IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0047 of 2017
[High Court of Labasa Criminal Case No. HAC 17 of 2015]

BETWEEN	:	**AKUILA KUBOUTAWA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**24 August 2020**
Date of Ruling	:	**27 August 2020**

RULING

[1] The appellant had been charged in the High Court of Labasa on a single count of Cultivation of Illicit Drugs contrary to section 5(a) of the Illegal Drugs Control Act of 2004. The information read as follows.

'*Statement of Offence*

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: *Contrary to section 5 (a) of the Illicit Drugs Control Act 2004.*

Particulars of Offence

TOMASI RABUKA *and* ***AKUILA KUBOUTAWA*** *between the 1st day of January 2015 and the 21st day of March 2015 at Viani Village, Savusavu in the Northern Division, without lawful authority cultivated illicit drugs namely Cannabis Sativa weighing 10.9 kilograms.*

[2] The co-accused Tomasi Rabuka had pleaded guilty to the information and been sentenced by court. The appellant had pleaded not guilty and proceeded to trial. After trial, on 18 November 2016 the assessors unanimously opined that the appellant was guilty as charged. On 21 November 2016 the appellant had been convicted and 23 November 2016 sentenced to 08 years of imprisonment subject to a non-prole period of 06 years and 06 months.

[3] The appellant had signed a notice of appeal on 25 January 2017 (received by the registry on 04 April 2017) against conviction and sentence. The delay is about 01 – 02 ½ months. Legal Aid Commission had tendered an application for enlargement of time, amended notice of appeal, affidavit and written submissions on 11 June 2020 against conviction and sentence. The State had tendered its written submissions on 14 July 2020 and 24 August 2020.

[4] The brief summary of facts according to the judgment is as follows.

> *'[5] Prosecution case against the accused was solely based on the admissions made by him in the caution interview statement. The prosecution alleged that upon raid of three houses in the Viani village, the accused and his co-accused were arrested on 21st March 2015, and they have uprooted 147 plants of Cannabis Sativa from the farm of the co-accused on the same day. It was the co-accused who led the Police team to his farm; located in a hilly area, while the accused remained in the Police vehicle with two officers.*
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> *[6] The plants uprooted from the farm, were then sent to Principal Scientific Officer of the Forensic Chemistry Unit of the Fiji Police Force, for identification and analysis. The Principal Scientific Officer, in her evidence, confirmed that the 147 plants were of the height ranging from 15 cm to 240 cm, with a total weight of 10.9 Kg, after removing its roots. Extracts taken from these plants were tested with two chemical tests and based on their results; she certified that the 147 plants as Cannabis Sativa plants. Her report was tendered to Court marked as **D.E. No. 1A** and **1B.***
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> *[7] The accused was interviewed by DC Saiyasi after caution, and at the conclusion of the interview, having read the record of the interview, he signed it. The statement was recorded voluntarily and the interview was not held under oppressive conditions. The iTaukei handwritten original statement was marked as **P.E. No. 2A** and its English translation was marked as **P.E. No. 2B**.*

[5] The learned trial judge had narrated the appellant's position as follows

> *'[8] The accused did not dispute the claim of the prosecution that it was made voluntarily. However he opted to challenge some of the answers on the basis that they were not his answers and therefore these answers were fabricated by the interviewing officer. He also stated in his evidence that the statement was not read back to him and he also did not read it. The accused also disputed the English translations of some of the answers and called a former Court officer to provide an alternative translation of these answers. He also highlighted mistakes, errors in translation, insertion of certain words and deletion of certain other words in the English translation of the caution interview.*
>
> *'[11] The accused challenged to the validity of the caution interview, based on the allegation of fabrication. He did not challenge the entirety of the caution interview on that ground but limited his objection only to the admissions relied upon by the prosecution. In his answer to Q 34 in **P.E. No. 2B**, the accused has said "Tomasi Rabuka took me to the said farm to identify which ones of them are matured and also for cleaning the farm."*

[6] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State: Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[7] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
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> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[8] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[9] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. I would rather consider the third and fourth factors in ***Kumar*** first before looking at the other factors which will be considered, if necessary, in the end. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

[10] Ground of appeal:

> ***Against Conviction***
>
> *(i) 'That the learned trial Judge erred in law and in fact when he convicted the Appellant on the said charge when there was no evidence or an insufficiency of evidence to uphold the conviction.*
>
> *(ii) That the learned trial Judge erred in law and in fact in convicting the Appellant after accepting evidence from the State that a co-accused had confirmed that the farm belonged to him.*
>
> (iii) *That the learned trial Judge erred in law and in fact when he failed to consider the inconsistency in the recoding's and the translations of the Appellant's caution interview which challenged the truthfulness of the admission and in turn those inconsistencies should have caused the admissions to be disregarded.*
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> ***Against Sentence***
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> *(iv) 'That the learned trial Judge erred in law and in fact in sentencing the Appeal using the Kini Sulua guideline when the case is one on cultivation.*

[11] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For an untimely ground of appeal against sentence to be considered arguable there must be a real prospect of its success in appeal**. The aforesaid guidelines are as follows.

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

01st ground of appeal

[12] The gist of the appellant's complaint here is that there was no evidence whatsoever to connect the appellant with the charge of cultivation except his answers in the cautioned interview which could not prove 'cultivation'.

[13] The trial judge had correctly identified the elements of 'cultivation' in paragraph 12 of the summing-up.

> *'[12] The prohibited act in the offence is "cultivation". Under Section 2 of the Illicit Drugs Control Act 2004 the word "cultivation" has been defined. According to this statutory definition of* ***"cultivation" means; "planting, sowing, scattering the seed, growing, nurturing, tendering or harvesting".*** *In order to prove this element, the prosecution must prove that the accused was "cultivating" an illicit drug as per the definition. This is the physical element of the offence.*

[14] It appears that the appellant's cautioned interview had been recorded in iTaukei using Bauan dialect and then translated into English by the interviewing officer, Saiyasi. The iTaukei version had been marked as **PE 2A** and the English translation as **PE 2B** at the trial. The appellant's answer to question 34 in PE2B is to the effect *'Tomasi Rabuka took me to the said farm to identify which ones of them are matured and also for cleaning the farm'* suggesting that the appellant had indulged in activities coming under 'nurturing or tendering' constituting 'cultivation'. The appellant had taken up the position that what he had told the interviewing officer was that Tomasi was planning to take him to the farm but before their visit the police arrested them.

[15] The appellant had called a witness called Apisalome, a former court officer who had claimed to have had experience in translating iTaukei into English for more than 11 years. Apisalome had stated in evidence that the appellant's answer to question 34 in PE 2A should be translated in PE 2B as *'Tomasi Rabuka took me to see and to show him the matured ones and how it is cleaned'* whereas it had been translated by Saiyasi in PE 2B as *'Tomasi Rabuka took me to the said farm to identify which ones of them*

are matured and also for cleaning the farm'. Apisalome had further said that the difference in the two translations of the appellant's answer to Q34 lies in the fact that in Saiyasi's translation Tomasi had accompanied the appellant for cleaning the farm whereas in Apisalome's translation the Tomasi had accompanied the appellant to show him how the farm is cleaned.

[16] The trial judge had then addressed the assessors on this aspect as presented by both parties very fairly in the summing-up as follows.

> *'**[39]** As already noted the word "cultivated" also includes "planting, sowing, scattering the seed, growing, nurturing, tendering or harvesting" as per the legal definition in the Illicit Drugs Control Act 2004.*
>
> *'**[40]** In order to prove this element, the prosecution relies on the answer given by the accused to Q 34 (Q33 in iTaukei original marked as **P.E. No. 2A**). The English translation by Saiyasi of his answer reads "Tomasi Rabuka took me to the said farm to identify which ones of them are matured and also for cleaning the farm." In addition, the witness of the accused also provided another translation to the effect "Tomasi Rabuka took me to see and to show him the matured ones and how it is cleaned." According to this witness the difference in the two translations is to show how the farm is cleaned and not for cleaning the farm.*
>
> *'**[45]** The accused wants you to consider that even if you accept the answer to Q 34 of the English translation as an admission, he only provided "advice" and therefore has not violated law. You will recall the accused in his evidence said that his cousin brother Tomasi Rabuka sought his assistance to identify the mature plants and also to clean the farm, but before they actually went there, the Police raid took place. With this the accused wants you to consider that this was to be a future event, which never took place. If you accept the caution interview, both translations agree that Tomasi Rabuka "took" the accused to his farm, an event that had already taken place.*
>
> *'**[47]** It is your responsibility to decide these conflicting claims by the parties, and if you accept the answer to Q 34, you will then consider whether the acts of "cleaning the farm" and also showing the mature plants to Tomasi Rabuka, could be accepted as "tendering or nurturing" the marijuana farm. If you decide it is so; and he knew them to be marijuana, then the accused may be find guilty to the count of cultivation of an illicit drug. If you decide that it is not so, then you must find the accused not guilty to the charge.*

[17] Clearly, the assessors had accepted the cautioned interview and thereby they had also accepted Saiyasi's translation of the appellant's answer to Q34. The trial judge himself had given his mind to these and noted that the appellant's testimony in court that he was to go with Tomasi to his farm to show him how to identify the mature plants and also show him how to clean his farm but before they could go the police raided and arrested them, had been an afterthought. It appears that his version of events presented in court is inconsistent with his answer to Q34 in the cautioned interview as translated by his own witness Apisalome. According to Apisalome's translation of the answer to Q34 the appellant had in fact gone to the farm with Tomasi and it was not something that was to happen in the future.

[18] In the judgment, the learned trial judge seems to have considered the facts of demonstrating how to clean the farm and identifying the mature plants, as nurturing or tendering constituting cultivation.

> *'[16] When the accused showed his cousin how to clean the farm and to identify the mature plants of marijuana, the accused had "nurtured and tendered" these plants and had therefore "cultivated" an illicit drug, as per the definition provided by the section 2 of the Illicit Drug Control Act. He knew its illegal to cultivate marijuana.*

[19] The state further argued that in any event even if one is to go by Apisalome's translation of the answer to Q34 *i.e. "Tomasi Rabuka took me to see and to show him the matured ones and how it is cleaned."* the appellant should still be held liable under joint enterprise for the charge of cultivation. The trial judge had addressed the assessors on the joint enterprise in paragraphs 41-44 of the summing-up.

[20] In the circumstances, I do not think that the appellant has a real prospect of success in the appeal on this ground of appeal.

02nd ground of appeal

[21] The appellant criticizes the trial judge for having convicted the appellant after accepting the evidence that the co-accused, Tomasi had admitted the farm to be belonging to him. Paragraphs 17 and 21 of the summing-up and paragraph 5 of the judgment show the evidence regarding as to who had owned the farm.

[17] The other Police officers called by the prosecution, stated in their evidence the circumstances under which the accused was arrested. According to them, the Police decided to conduct a raid in the Viani village for illicit drugs on 21st March 2015. During this raid, the houses of the accused and the other co-accused were searched. No illicit drug was found from the house of the accused but the accused was arrested. The co-accused showed the Police team where his farm was located. The accused remained in the Police vehicle with two others. He did not go with co-accused to show the farm. After about 2 hours the Police party returned with plants of marijuana and thereafter proceeded to Savusavu Police Station where the accused was interviewed.

'[21] The accused said in his evidence that after his arrest he was taken to the Police vehicle and when the co-accused was also brought in, they proceeded to the place where the farm of the co-accused was. A Police party along with the co-accused went up, while he remained in the vehicle. Then he was later interviewed at Savusavu Police Station by Saiyasi.

'[5] Prosecution case against the accused was solely based on the admissions made by him in the caution interview statement. The prosecution alleged that upon raid of three houses in the Viani village, the accused and his co-accused were arrested on 21st March 2015, and they have uprooted 147 plants of Cannabis Sativa from the farm of the co-accused on the same day. It was the co-accused who led the Police team to his farm, located in a hilly area, while the accused remained in the Police vehicle with two officers.

[22] However, it is clear that throughout the summing-up and the judgment there is nothing to indicate that the trial judge had contemplated the criminal liability of the appellant for cultivation to be based on ownership of the farm. In fact as a matter of law ownership has nothing to do with cultivation. Nor has the state run its case on such a basis.

[23] Therefore, the appellant has no real prospect of success in the appeal on this ground of appeal.

03rd ground of appeal

[24] The appellant complains of the alleged failure on the part of the trial judge to have considered inconstancy in the recording and translation of the appellant's cautioned interview. He particularly refers to the inconsistencies pointed out by his witness Apisalome in the English translation of the cautioned interview on some of his

answers and his own testimony where he had taken up a position different to his stand in the cautioned interview.

[25] The learned trial judge had pointed out that the appellant had not disputed that his cautioned interview had been made voluntarily but challenged some answers on the basis that they were not answers given by him but fabricated by the interviewing officer. He had also pointed out issues with the translations of some answers into English. The trial judge had addressed the assessors on the appellant's challenge to some of answers in his cautioned interview in paragraphs 22-26 and 31-34 of the summing-up and given his mind to those aspects in paragraphs 7-9, 11, 15 of the judgment and decided to accept the assessors' opinion.

[26] In those circumstances, the appellant's ground of appeal has no real prospect of success.

04th ground of appeal (sentence)

[27] The appellant argues that it was wrong for the trial judge to have followed Kini Sulua sentencing guidelines and sentenced him accordingly in as much as weight of the plants is not the weight of the dried leaves as in Kini Sulua. Further, he argues that Kini Sulua guidelines should be restricted only to possession and not cultivation.

[28] It is clear from the sentencing order that the trial judge had treated the appellant's case under the forth category identified in **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012) where the tariff had been set at 07-14 years of imprisonment for possession of cannabis sativa of 4000g or above.

[29] However, I am fairly certain that there had not been an error of double counting (see **Senilolokula v State** [2017] FJCA 100; AAU0095 of 2013 (14 September 2017), unwittingly though, in the light of **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008), **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019), for the trial judge had already incorporated the weight of 10.9 kg in selecting the starting point of 10 years and 06 months and not enhanced the sentence

for the weight as an aggravating factor [also see **Salayavi v State** AAU0038 of 2017 (03 August 2020) for detailed discussions on double counting]

[30] The Court of Appeal will see whether the ultimate sentence of 08 years of imprisonment is justified in the legal framework pronounced in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015). Also see **Salayavi v State** AAU0038 of 2017 (03 August 2020) for a detailed discussion.

[31] However, in **State v Bati** [2018] FJCA 762; HAC 04 of 2018 (21 August 2018) where a more fundamental issue on sentencing tariff relating to 'cultivation cases' had been highlighted. It had stated that *'There is no guideline judgment especially for cultivation of marijuana.'* meaning that **Sulua** guidelines may not apply to cultivation. There is said to be currently an appeal **Eparama Tawake v State** CAV 25 of 2019 pending in the Supreme Court where the state is seeking guideline judgment on this aspect of sentencing.

[32] ***Sulua*** was a case concerning possession; not cultivation. Although, ***Sulua*** tariff guidelines were expected apply to the offending verbs of *"acquire, supplies, produces, manufactures, **cultivates**, uses or administers"* in section 5(a) of the Illicit Drugs Control Act 2004, it is clear that the sentencing judges have not always applied ***Sulua*** guidelines when it comes to offences involving cultivation. The following are examples.

[33] In **State v Matakorovatu** [2017] FJHC 742; HAC355.2016 (29 September 2017) the learned trial judge had taken 07 years as the starting point for the second count on cultivation for the reasons set out in paragraphs 7-10 of the sentencing order.

> *'7. In the case of **Tuidama v State** [2016] FJHC 1027; HAA29.2016 (14 November 2016) this court decided to apply the following tariff for the offence of unlawful cultivation of illicit drugs*
>
> *a. The growing of a small number of plants for personal use by an offender on a non-commercial basis - 1 to 2 years imprisonment;*

b.Small scale cultivation for a commercial purpose with the objective of deriving a profit - 3 to 7 years imprisonment;

c.Large scale commercial cultivation - 7 to 14 years imprisonment.

8. Cultivating up to 10 plants can be considered as non-commercial cultivation if there is no other evidence to the contrary. Cultivating more than 10 plants up to 100 plants can be considered as a small scale commercial cultivation and cultivating more than 100 plants can be considered as a large scale commercial cultivation.

9. With regard to the second count you have admitted that you were involved in cultivating 824 plants. Your sentence for the second count should be within the range of 7 to 14 years imprisonment as you have been engaged in large scale commercial cultivation according to the above categorisation.

10. I will first determine the sentence for the second count. I select 7 years imprisonment as the starting point of your sentence.'

'11.Even though the weight of the plants was recorded as 7975.7 grams, you have been involved in cultivating 824 plants of cannabis sativa. The number of plants suggests that you have been involved in a very large scale cultivation of illicit drugs. Considering this factor I add 11 years to your sentence. The summary of facts does not reveal any other aggravating factor. Your sentence now is 18 years imprisonment.'

[34] In ***Tuidama*** the High Court had decided to apply the following tariff based on the number of cannabis plants for the offence of unlawful cultivation of illicit drugs calling in aid the judgment in **Meli Bavesi v State** [2004] FJHC 93; HAA 0027.2004:

a. The growing of a small number of plants for personal use by an offender on a non-commercial basis - 1 to 2 years imprisonment; [Cultivating up to 10 plants]
b. Small scale cultivation for a commercial purpose with the objective of deriving a profit - 3 to 7 years imprisonment; [Cultivating more than 10 plants up to 100 plants]
c. Large scale commercial cultivation - 7 to 14 years imprisonment. [Cultivating more than 100 plants]

[35] In **State v Nabenu** [2018] FJHC 539; HAA10.2018 (25 June 2018) the High Court had suggested the following tariff after considering a number of previous decisions including ***Tuidama***:

a. The growing of a small number of plants (less than 9 plants with assumed yield of 40g per plant) for personal use by a first offender - non-custodial sentence or a fine at the discretion of the court.
b. Small scale cultivation (10 to 30 plants with assumed yield of 40g per plant) for a commercial purpose with the objective of deriving a profit - 1 to 3 years imprisonment, with or without a fine at the discretion of the court.
c. Medium scale commercial cultivation (30 -100 plants) - 3 to 7 years imprisonment with or without a fine at the discretion of the court.
d. Large scale cultivation capable of producing industrial quantities for commercial use (more than 100 plants) 7 - 14 years imprisonment with or without a fine at the discretion of the court.

[36] ***Nabenu*** *inter alia* had equated the number of plants to a corresponding assumed weight. Both ***Tuidama*** and ***Nabenu*** had also considered the purpose of cultivation (*i.e.* personal or commercial) and scale of the cultivation to determine the sentence.

[37] **Dibi v State** [2018] FJHC 86; HAA96.2017 (19 February 2018) had referred to **In re Koroi** [2012] FJHC 1029; HAR002-006.2012 (20 April 2012) where the following tariff for cultivation had been pronounced deviating from ***Sulua*** on the basis that ***Sulua*** did not apply to sentences involving cultivation.

> *'19.] For ease of reference those tariffs as suggested by the U.K. Sentencing Council and adopted by this Court in Koroi are:*
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> > *(i) Possession of up to 100 grammes or cultivation of no more than 5 plants, non custodial sentences at the discretion of the Court*
> >
> > *(ii) Possession of 100-1000 grammes and cultivation of 5-50 plants; custodial sentences in the range of one year to six years*
> >
> > *(iii) Possession of more than 1000 grammes and cultivation of more than 50 plants, custodial sentences of six years or more*
> > *(iv) Possession of very large quantities (5kg or more) custodial sentences in the range of 10 to 15 year*
>
> *20.] There will be times when the plants are many, but small, yielding a minimal weight (as in the present appeal) and a balance will have to be struck between use of the above categories.*

[38] ***Tuidama*** had been criticized in ***Dibi*** on the ground that it had failed to consider ***Koroi*** and instead had followed 'discredited' ***Meli Bavesi.***

[39] ***Meli Bavesi*** in considering an appeal against possession stated the following guidelines for cultivation and possession.

> *'**Category 1** – The growing of a small number of cannabis plants for personal use by an offender or possession of small amount of cannabis coupled with "technical" supply of the drug to others on a non-commercial basis. First offender a short prison term, perhaps served in the community. Sentencing point 1 to 2 years.*
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> ***Category 2** – Small scale cultivation of cannabis plants or possession for a commercial purpose with the object of deriving profit, circumstantial evidence of sale even on small scale commercial basis. The starting point for sentencing should generally be between 2 to 4 years. However, where sales are limited and infrequent and lowest starting point might be justified.*
>
> ***Category 3** – Reserved for the most serious classes of offending involving large scale commercial growing or possession of large amounts of drug usually with a considerable degree of sophistication, large numbers of sales, circumstantial or direct evidence of commercial involvement the starting point would generally be 5 to 6 years.*

[40] There is an appeal pending against the decision in ***Tuidama*** filed by the State bearing No. AAU003 of 2017 where the State had demonstrated with 08 examples that while some High Court judges follow ***Sulua*** guidelines others rely on ***Tuidama***, ***Dibi*** and ***Nabenu*** and stated that this has resulted in lack of uniformity in the sentencing in cases involving cultivation of illicit drugs.

[41] This is clearly is not a healthy development [see paragraph 25 of the Ruling in **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020)] made on a similar situation in sentencing relating to aggravated burglary.

[42] It has to be admitted that there was no specific discussion on sentencing guidelines on cultivation in ***Sulua*** or in subsequent decisions in **State v Dreduadua** [2020] FJCA 7; AAU65 of 2016 (27 February 2020) and **State v Mata** [2019] FJCA 20; AAU0056 of 2016 (07 March 2019) as this issue of disparity of sentencing arising from different tariff regimes was not argued before the Court of Appeal. Therefore, there is an urgent need for the Court of Appeal or the Supreme Court to revisit the sentencing guidelines

on cultivation of illicit drugs in the light of the current situation which has surfaced in the recent past.

[43] Whether sentencing in offences involving cultivation should be based on weight of cannabis or the number of plants or a combination of both, cultivated in any given extent of land where cannabis plants are found with all other factors being considered as aggravating or mitigating the offence, would be a vital question to answer.

[44] Similarly, if the number of plants could be equated scientifically to a corresponding weight then whether ***Sulua*** guidelines could still be applied perhaps with suitable modifications even in the case of cultivation with other aggravating and mitigating factors specific to cultivation being taken into account in arriving at the final sentence, is also another matter to be considered. However, if weight is considered the determining guide for cultivation offences whether it is the weight of dry leaves or the weight of raw plants that should be considered is also a vital question to be answered as otherwise there is an anomaly between sentencing in possession and cultivation based on weight as highlighted in **State v Vuicakau** [2018] FJCA 12; HAC 01 of 2018 (19 January 2018).

[45] In **Matakorovatu v State** [2020] FJCA 84; AAU174.2017 (17 June 2020) and **Seru v State** [2020] FJCA 126; AAU115.2017 (6 August 2020) also I discussed the same issue in detail.

[46] Though, the ground of appeal urged by the appellant against sentence cannot be said to have a real prospect of success given the final sentence, the above issue relating to sentencing tariff on cultivation poses a question of law requiring no leave to appeal. However, as a matter of formality I allow leave to appeal.

[47] The delay is not substantial and the reason for the delay is plausible. The respondent would not be prejudiced by the extension of time.

Order

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is allowed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL