

BETWEEN: KENNETH JACK
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing: 5 August 2024

Coram: Hon. Chief Justice V. Lunabek
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice O. A. Saksak
Hon. Justice V. M. Trief
Hon. Justice E. P. Goldsbrough

Counsel: P. K. Malites for the Appellant
K. Massing for the Respondent

Date of Judgment: 16 August 2024

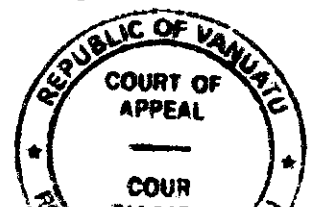
JUDGMENT OF THE COURT

Introduction

1. Kenneth Jack, the appellant appeals against the non-suspension of his end sentence of 10 months imprisonment in the Supreme Court on 21st May 2024. He had initially pleaded guilty to two charges of unlawful possession of cannabis (Count 1) and the attempted sale and supply of cannabis under the Dangerous Drugs Act [Cap 12].

Background

2. The appellant is from Paama Island residing at Ohlen White wood area in Port Vila. He is 39 years old and living in a defacto relationship with his partner. They have 2 children. He is employed by Top Sign Company as welder and installer.
3. The Police obtained a search warrant and executed it on 1st March 2024 at about 11:00am at his residence when the appellant was at work. During the search the Police found 7 large rolls of



leaves rolled in newspaper and placed in a shopping bag under the appellant's bed. They also found a 2 litre ice-cream plastic container which was partly filled with round aluminium balls containing leaves of cannabis. Further the police also found 11 rolls of aluminium foil containing dried leaves of cannabis placed inside a safety boot of the appellant in the kitchen. Shortly after the search the Police arrested the appellant at his work place and detained him until 2nd March 2024 when he was interviewed under caution about the cannabis leaves and rolls found in his residence.

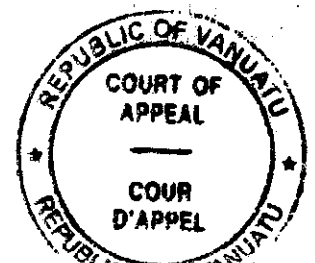
4. The appellant made admissions to the Police. He explained he had received the cannabis from a farmer on Epi Island for purposes of sale. He admitted that he had been dealing with the farmer since 2023. He had sold the cannabis and sent the proceeds back to the farmer.
5. The substance found were taken by the Police and tested positive as cannabis. The total net weight was 1.42kg.

The Sentence

6. The sentencing Judge considered the seriousness of the offences together with the aggravating features which involved the large quantity of cannabis weighing 1.42 kilograms and considered a starting point for the appellant was 24 months imprisonment for attempted sale and supply of cannabis, and 18 months imprisonment for possession of cannabis. The sentences were made concurrent but without suspension. The sentencing judge however considered the mitigating factors and the information contained in the pre-sentence report of the appellant and reduced the sentence by 8 months to 18 months imprisonment and 1 month for time spent in custody. The Judge discounted the sentence by 33% for guilty plea, leaving an end sentence of 10 months imprisonment

The appeal

7. There is no appeal against the length of sentence but only against the non-suspension of the sentence.
8. It was submitted on the appellant's behalf that the judge wrongly took into account the irrelevant fact of his admission that he had been selling cannabis in 2023 for which he was not charged. This was contrary to the principle in R v De Simoni [1981] 147 CLR 363, which was applied in the Vanuatu case of PP v Shing [2015] VUSC 58.
9. Further Mrs Malites relying on Malau v Public Prosecutor [2021] VUCA 48 submitted that the sentencing judge did not carry out a proper balancing exercise of the aggravating features with the mitigating factors when refusing to suspend the appellant's end sentence of 10 months imprisonment



10. Mr Massing submitted this was the exercise of a discretion by the Judge and no error was shown. Mr Massing supported the Judge's balancing exercise and his conclusion that a clear message to the community was required.

Discussion

11. The Prosecution's submissions in the Supreme Court favoured suspension of the sentence of imprisonment. We questioned Mr Massing whether the Public Prosecutor maintained the same position in this Court. However Mr Massing submitted that the Prosecution had departed from its initial submission and that the decision by the sentencing judge not to suspend the sentence imposed was within the judge's discretion.

12. We noted also that the sentencing judge recorded in [10] of the sentencing order that he had considered section 57 of the Penal Code Act [Cap 135] in relation to whether or not to suspend the sentence where he said:

".... Considering the circumstances of this case noting the amount of cannabis involved and the fact that the defendant has been selling cannabis since 2023, I will not suspend the sentence as it would send the wrong message to the community."

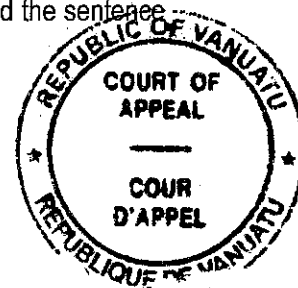
13. Section 57 of the Penal Code Act requires that the Court considers three factors namely:

- a) The circumstances of the case, and
- b) The nature of the crime committed, and
- c) The character of the offender.

14. The facts of the case show that the appellant was a long-term dealer of cannabis since 2023. Cannabis was sent to him from a farmer on Epi. He received the cannabis, prepared it in packages in rolls of aluminium foil for sale and supply. The amount in his possession was 1.42 kilograms. The sale of cannabis for profit or gain indicate a commercial activity. To supply cannabis to other persons or users for, or without, gain or profit, involves a great risk to the community and in particular to young people in the community. It is a significant community problem.

15. In paragraph 7 of the sentencing decision the judge considered the mitigating factors of the appellant as contained in his pre- sentence report and reduced his starting sentence of 24 months by 8 months.

16. Balancing those factors against the aggravating circumstances of the case, together with the seriousness of the offendings which carry the maximum penalty of a fine not exceeding VT 100 million and imprisonment not exceeding 20 years, the judge declined to suspend the sentence as to do so would send the wrong message to the community.



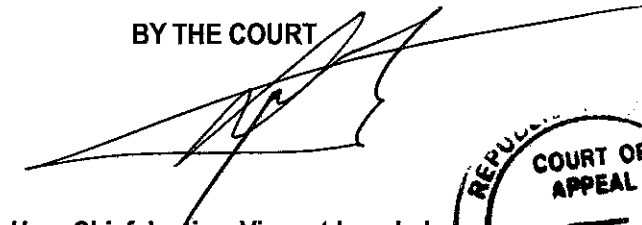
17. We agree with the Public Prosecutor's submission that the Judge had exercised his discretion correctly not to suspend the appellant's sentence in this case.
18. It did not matter that the appellant was not charged with the 2023 actions. He had made admissions to the Police voluntarily on 2nd March 2024 about his involvement in cannabis since 2023. His character was tainted by those admissions and that distinguished his case from De Simoni's and Shing's cases, to which the appellant's counsel referred in submissions.

The Result

19. The appeal is therefore dismissed. The sentence in the Court below is upheld. The sentence of 10 months imprisonment is to take immediate effect from the date of this judgment.
20. We note that the appellant was granted bail when he was previously remanded in custody presumably pursuant to section 50 of the Penal Code Act. For clarity and future purposes, section 50 is only available to an offender who has not been held in custody at any time pending trial for his offence, even if on bail at the time of sentence.

DATED at Port Vila, this 16th day of August, 2024.

BY THE COURT



Hon. Chief Justice, Vincent Lunabek

