

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No.AAU092 of 2010
[High Court Case No. HAC 28 of 2009]

BETWEEN : **ALIFERETI QIOLELE**

Appellant

AND : **STATE**

Respondent

Coram : **Calanchini P**
Chandra JA
Gamalath JA

Counsel : **Appellant in Person**
Mr. Mosese Korovou for the Respondent

Date of Hearing : **13 November 2014**

Date of Judgment : **5 December 2014**

JUDGMENT

Calanchini P:

[1] I have read the draft judgment of Gamalath JA and agree with the proposed orders.

Chandra JA:

[2] I have also read the draft judgment of Gamalath JA and agree with the proposed orders.

Suhada Gamalath JA

- [3] Acting on a tip off, on 26th March 2009, a team of police officers engaged in a search operation for drugs at Navosa had raided a house situated between Naroko and Naqalimare, in which a consignment of 7253 grams of marijuana was found.
- [4] According to the evidence, whilst approaching the house, the police observed from a distance three persons, sitting inside of the front portion of the house.
- [5] Upon entering the house, they found the appellant sitting alone beside a bowl of grog. The other two had taken to their heels on seeing the team of police approaching.
- [4] In the house, where the appellant was sitting, there were two sacks full of marijuana. In addition, there were some other parcels of marijuana scattered at different places of the house. The total weight of the consignment was 7253 grams.
- [6] According to the Police, it was the appellant who handed over the sacks to them.
- [7] Based on this material, the appellant was charged in the High Court for having in his possession 7253.0 grams of marijuana, contrary to Section 5(a) of the Illicit Drugs Control Act of 2004.

The Trial

- [8] In addition to the evidence of the investigating Police Officers, the prosecution relied on the evidence of Viliame Lauroko and Sailosi Sagula, the two persons who ran away from the appellants' house.

[9] According to their testimony, the bag full of marijuana belonged to the appellant, who before the police raided, had told them that that contained marijuana.

[10] The appellant also gave evidence, denying the allegation.

[11] At the conclusion of the trial, the appellant was convicted and sentenced to 12 years imprisonment, with a non-parole period of 9 years.

The Application for Leave to Appeal

[12] The appellant moved this Court in appeal, challenging both the conviction and the sentence.

[13] The learned single Judge hearing the application for leave to appeal granted leave only on one ground which involves the legality of the length of the sentence;

“The appellant has leave to appeal against the sentence of imprisonment for 12 years”.

[14] Based on the above decision there are two salient issues raised in the appeal;

- “(i) that the sentence is manifestly harsh and excessive;*
- (ii) that the learned trial judge failed to consider the appellant’s previous good behavior and other mitigating factors.”*

[15] In order to deal with these issues, the Court would now turn its focus on the factual basis upon which the learned High Court Judge had arrived at the imposition of the impugned sentence.

The Sentencing Order

[16] A close look at the reasons adduced by the learned High Court Judge in determining the sentence of imprisonment, would make it clear that he was influenced not only by

the material emanating directly through the evidence of the case, but also, to a certain degree by some extraneous factors. In the sense, some were quite rightly objective factors, whilst others were not.

[17] The clearly discernible objective factors had been;

- (a) *That the large quantity of marijuana found in the possession of the appellant; and it was found in the house of the appellant.*
- (b) *That the seriousness of the offence involved.*

[18] The other factors which were seemingly extraneous and subjective were;

- (a) *“that the latent risk that would be afforded to the youth of Fiji should it not have been seized.”*
- (b) *“such a large amount can only have been amassed by you for commercial purposes.”*

[19] Clearly, the first two factors, which were supported by evidence, had afforded a valid basis upon which a Court of Law can place reliance in determining an appropriate sentence.

[20] In so far as the other factors are concerned, since there is an element of subjectivity, we are required to examine the extent to which it had influenced the decision making process.

[21] In the case of R v Lawrence; [1981] 3 Crim.App. Report (S) 49; a similar matter came up for discussion before the Court of Appeal in UK. The decision of the Court goes as follows:-

“Six months’ imprisonment, suspended, for cultivating cannabis quashed where the sentencer appeared to have been influenced by the possibility

that the appellant was cultivating the cannabis with a view to supply, when the appellant's plea of not guilty to a count of possession with intent to supply had been accepted.

The appellant pleaded guilty to one count of cultivating cannabis plants and, two counts of possessing cannabis resin; he pleaded not guilty to a further count of possessing a controlled drug with intent to supply, and that plea was accepted.

A large number of cultivated cannabis plants had been found growing in a wood; the appellant was subsequently found in possession of a number of packages of cannabis and a set of scales, and admitted planting and looking after the cannabis plants. He claimed that all the cannabis was for his own use, and that he had no intention of selling it, but indicated that he might barter with it or give some away if the occasion arose. In passing sentence, the sentencer observed that he remained suspicious that the appellant had intended that the cannabis which he was growing would get into other people's hands. Sentenced to six months' imprisonment, suspended, and fined £200 for the offence of cultivating cannabis plants, and fined £50 on each of the counts of possessing cannabis resin.

Held, in view of the plea of not guilty to the count of possession with intent to supply, the judge had accepted that he was bound to deal with the appellant solely on the basis of possession of his own consumption, but the words he used in passing sentence suggested that he had not done so. The sentence of imprisonment was inappropriate and would be quashed, and the fine would be reduced to £100."

Their Lordships had made the following observation in the judgment;

"Unfortunately, when the learned Judge did pass sentence upon the appellant, he used these words: "I still cannot get out of my mind the very strong suspicion that you were growing cannabis so that some of it might get into other peoples' hands, however hard it may be put before me today that what you were in fact growing was for your own consumption." Those remarks at the beginning of the learned judge's address to the appellant when passing sentence, coupled with the actual sentence passed on count 1, lead this Court to the view that the learned judge had, in truth, difficulty in banishing from his mind what was covered in count 4, for which the appellant was not being dealt with by the court."

- [22] If we may now turn to the existing guidelines in Fiji on the sentencing of drugs related offences, they are extensively dealt with in the case of **Kini Sulua & Michael Ashley Chandra v State**; Criminal Appeal No. AAU 93/08 and AAU 74/08 (dated 13th May, 2012); accordingly the foremost factor in determining the sentence for

possessing drugs is the weight of the drug and the gravity of the offense should be commensurate to the weight in possession.

- [23] Furthermore the Court of Appeal in paragraph 117 of the decision in the above case held that;

“Section 5(a) of the Illicit Drugs Control Act 2004 treated the verbs ‘acquires, supplies, possesses, manufactures, cultivates, uses or administers an illicit drug’ equally. All the verbs are treated equally. In other words, all the offending verbs or offending actions are treated equally. ‘Supplies, possesses, manufactures and cultivates’ are treated equally and none of the offending actions are given any higher or lower standing, as far as Section 5(a) of the Illicit Drugs Control Act 2004 was concerned. It follows that the penalties applicable to possession, must also apply to the offending verbs of ‘acquire, supplies, produces, manufactures, cultivates, uses or administers’. That is the will of Parliament, as expressed in the words of Section 5(a) of the Illicit Drugs Control Act 2004. Consequently, the four categories mentioned above, apply to each of the verbs mentioned in Section 5(a) of the 2004 Act mentioned above. The weight of the particular illicit drug will determine which category the case falls under, and the applicable penalty that will apply. It also suggests that, the application of the four categories mentioned in paragraph 115 hereof to section 5(a) of Illicit Drugs Control Act 2004, be extended to the offending verbs or offending actions in Section 5(b) of the Illicit Drugs Control Act 2004. This will introduce some measure of consistency in how sentences are passed for offendings against Section 5(a) and 5 (b) of the Illicit Drugs Control Act 2004. This will enhance the objective and purpose of the 2004 Act, as highlighted in paragraph 111 hereof.” [Underlining emphasis added].

- [24] Finally the Court of Appeal had laid down the following guidelines to be used in determining the quantum of sentence in a case of possession of marijuana;

- (i) Category 1: possession of 0 to 100 grams of cannabis sativa – a non custodial sentence to be given, for example, fines, community service, counseling, discharge with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.
- (i) 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.

(ii) **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.*

(iii) **Category 4:** *possessing 4,000 grams and above cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment.*

The Application of the Yardstick and Conclusion

[25] In the High Court trial of Kini Sulua, His Lordship, Mr. Justice Daniel Goundar, on 27th August 2008, imposed a sentence of imprisonment of 8 years on Mr Kini Sulua for having in his possession 5,203.0 grams of Cannabis.

[26] The Court of Appeal endorsed the decision and commented that the sentence was not harsh and excessive, and is consistent with the intention of the Illicit Drugs Control Act of 2004.

[27] Taking a cue from this determination and setting aside any extraneous material, unsupported by any clear evidence, and acting under Section 23(3) of the Court of Appeal Act Cap 12 the Court is of the opinion, that the starting point should be reduced from 12 years to 10 years' imprisonment.

[28] The learned High Court Judge had rightly credited the accused for being a person with a clear record. The remorse expressed was also given credit.

[29] The learned High Court Judge deducted three years based on those mitigating factors.

[30] From the ten years imprisonment that this court has now intended to use as the starting point, we would deduct the 3 years' that the trial judge had allowed at the trial court on the basis of mitigating factors.

[31] In effect his total period of imprisonment will be 7 years and the original non-parole period of 9 years will be reduced to 6 years.

The Orders of the Court are:

- (i) *Appeal Allowed.*
- (ii) *Sentence varied to a term of seven years with a non-parole term of 6 years with effect from 2 September 2010.*



W. Calanchini
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Hon. Justice William Calanchini
PRESIDENT, COURT OF APPEAL

Suresh Chandra
.....

Hon. Justice Suresh Chandra
JUSTICE OF APPEAL

Suhada Gamalath
.....

Hon. Justice Suhada Gamalath
JUSTICE OF APPEAL