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

CRIMINAL APPEAL NO.AAU 028 of 2019
[High Court of Lautoka Case No. HAC 140 of 2018]

BETWEEN	**:**	**ORISI TOBUA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	**:**	**30 September 2021**
Date of Ruling	**:**	**01 October 2021**

RULING

[1] The appellant had been charged in the High Court of Lautoka on a single count of Unlawful Cultivation of Illicit Drugs contrary to section 5(a) of the Illegal Drugs Control Act of 2004 committed on 01 November 2016 at Navosa in the Western Division. 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***
>
> ***ORISI TOBUA** between the 1st day of November, 2016 and the 31st day of March, 2017 at Navosa in the Western Division without lawful authority, cultivated 46 plants of Cannabis Sativa, an illicit drug, weighing 8kg.*

[2] On 08 October 2018 the appellant represented by counsel had pleaded guilty. The appellant had admitted the summary of facts. On 19 February 2019 the appellant was sentenced to 11 years and 4 ½ months of imprisonment with a non-parole period of 09 years.

[3] The appellant had filed a timely appeal against sentence. The Legal Aid Commission had lodged an amended ground of appeal and written submission on 27 January 2021 and the State had tendered its written submissions 02 March 2021. Both parties had consented to have a ruling on written submissions filed without a hearing *via* Skype.

[4] The summary of facts is as follows:

> *'On 5/3/17, a team of police officers led by Sergeant 2873 Taivei Turaganivalu (hereinafter "PW1") were deployed for "Operation Cavuraka" at the Navosa Highlands. There were based at the Navosa Police Station. On 20/3/17, PW1 was tasked by DC Masitabua who was the ground commander to lead a raid team consisting of SC 2959 Anasa Kovea, SC 4439 Saiyasi Talemaitoga, SC Elo Maretino, SC 2965 Inoke Tavuyara and SC 1441 Maikeli Vereimi to conduct a drug raid on the highlands of Yauyau in Navosa.*
>
> *The accused, Orisi Tobua (hereinafter "the accused") accompanied the team. They went through Nasivikoso Road, Bukuya, Nanoko Road and arrived at their drop-off zone at Malua Highlands. They reached their drop-off zone at 6.50am. From there, they walked to the farmland at Yauyau. They reached the targeted farm at 10.00am.*
>
> *When they arrived at the farm, they found 46 cannabis sativa plants being planted on the farm. The farm was situated on a slope beside a small creek.*
>
> *While securing the farm, PW1 asked the accused as to whom does the marijuana farm belong to, the accused told PW1 that it belonged to him and that he planted the cannabis sativa alone. The team then uprooted the 46 marijuana plants. PW1 informed the accused that he is under arrest for unlawful possession of illicit drugs and advised him of his rights. They left Yauyau at 2.00pm together with the 46 marijuana plants. They arrived at Navosa Police Station at 6.58pm where PW1 handed the 46 cannabis sativa plants to PC 4880 Saula Kunavatu who was the Crime Writer at Navosa Police Station.*
>
> *The cannabis sativa plants were later taken for analysis. The government analyst confirmed that the plants were cannabis sativa and weighed 8 kilograms.*
>
> *The accused was caution interviewed where he admitted that he has been planting cannabis sativa. The accused was subsequently charged.'*

[5] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test in a timely appeal for leave to appeal against sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] 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.*

[7] The ground of appeal urged on behalf of the appellant is as follows.

> ***Sentence***
> ***Ground 1***
>
> *That the learned trial judge erred in law and fact in sentencing the Appellant using the Kini Sulua guideline when the case is one on cultivation.*

01st ground of appeal (sentence)

[8] The appellant had been dealt with under category 4 of sentencing guidelines in **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012) where the sentencing tariff for possession of cannabis sativa of 4000g or above was set between 07-14 years of imprisonment.

[9] The trial judge had taken 10 years as the starting point and added 04 years to the starting point on account of 46 plants uprooted on the basis that the appellant was engaged in commercial farming for a living. The judge had discounted 02 years for the early guilty plea, remorse and previous good character. After reducing the remand period the final sentence became 11 years and 4 ½ months.

[10] It appears that there is a concern whether the trial judge had double counted the number of plants (consequently the weight of marijuana) as an aggravating factor which the judge had already considered in picking the starting point at 10 years towards the higher end of the tariff.

[11] 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 stated that sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[12] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that 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.

[13] Some judges following **Koroivuki v State** (supra) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[14] 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.

[15] The methodology commonly followed by judges in Fiji is the two-tiered process expressed in the decision in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) which was further elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015). It operates as follows:

> *(i) The sentencing judge first articulates a starting point based on guideline appellate judgments, the aggravating features and seriousness of the offence i.e. objective circumstances and factors going to the gravity of the offence itself [not the offender]; the seriousness of the penalty as set out in the relevant statute and relevant community considerations (tier one). Thus, in determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or after the guilty plea was entered. In doing this the court is taking cognizance of the aggravating features of the offence.*
>
> *(ii) Then the judge applies the aggravating features of the offender i.e. all the subjective circumstances of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, (i.e. a bundle of aggravating and mitigating factors relating to the offender) leading to a sentence end point (tier two).*

[16] However, in applying the two-tiered approach the judges should endeavor to avoid the error of double counting as highlighted by the Supreme Court. The best way obviously to do that is to follow the two-tiered approach diligently as stated above**.** In this regard, it is always helpful for the sentencing judges to indicate what aggravating

factors had been considered in picking the starting point in the middle of the tariff and then to highlight other aggravating factors used to enhance the sentence. If the starting point is taken at the lower end without taking into account any aggravating features, then all aggravating factors can be considered to increase the sentence.

[17] The observations of the Supreme Court in **Qurai v State [2015]** FJSC 15; CAV24.2014 (20 August 2015) are instructive in this regard.

> *'[49] In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one), and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two), before deriving the sentence to be imposed. This is the methodology adopted by the High Court in this case.*
>
> *[50] It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.*
>
> *[51] In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. <u>The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges</u>.'*

[18] This court is faced with exactly the same issue raised by the Supreme Court in this appeal. The trial judge had considered in selecting the starting point only commercial farming arising from the number of plants (corresponding to the weight of cannabis). Although 'objective seriousness' had been mentioned to justify the starting point the trial judge had not elaborated as to what matters had constituted 'objective seriousness' other than commercial farming which was derived from the number of plants. It could therefore be reasonably assumed that it is only the commercial farming arising from the number of plants (and weight of the cannabis) that had gone into the decision of picking the starting point at 10 years. If so, there could be double counting when the sentence was enhanced by further 04 years in consideration of the same commercial farming inferred from the number of plants (and weight) once again for the second time, for the trial judge had not set out any other aggravating factors to add 04 years.

[19] I previously had the opportunity of examining a similar complaint in **Salayavi v State** [2020] FJCA 120; AAU0038 of 2017 (03 August 2020) where I stated:

> *'[30] In the present case, however, it is clear what features the learned trial judge had considered in selecting the starting point. Therefore, it becomes clear that there had been double counting when the same or similar factors were counted as aggravating features to enhance the sentence. Like in this case, if the trial judges state what factors they have taken into account in selecting the starting point the problem anticipated in **Nadan** may not arise. Therefore, in view of the pronouncements of the Supreme Court in **Nadan** it will be a good practice, if not a requirement, in the future for the trial judges to set out the factors they have taken into account, if the starting point is fixed 'somewhere in the middle of the range' of the tariff. This would help prevent double counting in the sentencing process. In doing so, the guidelines in **Naikelekelevesi** and **Koroivuki** may provide useful tools to navigate the process of sentencing thereafter.'*

[20] If ***Naikelekelevesi*** guidance is carefully followed *i.e.* first set out the objective circumstances *i.e.* the factors going to the gravity of the offence to pick the starting point and then state the aggravating features of the offender *i.e.* all the subjective circumstances of the offender to enhance the sentence, the danger of double counting expressed by the Supreme Court may be able to be avoided.

[21] 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).

[22] Nevertheless, whether the sentence imposed on the appellant is justified should be decided by the full court despite the sentencing error of probable double counting. If so, the full court would decide what the ultimate sentence should be. The full court exercising its power to revisit the sentence under section 23(3) of the Court of Appeal Act would have to decide that matter after a full hearing.

[23] 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].

[24] Leave to appeal against sentence could also 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 to be resolved by the Court of Appeal or the Supreme Court.

[25] 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

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

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 earlier cited before this court 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[3].

[26] These disparities and inconsistencies have been amply highlighted in ten recent Rulings[4] in the Court of Appeal and therefore, the same discussion need not be repeated here.

Order

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT 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] **Raivasi v State** [2020] FJCA 176; AAU119.2017 (22 September 2020) and **Bola v State** [2020] FJCA 177; AAU132.2017 (22 September 2020).
[4] **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), **Kuboutawa v State** AAU0047.2017 (27 August 2020), **Tukana v State** [2020] FJCA 175; AAU117.2017 (22 September 2020), **Qaranivalu v State** [2020] FJCA 186; AAU123.2017 (29 September 2020) and **Kaloulia v State** [2021] FJCA 6; AAU0036.2017 (8 January 2021), **Naqeleca v State** [2021] FJCA 7; AAU0093.2017 (8 January 2021), **Ravia v State** [2021] FJCA 65; AAU0071.2019 (4 March 2021) and **State v Tuidama** [2021] FJCA 73; AAU0003.2017 (16 March 2021).