IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 112 OF 2016
(High Court Civil Action No. HAC 310 of 2015)

BETWEEN : **SENITIKI NABULU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Ms B Malimali for the Appellant**
Ms J Prasad for the Respondent

Date of Hearing : **9 August 2018**

Date of Ruling : **3 October 2018**

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on one count of unlawful cultivation of an illicit drug being cannabis sativa with a weight of 59.5kgs. On 15 August 2016 the appellant was sentenced to 15 years imprisonment with a non-parole term of 14 years with effect from 15 August 2016.

[2] This is his timely application for leave to appeal against conviction and sentence pursuant to section 21(1) of the Court of Appeal Act 1949 (the Act). The appellant may appeal on any question of law alone as of right. To appeal on a ground that involves a mixed question of law and fact or fact alone, leave is required. To appeal against sentence leave is also required. Section 35(1) of the Act gives a single judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable and the test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (**Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013).

[3] There are 22 grounds of appeal against conviction and one ground of appeal against sentence. The grounds of appeal against conviction emanate from (a) the voir dire ruling delivered on 31 August 2016 admitting into evidence a copy caution interview and charge statement, (b) the voir dire ruling delivered on 29 August 2016 admitting into evidence the appellant's caution interview and charge statement, (c) the ruling on the no case to answer submission, (d) the conduct of the trial and (e) directions in the summing up. The one error alleged in the exercise of the sentencing discretion relates to the inclusion as an aggravating factor (the weight of the drugs) a matter already considered for the purposes of sentencing according to the decision of **Sulua and Another –v- The State** [2012] FJCA 33, AAU 93 of 2008, 31 March 2012.

[4] Some of the grounds of appeal against conviction do involve questions of law only for which leave is not required. Leave is required in respect of all the remaining grounds. The grounds of appeal against conviction and sentence are:

> *"1. That the Learned Trial Judge erred in law when he failed to consider that the State had not exhausted all avenues to locate the original of the Record of Interview and the Charge Statement.*
>
> *2. That the Learned Trial Judge made an error of law in his Ruling when he failed to consider that the Investigation only spent about 5 hours to search for the original Record of Interview and Charge Statement and even then, the Search was done by Telephone.*

3. *That the Learned Trial Judge erred in law when he failed to consider that the State had not proved beyond reasonable doubt as per Lobendahn the chain of evidence to show where and when the Record of Interview and the Charge Statement had last been seen up until where the State lost track of it. In this case, the last time the Record of Interview and Charge Statement were seen were in Kadavu sometime in 2012 and no one seems to know when happened to the originals since.*

4. *That the Learned Trial Judge erred in fact and in law when he failed to consider that the Appellant was assaulted by the Police.*

5. *That the Learned Trial Judge erred in fact and in law when he only considered the number of beatings rather than the fact of the beating when deciding the question of admissibility.*

6. *That the Learned Trial Judge erred in fact and in law when in his questioning of the Appellant when the Appellant was giving evidence during the Voir Dire, he only focused on why the Appellant did not ask the Magistrate at his first appearance in the Magistrate's Court on 10/01/16, to be taken for a medical examination.*

7. *The Learned Trial Judge erred in the Ruling on No Case To Answer when he failed to consider the fact the State did not identify the person in the dock or the Appellant as the person who was arrested and interviewed in Kadavu.*

8. *The Learned Trial Judge erred in law when he refused to allow the Defence to cross examine the State Witnesses, namely the police, about the arrest and interview of another suspect in relation to the drugs for which the Appellant was charged.*

9. *That the Learned Trial Judge erred in fact and in law when he refused to allow the Defence to ask the police witnesses why there was no confrontation between the Appellant and another suspect who was arrested and questioned over the same bags of plants suspected at the time to be marijuana.*

10. *The Learned Trial Judge erred in law when he refused to allow the Defence to use the Station Diary to properly question the State Witnesses, namely the police on the movements of the Appellant and other persons who were arrested in relation to drugs offences at the same time at Kadavu, even though the Station Diary showed the movements and arrest of other suspects.*

11. *That the Learned Trial Judge erred in fact and in law when in relation to Judges Rule IV (d), His Lordship stated in open court during the cross-examination of the Interviewing Officer, that during the interrogation of a suspect that a police officer not have to record everything that the suspect says and the a police officer should only record what "they consider relevant."*

12. *That the Learned Trial Judge erred in fact and in law His Lordship stated in open court that the court only records what they consider is relevant evidence and that they do not have record everything that is said by a witness.*

13. *The Learned Trial Judge erred in fact and in law when in his questioning of the Appellant during the trial proper, he only focused on why the Appellant did not ask the Magistrate at his first appearance in the Magistrate's Court on 10/01/16, to be taken for a medical examination.*

14. *That the Learned Trial Judge erred in fact and in law when in his questioning of the Appellant, he insisted on the witnesses approximately the number of beatings they saw being administered even when the witnesses said that they could not recall or they could not say.*

15. *That the Learned Trial Judge erred in law when he failed to put the correct elements of the offence to the Assessors in that the learned trial judge failed to put to the Assessors that the State had to prove beyond reasonable doubt the amount of the cannabis sativa.*

    (a) *The Learned Trial Judge erred by not putting to the Assessors that the State had to prove beyond reasonable doubt that the Appellant had cultivated 59.5 kg of marijuana*
    (b) *The Learned Trial Judge omitted to inform the assessors whilst explaining to them the elements of the offence that the State had to prove beyond reasonable doubt that he cultivated the cannabis sativa in Gasele village, Yale, Kadavu*

16. *The Learned Trial Judge erred in law when he failed to direct the assessors about the fact or the weight to be put on the State's failure to identify the Appellant as the person that was arrested and charged in Kadavu. There was no dock identification.*

17. *The Learned Trial Judge erred in law when he failed to properly explain to the assessors what "on or about 06/01/12" means.*

18. *The Learned Trial Judge erred in law and in fact when he failed to explain to the assessors that the Chain of Evidence in relation to the bags of Marijuana that were alleged to have come from the Appellant's farm were the same ones that the Photographer photographed whilst being destroyed or the same ones that the Investigating Officer took into the Government Analyst.*

19. *The Learned Trial Judge erred in fact and in law when he disregarded the evidence of the Defence witnesses purely on the bases that they were either related to him or in the case of the law preacher, that the Appellant was part of his congregation.*

20. *That the Learned Trial Judge erred in fact and in law when he omitted to put to the Assessors some of the gaps or omissions in the State's case and only focused on what he considered deficiencies in the Defence case.*

21. *That the Learned Trial Judge erred in fact and in law when he did not fairly put the Defence case to the Assessors in his Summing Up. This was brought to the attention of the Learned Trial Judge at the conclusion of the Summing Up but it was not rectified.*

22. *That the Learned Trial Judge erred in law when he did not have the assessors excused from the court room during re-direction in spite of a request from the Defence that the Assessors should be excused."*

[5] It is appropriate to comment briefly on the notice of appeal and grounds of appeal filed by the Appellant. It must be recalled that the case for the prosecution was based entirely on the admissions made by the appellant to the police during the investigation and in the caution interview and charge statement. To succeed it was necessary for the prosecution to establish beyond reasonable doubt that the admissions had been made voluntarily in order to be admitted into evidence. It was also necessary for the prosecution to establish at the trial that the admissions were voluntary in the sense that they were made by the appellant and that they were true. These matters also had to be established beyond reasonable doubt. With that background the observations of Dean Mildren in *"The Appellate Jurisdiction of the Courts in Australia"* (Federation Press 2015) at page 38 are relevant to the 22 grounds of appeal against conviction in this appeal:

> *"In drafting the grounds of appeal, it is important to be very selective. Choose only those grounds which have real merit and which demonstrate error of fact and/or law which will be decisive – that affect the result. The fewer the grounds the better. If there are too many grounds, the good points are likely to become obscured in a fog of bad points. Avoid dressing up the same ground in different ways. Weak points should be discarded. The best points should be put forward first."*

[6] In my opinion the notice of appeal is overloaded with innumerable grounds most of which cannot be described as decisive in the sense that they will affect the result in terms of section 23 of the Act. These grounds are sometimes referred to as *"shot gun"* grounds intended to maintain every potential and even remote basis for overturning the court below (Black and Selby: Appellate Advocacy – Federation Press 2006 at page 48).

[7] It seems to me that the grounds that are likely to prove decisive and for which leave should be given or if errors of law alone are raised, are those grounds arising from (a) the admission into evidence, of copy documents (b) the admission into evidence of the caution interview and charge statement and (c) the directions or lack thereof on the prosecution's duty at trial to establish voluntariness beyond reasonable doubt. It is clear that if the appellant is successful in the appeal on one of these issues then at least one of the requirements in section 23(1) of the Act would have been satisfied.

[8] On the basis that it is necessary to access the record of proceedings in the court below, and to the extent that it is necessary, leave is granted to the appellant to appeal conviction on grounds 1 – 3, 4 – 6 and 19. Leave is refused on the remaining grounds where leave is otherwise required.

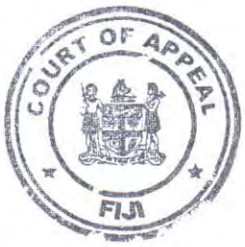
[9] Leave to appeal against sentence is granted on the basis that it is arguable that there has been an error in the exercise of the sentencing discretion when the trial judge included the actual weight of the cannabis as an aggravating factor. The weight of the cannabis had determined that this case fell into category 4 of the penalty ranges outlined by this Court in the **Sulua** decision (supra).

Orders:

1) *Leave to appeal against conviction on grounds 1 – 3, 4 – 6 and 19, to the extent that leave is required under section 21(1) of the Act.*

2) *Leave is refused on the remaining grounds where leave is otherwise required.*

3) *Leave to appeal against sentence is granted.*



W. Calanchini

Hon Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL