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

CRIMINAL APPEAL NO.AAU 132 of 2017
[High Court of Suva Criminal Case No. HAC 106 of 2016S]

BETWEEN	:	**SULIASI BOLA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. N. Tuifagalele 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 119/2017) 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 the assessors had unanimously opined that the appellant (01st accused in the High Court) was guilty as charged. On 15 August 2017 the appellant had been convicted and on 16 August 2017 sentenced to 14 years of imprisonment subject to a non-prole period of 13 years.

[3] The appellant had signed a timely notice of appeal on 29 August 2017 (received by the CA registry on 12 September 2017) only against conviction. Tuifagalele Legal had filed written submissions on behalf of the appellant on 15 June 2020 on five grounds of appeal against conviction and one ground of appeal against sentence but the amended grounds of appeal are not available in the case record. Therefore, it is not clear when the amended grounds had been tendered.

[4] When the appellant's counsel Mr. N. Tuifagalele appeared in court on 16 June 2020 this court advised him to file a copy of his amended grounds of appeal in the CA registry but he had not complied. At the leave to appeal hearing too he did not have a copy of the amended grounds of appeal to be submitted to this court. Moreover, though the counsel for the appellant had advanced a single ground of appeal against sentence in his written submissions, he had not tendered an application for enlargement of time along with an affidavit from the appellant explaining the delay as the appellant had not earlier appealed against sentence within time. The State had tendered its written submissions on 30 June 2020.

[5] 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.*
>
> *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.'

[6] 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 repeatedly sworn at him and assaulted him and that it was not voluntarily made or given on his own free will. The appellant had been interviewed on 04, 05 and 06 December 2015 and he had not made any confession on the first day but at the marijuana farm on the second day he is supposed to have confessed to his involvement.

[7] According to the summing-up, the voluntariness of the cautioned interview had been hotly debated during the trial. In his application for leave to appeal filed in person by the appellant he had stated that the learned trial had failed to hold a *voir dire* inquiry regarding the objection to the admissibility of his cautioned interview. 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 a *voir dire* inquiry. The counsel for the appellant who had appeared for him at the trial seemed to indicate that there was a *voir dire* inquiry but no written ruling was delivered by the trial judge except an oral pronouncement that the confession had been ruled admissible.

[8] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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.

[9] 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 a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable 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.*

[10] In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019), the Court of Appeal discussed how to deal with a ground of appeal urged for the first time in appeal before the full court and I shall follow the same thinking in this instance though the matter is still at the leave to appeal stage.

> *'[14] Therefore, in my view, the most reasonable and fair way to address this issue is to act on the premise that the new grounds of appeal against conviction submitted by the LAC should be considered subject to the guidelines applicable to an application for enlargement of time to file an application for leave to appeal, for they come up for consideration of this court for the first time after the appellant's conviction. This should be the test when the full court has to consider fresh grounds of appeal after the leave stage. In other words, the appellant has to get through the threshold of extension of time (leave to appeal would automatically be granted if enlargement of time is granted) before this court could consider his appeal proper as far as the two fresh grounds are concerned.*

[11] 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. This is relevant to the appellant's sentence appeal.

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

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(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?*

[13] ***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.'*

[14] 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*** regarding the sentence appeal first before looking at the other factors which will be considered, if necessary, in the end.

[15] Grounds of appeal urged on behalf of the appellant are as follows:

> *Against conviction*
>
> *'Ground 1 – The Learned Trial Judge erred in fact when he failed to consider the appellant's constitutional rights to legal representation during his caution interview for 3 days.*
>
> *Ground 2 – The learned Trial Judge erred in law and in fact when he started in his summing up at page 9, paragraph 34 "if you accept the accused's alleged confessions 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". – the learned trial judge is seen to have limited the assessors view for them to only consider the appellant's admission in his caution interview other than the whole trial.

Ground 3 – The learned Trial Judge erred in law and in fact when he failed to elaborate the details of the debate he mentioned in his summing up at paragraph 27 when he stated "the details of the debate is still fresh in your mind and I do not wish to bare you with the details".

Ground 4 – The learned Trial Judge erred in law and in fact when he failed to consider that the appellant was sworn at and assaulted I order for him to make his confession after he told the police that the said farm did not belong to him but to his uncle Maleli Nuku at question 35 of his interview statement.

Ground 5 – The learned trial Judge erred in his inadequate assessment of the caution interview admission of the Appellant on its truth aspect.

Against Sentence

Ground 1 – The Learned Trial Judge erred in his sentencing discretion by beginning his sentencing computation at the higher end of the tariff thus culminating in a high sentence which is beyond the applicable tariff.

01st ground of appeal

[16] The appellant's complaint here is that his constitutional rights to have legal representation during the cautioned interview had been violated. In **Parker v State** [2020] FJCA 10; AAU007.2014 (27 February 2020) the Court of Appeal held referring to the decision in **Josua Raitamata v The State;** [2008] FJSC 32; CAV 0002.2007(25 February 2008)

> *'[20] Thus, in my view, the answer relating to the issue of the lack of legal representation should be clear. According to the Supreme Court's decision, there is no absolute right for legal representation and as it is trite law, each case should be determined on its own merits.'*

[17] The appellant states that there were two lawyers from Legal Aid Commission visiting Kadavu Island for a court sitting in Vunisea during the time the appellant was held in police custody but he was not allowed to speak to them though he had wanted to seek the services of a lawyer. According to him, if he had obtained legal representation, the police would not have been in a positon to obtain his cautioned interview under oppression.

[18] The counsel for the appellant, however, conceded that he had no material to demonstrate to this court that the appellant had in fact requested legal aid at any time during his detention by the police. The trial judge had stated in paragraph 26 of the summing-up that the appellant had been given his right to counsel but whether he had opted to exercise that right or not is not clear. Further, whether he had raised this objection to the admissibility of his cautioned interview at the *voir dire* inquiry purportedly held cannot be ascertained without the *voir dire* inquiry proceedings as no *voir dire* ruling is available.

[19] Therefore, I see no reasonable prospect of success in this appeal ground at this stage.

02nd ground of appeal

[20] 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 already predetermined the outcome of the trial by focusing on the admission made on the cautioned interview alone rather than considering how the confession was made in the first place.

> *'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.'*

[21] 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 36 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 under duress and oppression. 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.

[22] 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.

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

03rd ground of appeal

[24] The appellant contends that the trial judge should have given details of the 'debate' he had referred to, at paragraph 27 of the summing-up. However, it is clear what he was referring to was the appellant's challenge to the confession at the trial and the attempt by the prosecution to convince the assessors to act upon it. The trial judge had in fact given details of the appellant's position at paragraph 9 and the prosecution's position in paragraph 26. Then, the judge had directed the assessors as to how they should approach the appellant's confession in paragraph 32. I do not think that any more details would have been needed to be conveyed to the assessors on this issue.

[25] Therefore, there is no reasonable prospect of success on this ground of appeal.

04th ground of appeal

[26] The submissions made under this ground of appeal do not relate to the gist of the complaint it articulates. In the submissions the appellant argues that he had told the police that the farm belonged to his uncle Maleli Nuku but trial judge had failed to ask why Maleli Nuku had not been interviewed or called to give evidence. I do not think that the trial judge could be assigned such an inquisitorial duty to perform in our criminal justice system. The appellant, defended by counsel, could have called Maleli Nuku to give evidence for the defense if his evidence was going to be favorable to the appellant. It is not clear whether the appellant's counsel had even cross-examined the

investigating police officers on this aspect to create a foundation for this complaint. In any event, the charge levelled against the appellant had little to do with the ownership of the farm but it was on cultivation. Maleli Nuku's alleged ownership could not have saved the appellant.

[27] Secondly, the appellant argues that he was a first time offender and therefore him not having complained to the Magistrate or the High Court of police mistreatment when produced for the first time should not have been taken, as done by the judge in paragraph 4 of the judgment, to mean that the confession was true. The contents in paragraph 4 go to the voluntariness of the appellant's cautioned interview (not the truth of it) which should have been decided by the trial judge at the *voir dire* inquiry. It is also on the credibility of the appellant about his allegation of police mistreatments. The judgment merely reiterates that the judge had not changed his mind on that aspect during the trial. The *voir dire* proceedings and the *voir dire* ruling, if any would reveal why the judge had decided on the voluntariness and then the admissibility of the appellant's confession.

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

05th ground of appeal

[29] The appellant complains of inadequacy of the trial judge's comments on the truth of his confession in the judgment where the trial judge was agreeing with the unanimous opinion of the assessors as to the guilt of the appellant.

[30] In **Manan v State** [2020] FJCA 157: AAU0110.2017 (3 September 2020)] it was stated

> *'18. 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.*

[31] The judge had directed the assessors specifically on the 'truth' aspect of the appellant's confession in paragraph 32 of the summing-up which is very much part of the judgment, 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). The trial judge had no further obligation to embark on an extensive discussion on the same aspect of 'truth' of the confession in the judgment other than what he had stated in paragraph 4 of the judgment.

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

06th ground of appeal (sentence)

[33] Despite the appellant not having made an application for enlargement of time as pointed out at the beginning, I would consider the sentence appeal because the state has conceded that leave to appeal could be granted against the sentence due to the issue of having two different methods of sentencing in offences relating to cultivation of illicit drugs among trial judges which is yet to be resolved by the Court of Appeal or the Supreme Court.

[34] Though, the appellant challenges his sentence on a different basis I would consider that as well in the overall context above highlighted. He complains that the trial judge had picked a high starting point of 12 years without assigning any reason. 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.

[35] 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.

[36] 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 discounts for mitigating factors, the judge had ended up with a sentence of 14 years of imprisonment on the appellant.

[37] 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.

[38] 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.

[39] 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.

[40] It is clear to me that 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 'cultivated' by the appellant 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.

[41] Thus, this complaint as a ground of appeal has a real 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).

[42] The appellant should be given leave to appeal against sentence on his ground of appeal against sentence. 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]

[43] The state has conceded that this is an appropriate appeal to grant leave to appeal against sentence 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.

[44] 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

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

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 one of the accused as a mitigating factor to reduce his sentence drastically.

[45] 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.

[46] The delay is substantial and no reasons have been given for the delay. The respondent would not be prejudiced by the extension of time on sentence.

Order

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

[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) and **State v Nabenu** [2018] FJHC 539; HAA10.2018 (25 June 2018).

[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)