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

CRIMINAL APPEAL NO. AAU 65 OF 2016
(High Court Criminal Case: HAC 8 of 2015)

BETWEEN : **THE STATE**

Appellant

AND : **ETUATE DREDUADUA**

Respondent

Coram : **Gamalath JA**
Prematilaka JA
Nawana JA

Counsel : **Mr A Jack for the Appellant**
Ms S Nasedra for the Respondent

Date of Hearing : **4 February 2020**

Date of Judgment : **27 February 2020**

JUDGMENT

Gamalath JA

[1] I have read the judgment in draft of Nawana JA and I agree with the reasons and the orders herein.

Prematilaka JA

[2] I have read in draft the judgment of Nawana JA and agree with the reasons and conclusions therein.

Nawana JA

[3] This is an appeal by the state against the sentence imposed on the accused-respondent (the respondent).

[4] The respondent stood charged before the High Court of Labasa on one count of unlawful cultivation of *cannabis sativa*, an illicit drug, in a total weight of 10 Kilograms, contrary to Section 5 (a) of the Illicit Drugs Control Act No 09 of 2004.

[5] The offence was alleged to have been committed at Savusavu in the Northern Division of Fiji between 01 December 2014-06 January 2015.

[6] After trial, the respondent was found guilty by a unanimous opinion of the assessors. The learned trial judge, having agreed with the opinion of the assessors, convicted the respondent and imposed a term of two year and eight-month imprisonment with a non-parole period of two years having set the starting point at five years. The sentence was given effect to, from 26 May 2016.

[7] The state lodged a timely appeal on 03 June 2016 on the basis that the learned judge had erred in law by his failure to impose a lawful sentence in compliance with the sentencing guidelines as set-out in ***Sulua vs State*** [2012] FJCA 33; AAU 0093. 2008 (31 May 2012) on the basis that the respondent was a '*Category 4 Offender'*.

[8] A single Justice of Appeal, after hearing the application for leave to appeal, where the respondent was represented by counsel, granted leave on 09 July 2019 on application of

the principles laid down in ***Naisua vs State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013).

[9] It was held in ***Naisua***'s case that the Court of Appeal would approach an appeal against a sentence using the principles set-out in ***House v King*** [1936] HCA 40; (1936) 55 CLR 499 and adopted in ***Kim Nam Bae v the State*** (Criminal Appeal No AAU0015 of 1998S). An appellate court will, accordingly, interfere with a sentence if it is demonstrated that the sentencing judge had erred on all or one of the following:

(i) That the learned judge acted upon a wrong principle;

(ii) That the learned judge allowed extraneous or irrelevant matters to affect the judgment;

(ii) That the learned judge mistook facts; and,

(iii) That the learned judge failed to take into account some relevant considerations.

[10] Facts in this appeal are straightforward. The state did not present and pursue its appeal on any other ground than stating that the learned judge had fallen into error in accepting the band of sentence for the offence as a '*Category 3*' offence when the offence, in fact, was a '*Category 4'* offence in line with the decision in ***Sulua v State*** (supra).

[11] The Court of Appeal in ***Sulua***'s case offered sentencing guidelines for offences in relation to *canabis*-related offences under Section 5 (a) of the Illicit Drugs Control Act on the basis of the weight of the substance. Accordingly, the weight of *cannabis sativa* will set the range for the purpose of determining the final sentence.

[12] The '*Category 3*' relates to the possession of 1000 to 4000 grams of *cannabis sativa* where the range of sentence was set between three to seven years, while the '*Category 4*' relates to the possession of 4000 grams and above of *cannabis sativa* where the range of sentence should be between 7 to 14 year-imprisonment.

[13] At the hearing, the respondent was absent. Ms S Nasedra, who appeared for the respondent at the leave to appeal stage was present in court and offered her assistance in clarifying matters in this appeal. Ms S Nasedra submitted that she could not receive instructions; but, informed that the respondent had been released on 05 November 2018 on completion of the sentence as awarded by the High Court on 26 May 2016.

[14] Learned counsel for the state submitted that the sentence awarded by the learned High Court Judge was wrong in principle in light of the sentencing guidelines set in ***Sulua***'s case. It was the learned counsel's submission that the error should not be permitted to stand on the face of the record and needed to be rectified at the intervention of this court.

[15] The appeal came up for hearing upon leave being granted by a single Justice of Appeal. The application for leave to appeal was not resisted by the respondent when he was represented at that stage on the basis that there was an error of law in the sentence.

[16] This court has considered the appeal of the state and the submissions advanced in support. This court upholds the state's submission that there was an error in imposing a sentence based on the range set for possession of 1000 grams to 4000 grams of *cannabis sativa* ('*Category 3*') when the sentence should have been based on the range set for more than 4000 grams of *cannabis sativa* ('*Category 4*').

[17] This court, accordingly, sets-aside the sentence as it is not found to be lawful as the weight involved was 10 Kilograms. However, the issue that this court is confronted with is, how the error could be corrected as against the respondent because the respondent had been released on 05 November 2018 on completion of the sentence as awarded by the High Court and integrated into the community.

[18] Court invited submissions from the state in order to consider the issue as the court primarily did not consider it as desirable to operationalize a sentence, if substituted with an enhanced sentence, on the respondent who has already been integrated with the community.

[19] Learned counsel for the state has filed a concise submission. In his submission, he urges that the appellant be awarded with an enhanced sentence where the time already spent in imprisonment could be considered as a part of the sentence spent in custody and the balance of the enhanced sentence to form a part of the service to the community to be served from now onwards. Learned counsel submitted that this suggestion is consistent with Section 15 (1) (b) of the Sentencing and Penalties Act, 2009.

[20] It was not in dispute that the respondent was the first offender and that there were no aggravating circumstances as noted by the learned sentencing judge in determining the sentence. On the contrary, having set the starting point at 5 years, the learned judge kept on reducing the sentence for mitigating factors, which were found in the respondent's favour.

[21] In the circumstances, I do not take the view that it is proper and desirable to entangle the respondent with another form of sentence and operationalize the same after the respondent had already completed the sentence fifteen months ago and integrated into the community.

[22] Acting under Section 23 (3) of the Court of Appeal Act, I would impose a term of seven year-imprisonment as the sentence in recognition of the error therein, although a sentence at the lowest end of the tariff will always not be the correct sentence for this type of offences. In my view, such a length of the sentence would meet the objectives of Section 4 of the Sentencing and Penalties Act, 2009.

[23] I would, however, not propose to operationalize the sentence. Instead, I would order that the sentence be deemed to have run from 26 May 2016 and that the part of the sentence be treated to have been completed by 05 November 2018, the date on which the respondent was said to have been released. I would order that the balance period of the seven-year term of imprisonment should not be made operative for the reasons set-out above. I am of the view that such an order would meet the interests of justice, as permitted by Section 23 (3) of the Court of Appeal Act, in the circumstances of this case.

[24] I am further of the view that the such an order would also meet the objectives of sentencing within the meaning of Section 4 of the Sentencing and Penalties Act, 2009 insofar as rehabilitation of the offender is concerned.

Orders are:

(i) Sentence dated 26 May 2016 is quashed and set-aside;

(ii) A term of seven-year imprisonment is substituted to be effective from 26 May 2016, a part of which is deemed to have been served by 05 November 2018; and,

(iii) Balance term of seven years should not be operative from 05 November 2018.

Hon. Mr. Justice S Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice P Nawana
JUSTICE OF APPEAL