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

CRIMINAL APPEAL NO.AAU 119 of 2017
[High Court of Suva Criminal Case No. HAC 106 of 2016S]

BETWEEN	:	**MIKAELE RAIVASI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**14 September 2020**
Date of Ruling	:	**22 September 2020**

RULING

[1] The appellant had been charged with two others (AAU 117 of 2017/AAU 133 of 2018 & AAU 132/2017) in the High Court of Suva 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

SULIASI BOLA, ELISEO TUKANA *and* ***MIKAELE RAIVASI*** *between the 1st day of July 2015 and the 04th day of December 2015 at Kadavu in the Eastern Division, without lawful authority cultivated 951 plants of cannabis sativa, an illicit drug weighing a total of 134.1 kilograms.*

[2] At the conclusion of the summing-up, on 14 August 2017 two of the assessors had opined that the appellant (03rd accused in the High Court) was not guilty as charged. The single assessor's opinion had been that he was guilty. On 15 August 2017 the learned trial judge had disagreed with the majority of assessors, convicted the appellant and sentenced him on 16 August 2017 to 08 years of imprisonment subject to a non-prole period of 07 years.

[3] The appellant had signed a notice of appeal on 16 August 2017 (received by the CA registry on 18 August 2017) only against conviction. Amended grounds of appeal had been tendered on 12 September 2017. The Legal Aid Commission had filed an amended notice of appeal and written submissions on behalf of the appellant on 29 June 2020 against conviction. The State had tendered its written submissions on 01 July 2020.

[4] The brief summary of facts according to the summing-up is as follows.

> *'15. According to the prosecution, the three accused had been cultivating cannabis sativa plants an illicit drug, in the interior hills of Gasele. Upon information obtained from police informers, a group of police officers travelled from Rakiraki village to the interior. There were led by Suliasi Bola who showed them the marijuana plants and farm. The police counted and uprooted 969 marijuana plants, which they later took to Kadavu Police Station. On 7 December, 2015, the plants were analysed by a government analyst and were found to be cannabis sativa weighing about 134.2 kilograms. The three accused were arrested by Police.*
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> *16. They were separately caution interviewed by police. Suliasi Bola was interviewed on 4, 5 and 6 December 2015 by DC 3691, Joape Qio (PW3). Eliseo Tukana was interviewed on 4, 6 and 8 December 2015, 2015 by DC 3650 Semi Daunitutu (PW 7). Mikaele Raivasi was interviewed by DC 3630 Simione Nakuna (PW 10). In their caution interview statements, all accused allegedly confessed to unlawfully cultivating marijuana, an illicit drug in Kadavu between 1 July and 4 December, 2015. In his charge statement, Eliseo Tukana also confessed to unlawfully cultivating cannabis sativa in Kadavu at the material time. All the accused were taken before the Kadavu Magistrate Court on 10 December, 2015 and formally charged with unlawfully cultivating cannabis sativa plants, an illicit drug.'*

[5] Therefore, it appears that the only evidence against the appellant had been his cautioned interview which he had challenged on the basis that the police promised him that he will not be charged and could go home for Christmas if he admitted the offence and he trusted the police and therefore, admitted the offence. In other words, he appeared to have taken up the position that the police had tricked him into admitting the offence. The appellant had been interviewed on 04, 05 and 08 December 2015 and he had not made any confession on the first day but on the second day and third day he is supposed to have confessed to his involvement.

[6] In his amended grounds of appeal filed in person by the appellant he had stated that the learned trial had failed to hold a *voir dire* inquiry regarding the disputed cautioned interview as to its voluntariness and admissibility. None of the counsel was in a position to give an affirmative answer to this court as to whether there had been a *voir dire* inquiry and whether a ruling had been delivered. None of them was in possession of a copy of any ruling delivered consequent to such *voir dire* inquiry either.

[7] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[8] Grounds of appeal urged on behalf of the appellant are as follows.

Against Conviction

Ground 1 - That the Learned Trial Judge erred in law and in fact when he misdirected the Assessors by directing them that if they accept the accused's alleged confession in their interview and/or charge statements then they must find them guilty as charged thus causing a grave miscarriage of justice to the Appellants.

Ground 2 – That the Learned trial Judge erred in law and in fact when he did not properly assess the voluntariness of the admissions in the caution interview and charge statements and the weight and reliance that should have been placed on it.

Ground 3 - That the Learned trial Judge erred in law and in fact when he convicted the 1st Appellant without giving cogent reasons for disagreeing with the majority opinion of the Assessors.

01st ground of appeal

[9] The appellant's criticism is based on paragraph 34 of the summing-up where the trial judge had directed the assessors as follows. He contends that the judge had misdirected the assessors on their use of the admissions in the appellant's caution interview and relies on **Korodrau v State** [2019] FJCA 193: AAU090.2014 (3 October 2019) to support his contention. The appellant seems to argue that the trial judge had simply directed the assessors to find guilty if they accepted his confession.

> *'34. If you accept the accused's alleged confession in their interview and/or charge statements, you must find them guilty as charged. If otherwise, you must find them not guilty as charged. It is a matter entirely for you.'*

[10] The directions to assessors on how to evaluate a confessional statement had been considered in detail in the decisions of **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51), **Tuilagi v State [2017] FJCA 116; AAU0090.2013 (14 September 2017)** and then in ***Korodrau*** the Court of Appeal contemplated the effect of the omission to give those directions on the verdict as follows.

'[54] Having examined several previous authorities the Court of Appeal in ***Volau v State*** *AAU0011of 2013: 26 May 2017 [2017] FJCA 51 stated as a general proposition on how to direct the assessors on a caution interview as follows.*

> *' 20 (iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them.'*

[55] However, the Court of Appeal in ***Volau*** *also correctly stated (referring to* ***Prasad v The Queen*** *[1981] 1 A. E. R 319 and* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30]) that the likely effect of any misdirection, non-direction or irregularity on the aspects of making, voluntariness, probative value (i.e. truth) and weight (i.e. sufficiency) of a confessional statement upon the decision of the assessors should be judged in the light of the now well-established position in Fiji that the decision on guilt or innocence of an accused is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict.*

[56] The Supreme Court had earlier remarked in ***Boila v The State*** *CAV005 of 2006S: 25th February 2008 [2008] FJSC 35 'The adequacy of a particular direction will necessarily depend on the circumstances of the case'.*

[57] Before ***Volau*** *the Supreme Court in* ***Khan v State*** *CAV 009 of 2013: 17 April 2014 [2014 FJSC 6] where the Petitioner's counsel had argued that the directions on how to approach the answers in the caution interview were inadequate and there were no adequate directions on weight, said that ' There is no incantation which must be read here. The required guidance need not be formulaic.'*

[58] The Supreme Court reinforced these remarks recently in ***Tuilaselase v State*** *CAV0025 of 2018: 25 April 2019 [2019] FJSC 2 where the complaint was that the trial judge had misdirected himself when he failed to give any direction to the assessors and to himself on the truth and weight of the caution statement, by stating as follows.*

> *'26.The enquiry into whether the directions to the assessors were sufficient must therefore be fact specific. The weight to be afforded to the confession in this case, was clear. The detailed nature thereof would almost inevitably give rise to a conviction. As to the truth of the statement, there was never any suggestion by the petitioner that even if*

voluntarily made the statement may be untrue. In this light, I believe the direction given by the trial judge in paragraph 38 of his summing up was quite sufficient....'

In paragraph 38 referred to by the Supreme Court in ***Tuilaselase*** *in the summing up as given below has no specific reference to the aspect of 'truth' and or 'weight'.*

"....However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of facts, you are entitled to rely on them for or against the accused".

[59] What is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt (see ***Volau, Boila, McGreevy v Director of Public Prosecutions*** *[1973] 1 WLR 276,* ***Kalisoqo v R*** *Criminal Appeal No. 52 of 1984) which the trial judge had given in the summing up.*

[11] The Court of Appeal finally remarked in ***Korodrau*** as follows.

'[60] Therefore, it appears that (though due reverence is still accorded) there is no longer any uncompromising insistence on rigid adherence to the traditional formula in the summing up on the caution interview in Fiji. No dogmatic or ritualistic words or forms are demanded or at least the departure from the ideal recipe would not be considered fatal to a conviction provided the appellate court is satisfied that taking into consideration all the circumstances surrounding the making of the confession and totality of the evidence led at the trial, the reasonably minded assessors would not have expressed a different opinion and the trial Judge would not have arrived at a different verdict in his judgment (being the ultimate decider of facts and law) on the admissibility, weight and truth of the caution interview and the consequential guilt or innocence of the appellant.'

[12] A summing-up should be considered in its totality and not in watertight compartments. I think the most objectionable word in the impugned paragraph is *'must'*. Undoubtedly, the use of it could have been avoided. However, on the other hand in paragraph 35 of the summing-up the trial judge had directed the assessors that they must find the appellant not guilty if they accepted his position that the confession had been obtained by false promises by the police. Similarly, the trial judge had given balanced directions in paragraph 38 of the summing-up in that he had directed them that burden of proof beyond reasonable doubt lied with the prosecution and never shifted at any stage of the trial and the appellant did not have to prove his innocence or anything. The assessors had been further directed that if they were satisfied beyond

reasonable doubt and they were sure of the appellant's guilt them must find him guilty but if they were not to accept the prosecution version of events and not satisfied beyond reasonable doubt and they were not sure of the appellant's guilt, they must find the appellant not guilty.

[13] Considering the fact that the appellant's conviction or acquittal depended totally on his confession and that the trial judge had used the same word 'must' even in his directions on the acquittal of the appellant as pointed out above, the impugned word 'must' in paragraph 34 cannot be said to have caused a miscarriage of justice. What the trial judge had stated in paragraph 34 had been evened out in subsequent paragraphs.

[14] In any event, the trial judge in paragraph 32 of the summing-up has given adequate directions to the assessors to consider whether the appellant had made the confession, whether it was true and the question of voluntariness *vis-à-vis* the weight to be attached to the confession.

[15] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[16] The appellant argues that it is clear from paragraph 30 of the summing-up that the appellant had not confessed on the first day of the interview but on the subsequent two days he had confessed and it is highly improbable that he would have not confessed voluntarily on the first day but only on the subsequent days. The summation of his argument appears to be that he had agreed with the answers given by the police in the cautioned interview on the subsequent days due to the promises given by the police.

[17] However, it appears from the summing-up that the trial judge had placed the appellant's position regarding how the appellant came to confess to the crime clearly before the assessors in paragraphs 20, 30, 31 and 35 and the fact that he had not made a confession on the first day but on two subsequent days in paragraph 30 of the summing-up. However, the failure to consider this aspect in the judgment may be relevant under the third ground of appeal.

[18] Therefore, I cannot see a reasonable prospect of success in this ground of appeal.

03rd ground of appeal

[19] The appellant's contention is that that trial judge had failed to give cogent reasons in disagreeing with the majority of assessors and relies on the decision in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009). When an appellant complains that the trial judge had not followed the guidelines given in several judgments cited above as to his burden when disagreeing with the assessors, such compliance becomes even more important when the trial judge had given what could be considered a complete summing-up on all aspects of law and facts to the assessors but they had returned with an opinion of not guilty.

[20] I examined ***Lautabui*** **, Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) and stated in **Eroni Cevamaca v State** AAU 0060 of 2017 (22 September 2020) as follows.

> *'[32] Therefore, there still appears to be some gray areas flowing from the above judicial pronouncements as to what exactly the trial judge's scope of duty is when he agrees as well as disagrees with the majority of assessors.*
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> *[33] However, what could be identified as common ground is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trail judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter.*
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> *[34] On the other hand when the trial judge disagrees with the majority of assessors the trial judge should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the*

weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.

[35] In my view, in both situations, a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

[21] Although, the trial judge had somewhat identified his duty in disagreeing with the majority of assessors in paragraph 03 of the judgment, unfortunately, the only reason given by him for accepting the opinion of the dissenting single assessor on the guilt of the appellant is that

> *'5. My reasons are as follows: I accept Accused No.3's confession in his caution statement. I accept that he made his confession voluntary and they were the truth.....'*

[22] This, in my view is hardly an independent assessment and evaluation of the evidence. Nor does it contain 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors. It cannot, however, be decided at this stage whether these reasons are capable of withstanding critical examination in the light of the whole of the evidence presented in the trial due to the want of complete appeal record.

[23] It also does not help that there appears to be no *voir dire* ruling where the trial judge's views on the weight of evidence and as to the credibility of witnesses could be gathered. I wonder whether the trial judge had at least directed himself on the same lines as he directed the assessors in the summing-up, for there is no such indication in the judgment.

[24] Therefore, the issue whether the trial judge had discharged his burden in disagreeing with the majority of assessors is a question of mixed law and facts which deserves to be looked into by the full court with the help of the complete appeal record and decide the appeal in the light of section 23(1) of the Court of Appeal Act.

[25] Thus, I am inclined to grant leave to appeal against conviction.

Sentence

[26] The appellant has not appealed against sentence. Mr. Burney indicated at the leave to appeal hearing that the state would not object to the appellant canvassing his sentence in appeal given the current state of confusion arising from the present sentencing practices for cultivation offences and this court granting leave to appeal against sentence.

[27] It is clear from paragraph 5 of 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 sentencing tariff had been set at 07-14 years of imprisonment for possession of cannabis sativa of 4000g or above.

[28] In paragraph 6 of the sentencing order the judge had identified one aggravating factor namely the huge quantity of 134.2 kg of cannabis sativa plants 'cultivated' by the appellant.

[29] The trial judge had started with 12 years in sentencing the appellant and added further 07 years for the large amount of 134.2 kg of cannabis sativa plants 'cultivated' making it 19 years and after giving discount for mitigating factors, the judge had ended up with a sentence of 08 years of imprisonment on the appellant.

[30] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting' and question the appropriateness in identifying the exact amount by which the sentence is increased for each of the aggravating factors stating that it is too mechanistic an

approach. Sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[31] The Supreme Court once again said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that whatever methodology judges choose to use, the ultimate sentence should be the same. If judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.

[32] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[33] Unfortunately the trial judge had fallen into the error of double counting in picking a very high starting point of 12 years of the tariff of 07-14 years because of the large quantity of 134.2 kg of cannabis sativa plants and then taken the same large quantity of 134.2 kg of cannabis sativa plants as the sole aggravating factor to increase the sentence by further 07 years.

[34] Thus, this sentencing error has a reasonable prospect of success in appeal. However, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach

taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[35] The appellant should be given leave to appeal against sentence on this sentencing error. The appropriate sentence is a matter for the full court to decide [Also see **Salayavi v State** AAU0038 of 2017 (03 August 2020) and **Kuboutawa v State** AAU0047.2017 (27 August 2020) for detailed discussions].

[36] The state concedes that leave to appeal against sentence could be granted on a different footing namely the general state of confusion prevalent in the sentencing regime on cultivation of illicit drugs among trial judges which is yet unresolved by the Court of Appeal or the Supreme Court.

[37] Some High Court judges and Magistrates apply sentencing guidelines in **Sulua v State** *(supra)* in respect of cultivation as well while some other High Court judges have suggested different sentencing regimes on the premise that there is no guideline judgment especially for cultivation of marijuana[1] meaning that ***Sulua*** guidelines may not apply to cultivation and the sentences not following ***Sulua*** guidelines have been based by and large on the number of plants and scale and purpose of cultivation[2]. State has cited the scale of operation measured by the number of plants (incorporating potential yield) and the role of the accused as a measure of his responsibility as the basis for possible guidelines in 'cultivation' cases deviating from ***Sulua*** guidelines. Interestingly, having applied ***Sulua*** guidelines the trial judge himself had considered the role played by the appellant *i.e.* assisting the others to weed the marijuana farm on two occasions, as a mitigating factor to reduce the sentence by 8 ½ years.

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[1] See **State v Bati** [2018] FJCA 762; HAC 04 of 2018 (21 August 2018)

[2] **Tuidama v State** [2016] FJHC 1027; HAA29.2016 (14 November 2016), **State v Matakorovatu** [2017] FJHC 742; HAC355.2016 (29 September 2017), **Dibi v State** [2018] FJHC 86; HAA96.2017 (19 February 2018), **State v Nabenu** [2018] FJHC 539; HAA10.2018 (25 June 2018).

[38] These disparities and inconsistencies have been amply highlighted in four recent Rulings[3] in the Court of Appeal and therefore, the same discussion need not be repeated here.

Order

1. Leave to appeal against conviction is allowed.
2. Enlargement of time to appeal against sentence (within 30 days) is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

[3] **Matakorovatu v State** [2020] FJCA 84; AAU174.2017 (17 June 2020), **Kaitani v State** [2020] FJCA 81; AAU026.2019 (17 June 2020), **Seru v State** [2020] FJCA 126; AAU115.2017 (6 August 2020) and **Kuboutawa v State** AAU0047.2017 (27 August 2020)