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

CRIMINAL APPEAL NO. AAU0174 OF 2017
[Criminal Action No: HAC 355 of 2016]

BETWEEN : **ATEKINI MATAKOROVATU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Jitoko, VP**
Mataitoga, JA
Qetaki, JA

Counsel : **Ms L. Ratidara for the Appellant**
Ms P Madanavosa for the Respondent

Date of Hearing : **4th July, 2023**

Date of Judgment : **27th July, 2023**

JUDGMENT

Jitoko, VP

[1] I have read in draft the judgment of Qetaki, JA. I agree with his reasoning, conclusions and with the Orders proposed.

Mataitoga, JA

[2] I agree with the reasons and conclusions of the Judgment.

Qetaki, JA

Background and facts

[3] The appellant is appealing against sentence after a single Judge had on 17 June 2020 allowed his request for enlargement of time to appeal to this Court against his sentence. He was charged with another, Arisi Kaitani, the appellant in Criminal Appeal No. AAU0029, who pleaded not guilty to the charges against him in the High Court. However, the appellant pleaded guilty to one count of unlawful possession, and one count of unlawful cultivation of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act 2004 ("*the Act*").

[4] The charges laid against the appellant are as follows:

First Count

Statement of Offence

Unlawful possession of Illicit Drugs: contrary to section 5(a) of the Illicit Drug

Particulars of Offence

Arisi Kaitani and Atikiatikini Matakorovatu On 15th day of September 216 at Kadavu in the Eastern Division, unlawfully possessed 1184.4 grams of illicit drug known as cannabis sativa.

Second Count

Statement of Offence

Unlawful cultivation of illicit drugs: contrary to section 5(a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

Arisi Kaitani and Atikiatikini Matakorovatu on 15th day of September 2016 at Kadavu in the Eastern Division, unlawfully cultivated 7975.7 grams of an illegal drug known as cannabis sativa.

[5] The appellant was sentenced on 29 September 2017 to a term of 8 years and 11 months imprisonment with a non-parole period of 6 years and 11 months.

[6] Aggrieved with the sentence the appellant lodged an appeal dated 18 December 2017 by sending his grounds of appeal directly to the Court of Appeal Registry.

[7] Section 5 of the Act related to *"Unlawful possession, manufacture and supply of illicit drugs"* and it states:

> *"5. Any person who without lawful authority-*
>
> *(a) acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or*
>
> *(b) engages in any dealings with any other person for the transfer, transportation , supply, use, manufacture, offer, sale import or export of an illicit drug commits an offence and is liable on conviction to a fine not exceeding $1 million or imprisonment for life or both."*

Before a single Judge

[8] The appellant's ground for appeal against conviction was considered by a single judge who allowed the appeal leave for enlargement of time to appeal to this Court. His ground:

> *"That the sentence ordered by the Court of 8 years 11 months with a non-parole of 6 years 11 months is manifestly harsh because of the Sentencing Judge adding 11 years for the aggravating factor which an error is given that he had used the same factor(s) for a starting point and again for aggravating factor(s).*

[9] The test for leave to appeal against sentence is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points measured against

the four principles set out in **Kim Nam Bae v State**, Criminal Appeal No AAU0015 which are: whether the learned sentencing judge:

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous ort irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iiv) Failed to take into account some relevant considerations.*

[10] It will be necessary to review the sentencing principles applied by the learned trial judge to properly address and resolve this ground.

[11] The appellant had admitted the summary of facts on 21 /07/ 17 and according to the summary of facts the *cannabis sativa* involved in the first count was in the form of loose plant material that weighed 1184.4 grams. On the second count the appellant admitted that he was involved in cultivating 824 plants of *cannabis sativa*.

Sentencing in High Court

[12] The appellant was sentenced on 29 September 2017 at Suva. He pleaded guilty to the offences for which he was charged and admitted the summary of facts that were filed in Court on 21/07/17.On the first count (unlawful possession), the appellant was sentenced to 2 years imprisonment, which is not challenged by the appellant. The sentence is not based on the sentencing tariff established in the majority judgement in **Sulua v State** [2012] FJSC AAU0093.2008 (31 May2012), which was based on the weight of dried leaves of *cannabis sativa*. The learned Judge stated:

> *"6.However, it is clear that what you had in your possession were not dried leaves. Therefore, in my view, it would be unfair by you to apply the tariff based on* ***Sulua*** *(supra) to determine your sentence for the first count....."* (page 140 of High Court Record).

Second count

[13] On the second count, which is being challenged in this appeal, in sentencing the appellant the learned trial Judge stated:

> *"8 Cultivation up to 10 plants can be considered a non-commercial cultivation if there is no other evidence to the contrary. Cultivating more than 10 plants can be considered as a small scale commercial cultivation and cultivating more than 100 plants can be considered as a large scale commercial cultivation.*
>
> *9. With regard to the second count you have admitted that you were involved in cultivating 824 plants. Your sentence for the second count should be within the range of 7 to 14 years imprisonment as you have been engaged in large scale commercial cultivation according to the above categorization.*
>
> *10. I will first determine the sentence for the second count. I select 7 years imprisonment as the starting point of your sentence.*
>
> *11.... Even though the weight of the plant was recorded as 7975.7grams, you have been involved in cultivating 824 plants of cannabis sativa. The number of plants suggests that you have been involved in a very large scale cultivation of illicit drugs. Considering this factor I have added 11 years to your sentence. The summary of facts does not reveal any other aggravating factor. Your sentence now is 18 years imprisonment.*
>
> *12. In your mitigation, you have submitted that you are a first offender. You have cooperated with the police. You pleaded guilty for the two offences on the first day your plea was taken. Your counsel says that you are remorseful and you seek forgiveness from this court.*
>
> *13. Considering your early guilty plea I deduct 6 years of your sentence. For the other mitigating factors, I deduct 2 years. Your sentence for the second count is 10 years imprisonment."*
>
> *"17.....you are sentenced to an imprisonment term of 10 years with a non-parole period of 08 years. Considering our time spent in custody, the time remaining to be served is as follows:*

Head Sentence-08 years and 11 months
Non-parole period-06 years and 11 months."

[14] The tariff adopted by the learned trial judge for the offence of cultivation of illicit drugs in this case was based on the tariffs for cultivation of illicit drugs decided and applied by the High Court in **Teidamu v State** [2016] FJHC 1027:HAA 29.2016 (14 November 2016) , as follows:

> "……
> *(a) The growing of a small number of plants for personal use by an offender on a non-commercial basis-1 to 2 years imprisonment;*
> *(b) Small scale cultivation for a commercial purpose with the objective of driving a profit-3 to 7 years.*
> *(c) Large scale commercial cultivation-7 to 14 years imprisonment."*

Appellant's case

[15] Essentially, the appellant's argument is that the learned trial judge was incorrect and made the mistake of double counting in the enumeration of aggravating circumstances in Sentencing. In a written submission filed on 8 May 2020 by the Legal Aid Commission for an on behalf of the appellant at the leave application stage before a single judge, the appellant submitted as follows:

> *"17. The Appellant submit in his sentence, the learned Sentencing judge had at paragraph [9] had made mention of the large scale commercial cultivation in this case as such placed the sentence for the 2nd count between 7-14 years and then at paragraph [10] selected the starting point to be at 7 years.*
>
> *18. Following the above, at paragraph [11], again using the fact that the number of plants suggest the involvement of a very large scale cultivation of illicit drugs, went on to use this as aggravating factor and increased the sentence by 11 years."*

[16] Two cases were cited in support of the appellant: **Senilolokula v State,** Criminal Appeal No. AAU 0095 of 2013 and **Saqanaivalu v State** [2015] FJCA 168: AAU0093.2010.In respect of the first mentioned case the appellant relied on paragraph [19] and [24] of the Judgment (per Gamalath, JA):

*" [19] Applying the yardstick clearly laid down by the authorities already cited, and with special emphasis being attached to the decision in **Kim Nam Bae**, vis-à-vis the factual matrix in this case , there is one matter on which I entertain a certain degree of doubt, namely, has the learned judge erred in enumerating aggravating circumstances? In the sense is there a possibility of falling into the error of double counting? Simply has he counted some of the aggravating factors twice over by becoming fastidious and at the same time was he oblivious to the fact that the distinctions amongst already cited aggravating factors are hair splitting? In my opinion in situations of such a nature the benefit must be endured by the appellant and the sentence must be altered accordingly."*

"[24] I wish to resolve the doubt in favor of the appellant. Avoiding the perceived double counting, the two segments of the aggravating factors should be rolled up together to be read as one. In the circumstances the aggravating factors of abuse of position of authority and the breach of trust should attract only 3 years composite imprisonment."

[17] On the second case, at paragraph [12], Grounder JA stated:

*"Of course, what is not permissible is the double counting of the same factors. For instance, if a certain factor is used to justify a high starting point, then the same factor should not be used as an aggravating factor to enhance the sentence. The use of the same factor twice to increase sentence amounts to double punishment **(Laisiasa Koroivuki v The State** unreported Crim App.No. AAU0018 of 2010: 5 March 2013 at [31]."*

Respondent's case

[18] Before the single Judge of Appeal the respondent argued that **Teidamu v State** (supra) relied upon in sentencing the appellant was currently on appeal, where the DPP has appealed the tariff set by Parera J where he adopted **Meli Bavesi**, considering that **Sufua & Others v The State**, Criminal Appeal No AAU 0093 of 2008 is still binding. The respondent submitted that there was a large disparity in sentencing of cases before the High Court hence the request by the Director of Public Prosecutions for some guidance from the Court of Appeal to clarify the tariff of unlawful cultivation of illicit drugs.

[19] The respondent conceded that taking the commercial quantity as an aggravating factor was an error by the sentencing judge since the tariff category is based on the weight of cannabis/marijuana.

[20] That there were other obvious aggravating factors which the learned sentencing judge failed to consider: such as the impact on the person using it. This factor was considered in the decision of this Court in **Ratuyawa v State** [2016] FJCA 45: AAU 121.2014 (26 February 2016), where this Court said:

> *".....Further he had failed to consider the ramifications on the health and wellbeing of others who would use the crop and the harmful effects of the abuse of marijuana which is a factor a Court should have necessarily take into consideration under section 4(2) of the Sentencing and Penalties Decree. I do not think that the learned Magistrate had in passing sentence given due regard to his own statement: "This is one case where a message of deterrence needs to be sent as a warning to others who like you may think that this is an opportunity to earn quick payday and that the end justifies the means."*

[21] The respondent further submitted that even if the exercise of discretion by the Judge was in error, the final sentence is within the tariff suggested by Sulua, and therefore no miscarriage of justice has occurred.

[22] I thought it would be beneficial to fully reproduce the respondent's written submissions filed on 3 July 2023 on this ground of appeal, and on the appeal by the appellant (Arisi Kaitani) in Criminal Appeal No. AAU 0026 of 2019, below:

"Law on Appeal against sentence

> *"2. In Kim Nam Bae v The State* (unreported Criminal appeal AAU 15 of 1998, (26 February 1999) *the court set out the proper approach to appeals against sentence:*
>
> *"It is well established law that before this Court could disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If a trial judge acts upon a wrong principle, if he*

allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant considerations, then the appellate courts may impose a different sentence. The error may be apparent from the reasons for sentence orbit may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499."

13 The test before the full bench of the Court of Appeal is governed by section 23 (1) (a) of the Court of Appeal act Cap.12 where the court may set aside the verdict of any ground where there appears to be a miscarriage of justice.

Determination of appeal in ordinary cases

23 -3 On appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash sentence passed at the trial and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution thereof as they think ought to have been passed or may dismiss the appeal or make such other order as they think just.

13. In Mr. Kaitani's submission at paragraph 4.1 of his submission they have referred to the case Jone Seru v State AAU115/2017 which is the guiding judgement on cultivation.. The same is been reproduced in the submissions of Mr. Kaitani. However, it is Mr. Kaitani's submission that it has always been the stance of Mr. Kaitani that it was never his farm and he was not found on the farm but on the roadside and then was taken to the farm. It is important to note that both the appellant Kaitani and Mr. Matakorovatu were jointly charged with the charge of cultivation which makes them equally responsible for the offence that they have committed. The only difference is that Mr. Kaitani decided to plead not guilty and proceeded to trial.

14. The single judge at the leave in his leave to appeal for Atekini Matakorovatu at paragraph 25 held that: "there is an urgent need for the Court of Appeal or the Supreme Court to revisit the sentencing guidelines for cultivation of illicit drugs in the light of the current situation which has surfaced. Whether sentencing in offences involving cultivation should be based on weight of cannabis or the number of plants or a combination of both cultivated in any given extent of land where cannabis plants are found with all other factors being considered as aggravating or mitigating offence would be a vital question to answer."

*15. It is also important to note that because the number of plants falls in Category 1 which is100 plants or more as per the guideline set out in **Jone Seru v The State** (supra) and in terms of culpability both appellants had significant role to play. Therefore in these types of cases as per the guideline judgment the*

starting point would be 14 years and the category range would be 12 – 16 years in custody."

Analysis

[23] The Illicit Drugs Control Act 2004 is an Act enacted by the Parliament if Fiji to regulate and control the cultivation, manufacture, importation, sale, supply, possession and use of illicit drugs and controlled chemicals and for related matters.

[24] Part 2 of the Act provides for Offences .Section 5 makes provisions related to unlawful possession, manufactures, cultivation and supply of illicit drugs. This is the section under which the appellant and his co-accused were charged with. A person convicted for an offence under section 5 is liable on conviction to a fine not exceeding $ 1 million or imprisonment for life or both.

[25] The term *"illicit drug"* means any drug listed in schedule 1 of the Act. Cannabis is listed in Part 1 of Schedule 1 of the Act with other drugs in line with Schedule IV of the Convention on Narcotic Drugs 1961.

[26] The appellant is challenging the sentence imposed on him by the learned trial judge in the following terms: ***That the sentence ordered by the Court of 8 years 11 months with a non-parole of 6 years 11 months is manifestly harsh because of the Sentencing Judge adding 11 years for the aggravating factor which is an error given that he had used the same factor(s) for a starting point and again for aggravating factor(s).***

[27] Cultivation of illicit drugs is a very serious offence and viewed by the Fiji Parliament as such by enacting a maximum penalty (see above) for any person who is guilty of the offence. In this case the appellant had pleaded guilty to both counts of *"unlawful possession"* and *"unlawful cultivation"* of illicit drugs. The appellant however, is not challenging the sentence for count 1 (unlawful possession).

[28] The case and arguments of the appellant are set out in paragraphs [15] to [17] and the respondent's (State's) arguments are set in paragraphs [18] to [22] respectively, above.

[29] Essentially, the appellant contends that the learned trial Judge had made an error in the enumeration of aggravating circumstances in sentencing the appellant amounting to double counting. Double counting is the use of the same factor twice to increase sentence. It amounts to double punishment.

[30] He challenged the learned trial judge's sentencing at paragraph [9] when he referred to the appellant being involved in "*large scale commercial farming*" and used that as a basis of fixing the starting point of 7 years. The appellant is also challenging the learned trial judge's statement in paragraph [9] of the sentencing when he referred to the appellant carrying out "*large scale cultivation of illicit drugs*", and adding 11 years as aggravating factor.

[31] The appellant cited two cases in support. Firstly, **Senilolokula v State** (supra), a decision of this Court. This is a case where the appellant was appealing a rape sentence of 16 years. The appellant's complaint was in relation to double counting in the aggravating factors taken by the sentencing judge in relation to two overlapping factors accepted as aggravating factors, namely abuse of "*position of authority*" and "*the breach of trust*". This Court (Gamalath; JA) stated:

> "*[23]....I perceive them to be inseparable interconnected and in the circumstances, a valid doubt can be entertained with regard to the maintainability of both aggravating factors, side by side, parallel to each other.....[.24].....In the circumstances the aggravating factors of abuse of position of authority and the breach of trust should attract only 3 years composite imprisonment*"

[32] In the result, the 16 years sentence was reduced to 12 years sentence. Secondly, **Saqanaivalu v State** (supra), a decision of the High Court where the appellant was charged with manslaughter of his wife contrary to section 198 of the Penal Code Cap. 17. The appellant pleaded guilty to the charge and was sentenced to 7 years imprisonment with a minimum term of 5 years.Gounder JA (see paragraph [15] above, pointed out that

what is not permissible is "*double counting*". " The use of the same factor twice to increase sentence amounts to double punishment.

[33] Having considered the Sentencing (pages 138 to 142 of High Court Record) I am of the view that there is doubt that double counting has not occurred .This doubt is created due to what the sentencing Judge stated at paragraphs 8 and 11:

> " *8.....Cultivating more than 10 plants up to 100 plants can be considered as a small scale commercial cultivation and cultivating more than 100 plants can be considered as large scale commercial cultivation.*"
>
> "*11 Even though the weight of the plant was recorded as 79"5.7 grams, you have been involved in cultivating 824 plants of cannabis sativa. The number of plants suggests that you have been involved in a very large scale cultivation of illicit drugs. Considering this factor I add 11 years to your sentence. The summary of facts does not reveal any other aggravating factor.. ....*"

[34] The basis of fixing of tariff at 7 years was due to the fact that there were 100 plus plants, which is within Category 1 of the guideline on sentencing in **Teidamu's** case. The aggravating factor was the 725 plants over and above the 100 plants cultivated. For that 11 years was added which is a mistake by the learned trial Judge. .

[35] The learned trial Judge had clearly explained the sentencing steps being taken in paragraphs 7 to 17 of the Sentencing at pages 140 and 141 of the High Court Record. See also paragraphs [13] to [15] above.

[36] The Respondent (State) conceded that the learned trial judge erred in taking account of the "*commercial quantity*" as aggravating factor. This means that the 11 years added as aggravating factor was erroneous on the part of the trial Judge. I agree.

[37] However, the respondent also submitted that, there were other factors which ought to be taken as aggravating, but were not. For instance, the health effect of cultivation of illicit drugs; see **Ratuyawa v State** (supra). The learned trial Judge did not consider the health and wellbeing of others who would use the crop and the harmful effects. This is a valid point and I also agree with it.

[38] I also agree with the respondent's submission that, even if the trial Judge had made an error in that regard, the final sentence is within the level of Category 1 sentence guideline in **Teidamu**, and especially within the Guideline Judgment in **Jone Seru v State** (supra). The sentence is not harsh or excessive.

Conclusion

[39] The Sentencing and Penalties Decree (42/9), now an Act, was promulgated to meet certain objectives, the prominent one of which is ***"to make comprehensive provisions for the sentencing of persons for criminal offences and to reform processes applicable to prescription of penalties."***

[40] The Act has been in use for approximately 14 years and many judicial pronouncement have been made in connection with its provisions, and especially in relation Part 2 thereof. A line of cases had established that: *"The ultimate object of the Decree coupled with the judicial guidelines is to help judges arrive at a just and fair sentence proportionate to the gravity of the offence for an accused considering all the circumstances of the case while maintaining an acceptable degree of uniformity and consistency. It is not to insist on a straightjacket approach to sentencing"*; **Ashwin Chand v State** (2016) FLR 450 AAU 63/12 (apt HAC 49/12) (27 May 2016) at [15]; **Emasi Tuisova v State [2016]** HAA 48/6L, 6 December 2016; **Bijendra v State** (2016) FLR 814 AAU 56/13 (HAC 127/1, etc.

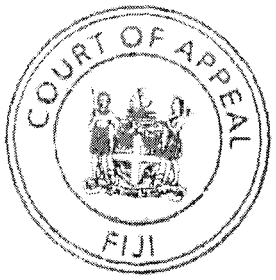
[41] Section 4 of the Act defines the 5 purposes for which sentence may be imposed: Cases on this point tend to agree that: *"The purpose is not only to deter the appellant from committing similar offences in the future but other -like-minded people should know that if they commit a similar offence they would be dealt with in the like manner:* **Laisiasa Koroivuki v State** (2013) FLR 119 AAU 18/10, 5 March 2013 at [33].

[42] For the above reasons the appeal against sentence has no merit and is dismissed. Sentence is affirmed.

Orders of Court

1. Appeal against sentence is dismissed.

2. Sentence affirmed.



Hon. Justice Filimone Jitoko
VICE PRESIDENT, COURT OF APPEAL

Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

SOLICITORS:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent