

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**[APPELLATE JURISDICTION]**

**CRIMINAL APPEAL NO. HAA 33 OF 2020**

**IN THE MATTER** of an Appeal from the decision  
of the Magistrate's Court of Nabouwalu, in  
Criminal Case No. 37 of 2020.

**BETWEEN** : **SALIMONI NALOGA**

**APPELLANT**

**AND** : **THE STATE**

**RESPONDENT**

**Counsel** : The Appellant appears in person  
Ms. Juleen Fatiaki for the Respondent

**Date of Hearing** : 29 March 2021

**Judgment** : 30 March 2021

**JUDGMENT**

[1] This is an Appeal made by the Appellant against his conviction imposed by the Magistrate's Court of Labasa.

[2] The Appellant was charged in the Magistrate's Court of Labasa for the following offence:

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

**UNLAWFUL POSSESSION OF ILLICIT DRUGS:** Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.

***Particulars of Offence (b)***

**SALIMONI NALOGA**, on the 12<sup>th</sup> day of March 2020, at Bua, in the Northern Division, was unlawfully in possession of 1576 grams of Indian hemp botanically known as *Cannabis Sativa*, an illicit drug.

- [3] The Appellant was first produced in Court on 13 March 2020, and was remanded in custody. Thereafter, on 8 April 2020, he was released on bail.
- [4] On 20 August 2020, the Appellant was ready to take his plea. Accordingly, the Appellant pleaded guilty to the charge. The Learned Resident Magistrate had been satisfied that the Appellant pleaded guilty voluntarily and on his own free will. On the same day the Summary of Facts had been read over and explained to the Appellant. Having understood same the Appellant admitted to the said Summary of Facts. Accordingly, he had been found guilty and convicted of the charge on his own plea.
- [5] It must be mentioned that during these proceedings in the Magistrate's Court, the Appellant was represented by Counsel from the Legal Aid Commission.
- [6] Thereafter, on 22 September 2020, the Appellant was sentenced to 2 years and 8 months imprisonment, with a non-parole period of 2 years. Considering the approximately one month time spent in remand for this case, the final sentence imposed on the Appellant was 2 years and 7 months imprisonment, with a non-parole period of 1 year and 11 months imprisonment.
- [7] Aggrieved by the said Order, on 28 October 2020, the Appellant filed a Petition of Appeal in the High Court. The Petition of Appeal was only in respect of his conviction.
- [8] During these proceedings in the High Court the Appellant had waived his right to Counsel and remained unrepresented.

- [9] This matter was taken up for hearing before me on 29 March 2021. The Appellant and the State Counsel for the Respondent were heard.
- [10] As per the Petition of Appeal the single Ground of Appeal taken up by the Appellant is as follows:

### **APPEAL AGAINST CONVICTION**

#### **GROUND ONE**

That the learned judge failed to give time for me to speak on behalf of the allegation that was been put to me.

#### **PARTICULARS**

Sir, I Salimoni Naloga would like to inform the Court that on the 12<sup>th</sup> day of March 2020 at Nabouwalu Market, Nabouwalu, I was arrested by CPI 3191 Neori Tavakaturaga where he received information from an informant that I with another were about to go to Nadi. Sir I got off the bus with Nezbitt Bret Bhurrah I was then approached by Neori Tavakaturaga and he started to search the travelling bag, whereby it was full of dried leaves believed to be Marijuana. I was escorted to Nabouwalu Police Station where they [Police Officer] assaulted me swearing at me by saying Magaitinamu meaning your mother's vagina for me to admit that the travelling bag belongs to me. Then they took me to my house. Later they boil hot water and they told me to tell the truth if not they are going to burn me with the hot water. Later they took my money worth \$60.00 without returning it back. I told them that the travelling bag does not belong to me and I don't know why they were treating me like this. They been entering my home without a search warrant and the officer namely Neori Tavakaturaga was wearing his boots inside my home and I asked him to take his boots off and he started to swearing at me again and telling me to shut my mouth.

Sir, I would like to tell the Court that the travelling bag was not mine and it belong to Nesbitt Bret Bhurrah and he is the one that plant the Marijuana.

## **The Law and Analysis**

**[11]** Section 246 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

*“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*

*(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*

*(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*

*(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

*(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*

*(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*

*(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.”*

**[12]** Section 247 of the Criminal Procedure Act, which is relevant as the Appellant has pleaded guilty to the respective charge against him, stipulates that *“No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been*

*convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence.”*

- [13] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

*“(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 any 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.”*

## **The Ground of Appeal against Conviction**

### **Ground One**

- [14] This Ground of Appeal is that the Learned Magistrate failed to give time for him to speak on behalf of the allegation that was been put to him. The Appellant further alleges that the Police Officer who arrested him had assaulted him and forced him to plead guilty to the charge. Therefore, the Appellant is alleging that his plea was not made voluntarily or on his own free will and that it was equivocal.

- [15] However, when examining the Magistrate's Court Case Records, it is clearly recorded (In the proceedings of 20 August 2020, at page 35), that the Appellant was pleading guilty voluntarily and on his own free will. Furthermore, when the Summary of Facts had been read out and explained to him he had said that he understood and admitted to the said Summary of Facts.
- [16] It is pertinent to note that at the time he took his plea, the Appellant was represented by Counsel from the Legal Aid Commission. It is more important to state that the Appellant had been on bail since 8 April 2020. He took his plea on 20 August 2020, which is 4 months later. In the circumstances, it is now not permissible for the Appellant to submit that his plea was not made by him voluntarily or not on his own free will or to state that he pleaded guilty because the Police Officer who had arrested him had forced him to plead guilty.
- [17] In any event, in terms of Section 247 of the Criminal Procedure Act, it is stated that where the Appellant has pleaded guilty to the charge against him, as in this case, no Appeal shall be allowed against his conviction. An Appeal may only be permitted in respect to the extent, appropriateness or legality of the sentence.
- [18] In the circumstances, I see no reason or justification to interfere with the Learned Magistrate's Order convicting the Appellant in this matter.
- [19] For the aforesaid reasons, I find that the Ground of Appeal against the Conviction is without merit.
- [20] Although the Appellant has not appealed against his sentence, since he is appearing in person, I deemed it appropriate to examine the sentence made by the Learned Magistrate, so as to determine the extent, appropriateness and legality of the sentence.
- [21] In determining the tariff for this offence the Learned Magistrate has correctly considered the authority of ***Sulua v. State*** [2012] FJCA 33; AAU 93 of 2008 (31 May 2012), where the Fiji Court of Appeal laid out the following tariffs for the possession of cannabis sativa:

- (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.

[22] Since the quantum of the cannabis sativa in the instant case was 1576 grams, it would be considered as a Category 3 Offence in terms of ***Sulua v. State*** (*Supra*). Therefore, the tariff would be between 3 to 7 years imprisonment, with those possessing less than 2,500 grams, to be sentenced to less than 4 years imprisonment.

[23] The Learned Magistrate has correctly identified the sentencing tariff in this case to be between 3 to 4 years imprisonment.

[24] In determining the starting point within a tariff, the Court of Appeal, in ***Laisiasa Koroivuki v. State*** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

*“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 time. 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 either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.”*

- [25] Based on the above principles, the Learned Magistrate has taken a starting point of 3 years imprisonment.
- [26] The Learned Magistrate has considered the fact that the Appellant was arrested for this case while he was trying to carry the illicit drugs from Nabouwalu to Viti Levu in Nadi. Considering the fact that the quantity of the cannabis sativa recovered from his possession was over one kilogram, the Learned Magistrate has correctly drawn the inference that the possession of the drugs at the time was not for the Appellant’s personal use, but was been transported to Viti Levu for commercial purposes. He has considered this factor as an aggravating factor and has increased the sentence by 2 years bringing the sentence to 5 years imprisonment.
- [27] Thereafter, the Learned Magistrate has reduced 1 year for the mitigating factors (except for the guilty plea) and a further 16 months for his early guilty plea and arrived at a sentence of 2 years and 8 months imprisonment. In terms of Section 18 (1) of the Sentencing and Penalties Act No 42 of 2009 (Sentencing and Penalties Act), he has fixed the non-parole period as 2 years.
- [28] Pursuant to Section 24 of the Sentencing and Penalties Act, the Learned Magistrate has deducted a further 1 month as time spent in remand and arrived at a final sentence of 2 years and 7 months imprisonment, with a non-parole period of 1 year and 11 months imprisonment.
- [29] Considering the aforesaid, I see no error of law made by the Learned Magistrate in his sentence.




## **Conclusion**

[30] Accordingly, I conclude that this Appeal should stand dismissed and the conviction and sentence be affirmed.

## **FINAL ORDERS**

[31] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Labasa in Criminal Case No. 37 of 2020 is affirmed.

  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI



## **AT LABASA**

This 30<sup>th</sup> Day of March 2021

Solicitors for the Appellant :  
Solicitors for the Respondent:

Appellant in Person.  
Office of the Director of Public Prosecutions, Labasa.