting too much weight on certain factors which led to the sentencing being harsh.*

The sentencing remarks, such as it is, contains no analysis whatsoever therefore it is not possible to even glean what weight she placed on what factors, leading to the final sentence before the Court. The lack of analysis is also an error in principle as the Appellant who is being sentenced, is entitled to know what factors the sentence is considering when meting out their sentence. This ground of appeal is made out.

40. As the appeal against sentence has succeeded, I will apply section 256 (3) of the Criminal Procedure Act and quash the sentence handed down on the 11th of August 2023. Further to that section I will sentence the Appellant afresh.

Fresh Sentence

41. The Appellant Keverieli Kaicolo was convicted of being in possession of 1 clear resealable plastic containing seeds, which were later found to be marijuana weighing 4.5 grams and 10 green plants in pot plants were found on his farm. Upon analysis the 10 green plants were also found to be marijuana with a weight of 15.65 grams. The Police had conducted a raid at his farm in Nananu Village on the 27th of July 2023.

42. At the farm, the Police were led by Keverieli to his farm and the police seized both the pot plants and the resealable plastic containing the seeds.

43. He was subsequently charged and produced in the Tailevu Magistrate's Court, Korovou.

44. He has pleaded guilty at the earliest opportunity and offered the plea in mitigation. He is 26 years of age, single and he is a farmer planting yaqona however his plantation was damaged by wild pigs and others stole it that is why he planted drugs. He only planted 10 plants to assist him to buy food and other items. He sought the Court's forgiveness and promised not to reoffend. He is a first offender.

45. There are no aggravating factors as these are subsumed in the particulars of the offence.

46. In sentencing Keverieli Kaicolo, the Court acknowledges that he pleaded guilty at the earliest opportunity, and he cooperated with the Police in their investigations. He has explained why he cultivated the illicit drugs and the number of plants cultivated corroborates that explanation.

47. The two offences in the charge were part of one transaction therefore he will receive an aggregate sentence pursuant to section 17 of the Sentencing and Penalties Act.

48. Under the tariff set out in the Jone Seru case, I find that the offending falls into Category 3 and for the personal culpability of the offender Keverieli Kaicolo, I find that he played a significant,

rather than leading role. This is due to his reasons for offending, and the small quantity of illicit drugs seized from him.

49. I adopt a starting point of 7 years and I deduct 2 years for the early guilty plea and the other mitigating factors identified above. I deduct a further 2 years for his status as a first offender leaving him with a final sentence of 3 years imprisonment.

50. He was remanded for 14 days therefore this period spent in remand will be deducted as time already served leaving him with a final sentence of 2 years 11 months 17 days imprisonment.

51. As the sentence has been reduced, he will now serve a non-parole period of 18 months. This sentence will be back dated to 11th August 2023 therefore the Authorities will calculate his release date accordingly.

This is the Ruling of the Court: -

- 1. The appeal against sentence is allowed and the sentence handed down on the 11th of August 2023 is hereby quashed.**
- 2. Pursuant to its powers under section 256 (3) of the Criminal Procedure Act 2009, the Court hereby sentences Keverieli Kaicolo to 2 years 11 months and 17 days imprisonment, with a non-parole period of 18 months.**
- 3. This new sentence will be backdated to the 11th of August 2023 so the Authorities will recalculate his release date accordingly.**

30 days to appeal



Mr. Justice Usaia Ratu
Puisne Judge



si

cc: *Office of the Director of Public Prosecutions*
Office of the Legal Aid Commission

