

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL CASE NO.: HAA 34 OF 2015**

**BETWEEN:**                    1.    SEMI NAQELECA  
                                      2.    ROY BAXTER

**Appellants**

**AND:**                         STATE

**Respondent**

**Counsel:**                    :    Ms. V. Narara for Appellants  
                                      :    Mr. J. Niudamu for Respondent

**Date of Hearing**            :    20<sup>th</sup> January, 2016

**Date of Judgment**        :    01<sup>st</sup> March, 2016

**JUDGMENT**

1. The Appellants were charged with one count of Unlawful Possession of an Illicit Drugs (*cannabis sativa*) contrary to Section 5 [a] of the **Illicit Drugs Control Act 2004**.
2. The Appellants were given full disclosures before the plea was taken. Having agreed summary of facts, both pleaded guilty to the offence on their own free will on 20<sup>th</sup> August 2015. On the 21<sup>st</sup> of August 2015 the Magistrates Court sentenced each Appellant to 4 years' imprisonment with a non-parole period of 2½ years.

3. On 02<sup>nd</sup> September 2015, both Appellant filed timely appeal against their sentences handed down by the Lautoka Magistrates Court on 21<sup>st</sup> August, 2015.

### **Grounds of Appeal**

4. The Appellant filed grounds of Appeal on 02<sup>nd</sup> September 2015 which is within the 28 days' time frame when the sentence was delivered.
5. The Appellant's appeal grounds filed on 02<sup>nd</sup> September 2015 which, in summary, are as follows:
  - (i) That the learned Magistrate erred in law and in fact by failing to apply proper case law and authorities to help guide himself in making sentencing remarks.
  - (ii) The learned magistrate failed to use proper sentencing guidelines when passing sentence bearing in mind that the Appellants being first offenders.
  - (iii) That the learned trial Magistrate erred by allowing extraneous and irrelevant matters to guide himself.
  - (iv). That the learned Magistrate failed to take into account some relevant considerations and took some irrelevant considerations.
  - (v) The learned Magistrate erred in acting upon wrong principle.
6. In Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015) statutory basis for the determination of an appeal against sentence was explained as follows:

*"On an appeal against sentence the Court of Appeal shall if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted by law by the verdict*



*(whether more or less severe) in substitution thereof as they think might to have been passed, or may dismiss the appeal or make such other order as they think just."*

7. It is now well settled that this provision is concerned with the proper exercise of the sentencing discretion by the trial judge. In **Kim Nam Bae –v- The State** (AAU 15 of 1998; 26 February 1999) Fiji Court of Appeal observed:

*"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 principles, 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] HCA 40; (1936) 55 CLR 499)."*

8. **In Sharma** (*supra*) Fiji Court of Appeal stated:

*"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. **It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range.** However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would*

*have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust. (emphasis added)*

#### Appeal Ground I

9. Appellants submit that the learned Magistrate erred in law and in fact by failing to apply proper case law and authorities to help guide himself in making sentencing remarks.
10. Both Appellants have been found to be in constructive possession of 3.3kg of *cannabis sativa*. The authoritative case of **Sulua and Chandra** AAU0093/08 sets out sentencing tariffs for the offence of possession of *cannabis*. Temo J delivering the majority decision of the Court of Appeal said (at para 115 (iii)):

*“Category 3: possessing of 1,000 to 4,000 grams of cannabis sativa. Tariff should be a sentence between 3 to 7 years imprisonment, with those possessing less than 2,500 grams being sentenced to less than 2 years’ and those possessing more than 500g, be sentenced to less than 4 years’ imprisonment, and those possessing more than 2,500 grams, be sentenced to more than 4 years.”*

11. The learned Magistrate has correctly cited the above case law as the basis of his sentence. Even the Counsel for the Appellants agrees that the learned Magistrate was within the tariff as set by Temo J when he sentenced the Appellants. The learned Magistrate had correctly stated at paragraph 9 the following:

*“The offending in this case falls into category 3 that is possession of 1,000 to 4,000 grams of cannabis sativa. The tariff would be 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."*

12. In this case, both Appellants had in his possession 3.3kg of *cannabis* which is 3,300 grams. Therefore, their sentences should be more than 4 years' imprisonment. The learned Magistrate has correctly identified the tariff and the sentence when he sentenced each Appellant to 4 years' imprisonment.
13. The learned Magistrate correctly followed the tariff for drug related offences of this nature. The decision in *Sulua and Chandra* had been handed down by the time this sentence was passed and there is no reason why it should not have been followed. This ground of appeal has no merit and fails.

#### Appeal Ground II

14. In appeal ground II, Appellants submit that the learned Magistrate failed to use proper sentencing guidelines when passing sentence bearing in mind that the Appellants being first offenders.
15. Section 4 (2) (i) of the Sentencing and Penalties Decree 2009 reads as follow:

*'In sentencing offenders, a court must have regard to the offender's previous character'.*

Section 5 reads:

*In determining the character of an offender, a court must consider (among other matters)*

*(a) The number, seriousness, date, relevance and nature of any findings of guilt or convictions recorded against the offender.*

16. The Learned Magistrate took into consideration the fact that the Appellants are first offenders and gave discount of one-year on that account. Therefore, this ground also has no merit and fails.

Grounds III and IV

17. Appellants submit that the learned Magistrate erred by allowing extraneous and irrelevant matters to guide himself and failed to take into account some relevant considerations.
18. Appellants have failed to specify the irrelevant matters that the learned Magistrate took into consideration and the relevant matters that he failed to take into consideration.
19. The learned Magistrate had correctly followed the tariff for *cannabis* related drug offences. He did not allow extraneous and irrelevant matters to guide himself in his sentencing. The learned Magistrate took only relevant matters into considerations.
20. In paragraph 5 of the learned Magistrate's sentencing ruling, he correctly identified the mitigating factors. He reduced 1 year for their mitigation of ramose and of them being first offenders. The learned Magistrate gave a discount of 2 years for the early guilty plea. Hence this ground has no merit.

Ground V

21. Appellants argue that, in view of the following remarks of Justice Temo in *Sulua and Chandra*, the learned Magistrate could have deviated from the existing tariff and handed down a sentence less than four years.

*"The actual sentence will depend on the aggravating and mitigating factors, in the particular circumstances of the case, and it may well fall below or above the set tariff"*



22. Court finds it difficult to concur with the Appellant's contention as it militates against sentencing policy generally and also, in light of the circumstances of this particular case, such a deviation was not justified. Having considered every aspects of the offence and offending, a tariff for a particular offence is set for a specific purpose. Once that is in place it is believed that each and every court in Fiji will follow the tariff range set by the guideline judgment in sentencing. Uniformity of sentencing practice that reflects the judicial accountability is the main object that is to be achieved in so doing. Any deviation from the existing norm should only be for valid and cogent reason.
23. I can't see why the learned Magistrate should have deviated from the existing tariff in this case. The quantity of *cannabis* found in the possession of the Appellants is considerably high. Although they were charged only for possession, such a big quantity could have been used for other purposes than mere personal consumption. The learned Magistrate noted that the 'offence is prevalent in the community'.
24. In Paragraph 10 and 11 of the submission, the Appellants question the learned Magistrate's decision to pick a starting point at six years, closer to the upper range of the sentencing tariff which is 3 to 7 years. To support their contention, Appellants have cited Koroivuki v State [2013] FJCA 15; AAU 0018.2010 (5<sup>th</sup> March 2013) where Fiji Court of Appeal observed:


*"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls outside either below or higher than the tariff, then the sentencing Court should provide reasons why the sentence is outside the range."*

25. As a matter of good practice, the learned Magistrate should have picked a starting point from the lower or middle range of the tariff. However, in view of the observation of Sharma (*supra*) which I reiterate below, I don't find the exercise of discretion of the learned Magistrate is so blameworthy or injudicious to the extent that this court should intervene to reverse. In selecting the starting point, the learned Magistrate has apparently considered the objective seriousness of the offence. Although he has picked a starting point from the upper region of the tariff, his final sentence is within the existing tariff band and also in the lower region. The learned Magistrate has not acted upon wrong principle.

*"It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. Sharma (Supra)*

26. For reasons given in the judgment, I dismiss the appeal and affirm the sentences imposed by the learned Magistrate.



  
**Aruna Aluthge**  
**Judge**

**At Lautoka**  
**01<sup>st</sup> March, 2016**

**Solicitors:   Office of the Legal Aid Commission for Appellants**  
**Office of the Director of Public Prosecution for Respondent**