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

CRIMINAL APPEAL NO. AAU 142 of 2016
[In the High Court at Suva Case No. HAC 083 of 2015]

BETWEEN	:	**INOKE RATU**
		Appellant
AND	:	**STATE**
		Respondent

Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Bandara, JA**
Counsel	:	**Ms. S. Prakash for the Appellant in the Sentence Appeal** **Appellant represented himself in the Conviction Appeal** **Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**14 September 2022**
Date of Judgment	:	**29 September 2022**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Bandara, JA and agree with the orders and the conviction appeal should be dismissed and the sentence appeal should be allowed. I concur with the proposed sentence of 12 years imprisonment with a non-parole period of 11 years.

Gamalath, JA

[2] I agree with the draft judgment of Bandara, JA.

Bandara, JA

[3] The Appellant was charged on a single count of Unlawful Cultivation of Illicit Drugs contrary to section 5 (a) of the Illicit Drugs Control Act.

[4] 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***
>
> ***INOKE RATU*** *between 1st day of December 2014 and 7th day of January 2015, at Nabununikoula, Kadavu, in the Eastern Division, without lawful authority cultivated approximately 228 plants of cannabis sativa an illicit drug, weighing approximately 26.4 kilograms.'*

[5] Upon his arraignment before the High Court at Suva, the Appellant pleaded not guilty to the charge and the matter proceeded to trial. At the conclusion of the trial on the 24th August 2016, two assessors found the Appellant not guilty while the other assessor found him guilty.

[6] The Learned High Court Judge disagreed with the majority of assessors and found the Appellant guilty as charged and convicted him. On the same day the Appellant was sentenced to 13 years of imprisonment subject to a non-parole period of 12 years. The present appeal arises out of the said conviction and sentence.

The Appellate Process

[7] The Appellant filed a timely appeal against the conviction and the sentence on the 21st September 2016, with subsequent additional grounds.

[8] In the Leave Ruling on the 26th May 2020, the Single Judge of Appeal refused leave to appeal against the conviction and allowed leave against sentence. Subsequently on the 29th August 2022, the Appellant filed a renewal application pursuing six grounds of appeal against the conviction.

[9] The Legal Aid Commission had assisted the Appellant in filing the sentence appeal only. In the course of the hearing before the Full Court the Appellant advanced the grounds of appeal against the conviction in the renewal application in person, whereas the sentence appeal was argued by the counsel for the Legal Aid Commission.

Brief Summary of evidence

[10] The Appellant hailed from Vuda and was residing in Naini. At the time of the incident he was 24 years old and married. He worked as a subsistence farmer planting dalo, cassava, yaqona and vegetables. Police received information that the Appellant was cultivating marijuana at Nabununikoula farm, since 1 December 2014 upon which a search was arranged.

[11] On the 7th January 2015, upon being briefed by Sergeant 3131 Meli Bola (PW1), PC 4651 Vakuru Sawalu (PW2) and PC 5322 Timoci Malanicagi (PW3) set to search for the Appellant's marijuana farm, in mufti.

[12] At about 10 a.m. the two PCs discovered a marijuana farm at Nabununikoula. They briefed PW1 on the finding and the latter instructed them to wait at the farm for its owner. Accordingly, PW2 and PW3 had waited at the farm from 10 a.m. to 4 p.m. looking out for the owner.

[13] According to PW2 and PW3, at about 4 p.m. the Appellant had arrived at the marijuana farm. PW2 had narrated in evidence as to what the Appellant did after arriving at the farm.

"He came at 4 pm. He looked right and left and started weeding the farm with a cane knife. Later he held the plants and sniffed them. I later approached Inoke Ratu and arrested him."

[14] PW2 had testified that the Appellant admitted that the marijuana farm was his. PW2 had further testified stating that:

"I held his hand and told him he was under arrest for cultivating marijuana. I cautioned him gave him his rights."

[15] The marijuana plants (which were in total 228) were later uprooted by the police. They had packed the same and brought them to Kadavu Police Station along with the Appellant. On the same day at 8.18 p.m. the Appellant had been caution interviewed by Corporal 3349 Moape Tau (PW4).

[16] On the 8th January 2015 PW4 had taken the Appellant to Suva. From Suva PW4 had taken the Appellant and marijuana plants to Nasinu Police Station. On the 9th January 2015 marijuana plants had been analysed by the Government Analyst which weighed a total of 26.4 kilograms.

[17] On the 9th and the 10th of January 2015 PW4 continued his interview with the Appellant wherein he confessed to the crime. On the 12th of January the accused was produced at Suva Magistrate's Court.

The version of the Appellant

[18] The Appellant on oath denied the allegation against him. He denied having cultivated cannabis sativa. He further stated that 228 marijuana plants, the police uprooted were not his and the allegation against him was nothing but a fabrication.

[19] Appellant had stated that he was repeatedly assaulted and threatened by police when caution interviewed on the 7th, 9th and 10th January, 2015 and forced to sign his caution interview statements.

[20] He also said that the police refused to take him to '*CWM Hospital'* for a medical examination, and that he was so frightened by the police that he confessed to them.

[21] In the instant case the Prosecution primarily relies on:

(1) the inculpatory statements in the caution interview where the Appellant admitted to unlawfully cultivating cannabis sativa at the time in question.

(2) the evidence of the police officers who had found the Appellant weeding his marijuana farm at the time of the arrest.

Consideration of the grounds of appeal against conviction

Ground 1

"THAT the Learned Judge erred by first failing to provide cogent reasons for overturning the majority verdict. Secondly, failing to independently assess the evidence, a failure to do so meant that the Learned Judge could not make an informed judgment on whether the assessors had made a reasonable decision not to convict, especially when the Judge found the assessors opinion "not perverse" and open to them to reach such conclusion on the evidence."

[22] The Learned High Court Judge in his judgment delivered on the 25th of August 2016 from paragraphs 8 -13 sets out the reasons for differing with the majority opinions of assessors. The said paragraphs are as follows:

> *"8. Six witnesses gave evidence for the prosecution. They were:*
>
> *(i) Sergeant 3131 Meli Bola (PW1);*
> *(ii) PC 4651 VakuruSawalu (PW2);*
> *(iii) PC 5322 TimociMalanicagi (PW3);*
> *(iv) Corporal 3349 Moape Tau (PW4);*
> *(v) SC 2959 Anasa Kovea (PW5), and*
> *(vi) Ms. Miliana Werebauinona (PW6).*
>
> *9. One witness gave evidence for the defence, that is, the accused himself.*

10. I had carefully considered all the evidence and had carefully compared them. I had carefully assessed the demeanour of all the witnesses. The prosecution's case was that the accused verbally confessed to PW2 and PW3 that, the marijuana farm at Nabununikoula was his. This was when PW2 confronted him at the crime scene, and later arrested him on 7 January 2015. PW2 said, he gave the accused his legal rights during the arrest.

11. Furthermore, when he was caution interviewed by PW4 on 7, 9 and 10 January 2015, the accused fully confessed to the crime. I accept PW2, PW3 and PW4's evidence that when the accused confessed to the police, he did so voluntarily and out of his own free will.

12. On my assessment of the credibility of the witnesses, I find all the prosecution's witnesses to be credible. They were forthright and not evasive. I accept that the accused verbally confessed to PW2 and PW3 that the marijuana farm was his on 7 January 2015. I also accept that he confessed to the crime when caution interviewed by PW4 on 7, 9 and 10 January 2015. I accept that his confessions were true.

13. As to the accused's allegation of alleged police brutality, I totally reject the same. He did not ask the Magistrate on his first appearance on 12 January 2015 for a medical examination at CWM Hospital. Neither did he ask the Magistrate for the same on 26 January 2015 and 9 February 2015. He did not ask the High Court on 27 February 2015 for the same. To me, that showed he had no injuries to complain about. Furthermore, he was very evasive when cross-examined. To me, he was not a credible witness, and thus I reject his denial of the crime."

[23] It is trite law that the assessors are not the ultimate deciders of a case, which is the sole function of the Trial Judge. The assessors are assigned with the task of giving an opinion based on the facts and directions of the Trial Judge on the law.

[24] The trial judge's reasons as to why he disagreed with the majority of assessors are found in paragraphs 8-14 of the judgment.

[25] In **Rokonabete v State** [2006] FJCA 85*;* AAU0048.2005S (22 March 2006) the Court of Appeal held that:

"...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts..."

[26] In **Maya v The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] Keith, J reiterated:

"21...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".

[27] Section 237(4) of the Criminal Procedure Act, 2009 states:

'(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be —

(a) written down; and
(b) pronounced in open court.

(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the all purposes.'

[28] In **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) the Supreme Court said:

'[23] In the course of its judgment in Ram v The State this Court succinctly described the role of the trial judge as well as the supervisory function of the appellate court in the following words-

"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that

the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."(Emphasis added)"

[29] In paragraphs 3 of the summing up the Learned High Court Judge states that:

"3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment."

[30] In **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) the Supreme Court on section 299 of the Criminal Procedure Code said:

"[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence."

"The authorities to which we have referred make it clear that the reasons for the Judge not agreeing with the majority opinion of the assessors must be cogent and in sufficient detail to enable this court critically to examine them in the light of the whole of the evidence and reach a conclusion on whether the decision to reject the majority opinion of the assessors is justified.

In the present case the reasons set out in the judgment were sparse. It would have been preferable for the Judge to have set out in more detail the reasons for finding 'a compelling case of a joint unlawful enterprise', and,

perhaps more importantly, the reasons for concluding that the appellants participated in the enterprise voluntarily and not under duress. It would have been helpful if she had given more detailed reasons for her conclusion that the three appellants had opportunities to remove themselves from the plan and that the threats to them, if they existed, were not of a continuing nature instantly to kill or injure the accused. We do not mean to suggest that the judgment should review the evidence in the detail that we have done in this judgment, but findings of credibility of important witnesses and inferences properly drawn from the evidence should be clearly but concisely stated.

If the requirements of the section to give clearly stated cogent reasons for departing from the opinions of the assessor are not adequately complied with, this Court may conclude that the convictions should be quashed and a new trial directed".”

“[28] Section 299 of the CPC recognizes that a judge has the power and authority to disagree with the majority opinion of the assessors. When the judge disagrees with the assessors his or her reasons are deemed to be the judgment of the Court. However, the judge’s power and authority in this regard is subject to three important qualifications.

[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have "cogent reasons" for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge’s views as to the credibility of witnesses: ***Ram Bali*** *v* ***Regina*** *[1960] 7 FLR 80 at 83 (Fiji CA), affirmed* ***Ram Bali*** *v* ***The Queen*** *(Privy Council Appeal No. 18 of 1961, 6 June 1962);* ***Shiu Prasad*** *v* ***Reginam*** *[1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in* ***Setevano*** *v* ***The State*** *[1991] FJA 3 at 5, the reasons of a trial judge:*

> *"must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial".*

[30] Secondly, although a judge is entitled to differ from even the unanimous opinion of the assessors, he or she must comply with the requirement of s.299 of the CPC to pronounce his or her reasons in open court.”

[31] In **Lautobui v State** (supra) the Supreme Court made the following observations:

“3. The law after the assessors gave their opinion is Section 237(1), (2), (4) and (5) of the Criminal Procedure Decree 2009, which reads as follows:

"...237 (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.

(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...

(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be

(a) written down; and
(b) pronounced in open court

(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for...all purposes..."

4. *In **Ram Dulare, Chandar Bhan and Permal Naidu** **vs** **Reginam** [1956 – 57], Fiji Law Report, Volume 5, pages 1 to 6, page 3, the Fiji Court of Appeal, said the following, on an equivalent section of the then Criminal Procedure Code:*

   "...In our opinion learned counsel for the appellants is confusing the functions of the assessor with those of a Jury in a trial. In the case of the King v. Joseph 1948, Appeal Case 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessor is that of the trial judge and the trial judge alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors..."

5. *In Sakiusa Rokonabete v The State, Criminal Appeal No. AAU 0048 of 2005, the Fiji Court of Appeal said as follows:*

   "...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts..."

[32] This ground of appeal lacks merit.

Ground 2

"THAT the Learned Trial Judge erred in law by misdirecting himself and the assessors that they decide out of the two parties who was the credible forthright and evasive witnesses were credible then you must find the accused guilty as charged. Therefore shifting the burden on the appellant."

[33] In regard to this ground of appeal consideration of paragraphs 37 of the Learned High Court Judge's summing up becomes relevant.

> *"**(e) Considering All the Evidence:***
>
> *37. You will have to look at and consider all the evidence together. You will have to compare and analyse all the evidence together. You have heard and seen all the witnesses give evidence. You had observed their demeanour in the courtroom. Who do you think was the credible witness? Who do you think was forthright as a witness? Who do you think was the evasive witness? Who do you think, from your point of view, was telling the truth? If you think the prosecution's witnesses were credible witnesses and you accept their evidence, then you must find the accused guilty as charged. If otherwise, then you must find the accused not guilty as charged. It is a matter entirely for you."*

[34] From above mentioned paragraph or in any other paragraphs the Learned High Court Judge had not stated that the burden shifts to the Appellant. Moreover, highlighting the fact that the burden never shifts to the Appellant, the Learned Trial Judge states in the following paragraph:

> *"I. **SUMMARY***
>
> *38. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt*

so that you are not sure of the accused's guilt, you must find him not guilty as charged."

[35] The Appellant's complain appears to be based on paragraph 37 of the summing up. However, in terms of paragraph 38 of the same the Appellant's complaint cannot be sustained.

[36] This ground of appeal lacks merit.

Ground 3

"Unprepared legal representation"

[37] The Appellant claims a change of counsel had taken place during the pendency of the trial and that the two newly appointed attorneys from the Legal Aid Commission, did not have sufficient time to get briefed by him before the commencement of the voir dire inquiry.

[38] The court proceedings clearly reflects that the Legal Aid counsel assigned with the Appellant's case had cross-examined all four prosecution witnesses during the voir dire inquiry which indicates the fact, that they would have conducted the cross-examination based on the instructions received from the Appellant.

[39] The question that has been raised at the cross-examination clearly shows that the counsel were properly prepared and focused on a proper line of defence. The Appellant had remained silent at the voir dire inquiry exercising his right, and his decision not to give evidence at the voir dire inquiry could have been done with the concurrence of the Appellant since a counsel acts only with the agreement of the client and not contrary to it.

[40] This ground of appeal lacks merit.

Ground 4

"THAT the Learned Judge erred in the voir dire proceedings by not analysing the prosecutions failure in their duty to disclose the medical report. The failure by the prosecution to uphold section 290 of the Criminal Procedure Decree 2009 and section 14 (2) (2) of the Fiji Constitution."

[41] There had been no medical examination report since the Appellant had not been medically examined by any doctor. However, he had been given medication at Makoi Health Centre.

[42] It appears that the Appellant had at no point raised any issue at the voir dire inquiry or at the trial proper, regarding a failure to produce a medical report relating to a medical examination done at the Makoi Health Centre. At no point, the defence suggested that the Appellant was medically examined and requested a medical examination report prior to the voir dire hearing.

[43] If a medical report was available, which may or may not have substantiated the complaint of a police assault, the Appellant had all the opportunity to produce the same at the voir dire inquiry or at trial proper as part of his defence.

[44] In this regard the observations made by the Learned High Court Judge in paragraph 13 of the judgment becomes relevant:

> *"13. As to the accused's allegation of alleged police brutality, I totally reject the same. He did not ask the Magistrate on his first appearance on 12 January 2015 for a medical examination at CWM Hospital. Neither did he ask the Magistrate for the same on 26 January 2015 and 9 February 2015. He did not ask the High Court on 27 February 2015 for the same. To me, that showed he had no injuries to complain about. Furthermore, he was very evasive when cross-examined. To me, he was not a credible witness, and thus I reject his denial of the crime."*

[45] This ground of appeal lacks merit.

Additional Ground One

"(i) THAT the Learned Trial Judge erred in law and in fact had failed in his duty to adequately evaluate the evidence and also failed to address the assessors himself on the principle contradictions and omission resulting in an unreasonable conviction.

(ii)THAT whether the Learned Trial Judge erred in law and in facts when he failed to satisfy the reasoning principles (cogency test) as he based himself from the credibility of witnesses as to overturn the majority verdict of the assessors."

[46] It appears that none of the state witnesses were cross-examined by the defence on the issue of contradictions and omissions against their statements made to the police. The complaint appears to have arisen at the appellate stage, even though the defence was in possession of the full record. No directions or re-directions had been sought on the matter at the trial stage.

[47] The following observations made in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) are relevant to note herein:

> *"It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion."*

[48] This ground of appeal lacks merit.

Additional Ground Two

"(i) THAT the Learned Trial Judge erred in law and in fact in misdirecting himself in respect of the admissibility, voluntariness and truthfulness of the confessions in the caution interview when in fact the trial judge had misdirected himself to consider the evidence of PW4 at the voir dire and that arose during the trial proper which later stated that the appellant being taken to Makoi Health Center neither there was no witnessing officer present at the interview nor any signature to prove the same and in circumstances of his prolonged detention in the trial necessitated the need out to

have caused the Learned Trial Judge in his judgment that he believed the entirety of PW4's evidence and when he confess to PW2 and PW3 when caught red handed that this in turn cause a substantial and grave miscarriage of justice against the appellant."

[49] In consideration of this ground of appeal it is necessary to draw attention to paragraphs 34 and 35 of the summing up wherein the Learned High Court Judge had adequately dealt with the issue:

> *"34. When considering the above evidence. I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements as alleged by the police above. If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely for you.*
>
> *35. If you accept the accused's above confessions, then you will have to find the accused guilty as charged. If you don't accept the same, then you will have to find the accused not guilty as charged. It is a matter entirely for you."*

[50] It is further to be noted that, the interviewing officer testified that there were no assaults on the Appellant and that he had taken the Appellant to Makoi Health Centre, since the latter asked for medication whilst being kept in the cell at Nasinu Police Station.

[51] This ground of appeal lacks merit.

Appeal against Sentence:

"(i) THAT the sentence imposed was harsh and excessive given all the circumstance of the case.

(ii)THAT the Learned Trial Judge erred when he took the weight of the drug into consideration twice."

[52] The final sentence of 13 years is within the sentencing tariff for category 4 which is between 7 -14 years for possession of weight above 4000 grams (4 kilograms) as set out in **Sulua v State** [2012] Fiji Law Reports, Volume 2 page 111; [2012] FJCA 33; AAU 0093.2008 (31 May 2012), subject of course to the fact that if the same guideline are applied to unlawful cultivation of cannabis sativa plants as well. However, we note that the judicial opinion is divided over the application of Sulua guideline to cultivation which has to be resolved upon a guideline judgment in the future. It is beyond our task in this appeal.

[53] In the instant case the weight of the illicit drugs seized by the police is substantial in size giving the impression that the cultivation was meant for commercial use.

[54] In the circumstances the sentence imposed on the Appellant in respect of 26.4kg cannabis sativa cannot be considered as harsh and excessive.

[55] In passing the sentence the Learned High Court Judge had taken 12 years as the starting point. It has been held in **Koroivuki v State** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013) by the Court of Appeal that:

> *"[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.*
>
> *[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than*

the tariff, then the sentencing court should provide reasons why the sentence is outside the range.

[30] By selecting 5 years as his starting point, the trial judge was virtually incorporating the aggravating features of the offence rather than picking a term based on an objective seriousness of the offence. This ground of appeal succeeds."

[56] The observation made in **Tawake v State** [2022] FJCA 32; AAU 063.2016 (3 March 2022) are also relevant to take into consideration, wherein an Appellant was sentenced to a period of 13 years with a non-parole period of 12 years taking into consideration the issue of *'double counting':*

"[36] Still on the same topic, whether sentencing in offences involving cultivation should be based on weight of cannabis or the number of plants or a combination of both and the 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. Should the role of the offender such as the owner-farmer versus mere labourer also should be taken into account is another important consideration.

[37] 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 green plants that should be considered and which parts of the plants should be taken into account are also vital questions 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).

[38] There is a detailed discussion on these matters in Matakorovatu v State [2020] FJCA 84; AAU174.2017 (17 June 2020) and Seru v State [2020] FJCA 126; AAU115.2017 (6 August 2020).

[39] Coming back to the question as to what sentence this court should consider appropriate to impose on the appellant, when a cross-section of the sentences that have been imposed by trial courts irrespective of the tariff they have chosen to apply, are taken into account, in my view an ultimate sentence of 12 years appears to fit the crime. It is clear that the appellant

had cultivated 76 cannabis sativa plants on his own farm weighed on the following day of the raid to be 84.6kg. Clearly, the appellant had engaged in cultivation of cannabis as owner-farmer and for commercial purposes as evidenced by the number of plants and weight though the weight has been of green plants and fresh leaves and not dried ones. I have considered the mitigating factors as well. This sentence addresses the concern of double counting too."

[57] In the instant case the State concedes that "*the Learned Trial Judge had considered the weight of the drug twice in its pronouncement of the same sentence".*

[58] Having regard to the above considerations I am of the view that imposing an ultimate sentence of 12 years on the Appellant could meet the end of justice.

[59] The appeal against the sentence succeeds.

Orders of the Court:

1. Appeal against the conviction dismissed.
2. Sentence imposed by the Learned High Court Judge is quashed.
3. A sentence of 12 years with a non-parole period of 11 years is imposed on the Appellant to be effective from the 24th August 2016.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL