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

CRIMINAL APPEAL NO. AAU 0028 OF 2019
[Criminal Action No: HAC 140 of 2018]

BETWEEN : **ORISI TOBUA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, JA
Qetaki, JA

Counsel : **Ms L. Ratidara for the Appellant**
Dr A Jack for the Respondent

Date of Hearing : **8th September, 2023**

Date of Judgment : **28th September, 2023**

JUDGMENT

Prematilaka, RJA

[1] I agree that the appeal against sentence should be allowed and concur with the proposed orders.

Mataitoga, JA

[2] I concur with the draft judgment of Qetaki, JA.

Qetaki, JA

Background

[3] This is an appeal against sentence imposed in a judgment of 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 2004.

[4] The appellant had been charged for committing the offence 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 Act6 2004.*
>
> *Particulars of Offence*
>
> ***ORISI TOBUA*** *between 1st day of November, 2016 and 31st day of March, 2017 at Navosa in the Western Division without lawful authority, cultivated 46 plants of Cannabis Sativa, an illicit drug, weighing 8 kg.*

[5] The appellant who was represented by counsel pleaded guilty to the charge on 8 October 2018 and had admitted the summary of facts. On 19 February 2019 the appellant was sentenced to 11 years and 4 and a half months imprisonment with a non-parole period of 09 years.

[6] The appellant had filed a timely appeal against sentence. The Legal Aid Commission had lodged an amended grounds of appeal and written submissions on 27th January 2021.The State had tendered its written submissions on 02 March 2021.Both parties then consented

to have a ruling based on written submissions filed by them without a formal hearing which was to be held *via* Skype.

Facts

[7] The summary of facts (as adopted from the Ruling of the single Judge at paragraph [4] thereof is as follows:

> *"On 5/3/17, a team of police officers led by Sergent 2873 Taivei Turaganivalu (hereafter "PW1") were deployed for "Operation Cavuraka" at the Navosa Highlands. They were based at the Navosa Police Station. On 20/3/17, PW1 was asked by DC Masitabua who was the ground commander to lead a raid team consisting of SC Anasa Kovea, SC Saiyasi Talemaitoga, SC Elo Maretino, SC 2965 Inoke Tavuyara and SC 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, and Nanoko Road and arrived at the drop-off zone at Malua Highlands. They reached the drop-off zone at 6.50 am. From there, they walked to the farmland at Yauyau. They reached the targeted farm at 10am.*
>
> *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, PW1asked 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 told the accused that he is under arrest for unlawful possession of illicit drugs and advised him of his rights. They left Yauyau at 2pm together with the 46 marijuana plants. They arrived at Navosa Police Station at 6:58pm where PW1 handed the 46 cannabis sativa plants to PCF 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 when he admitted that he has been planting.*

Leave Stage

[8] The appellant had only one ground of appeal against sentence at the leave stage which is:

"(1) That the learned trial Judge erred in law and in fact in sentencing the appellant using the Kini Sulua guideline when the case is one of cultivation."

[9] On 1st October 2021, leave was granted by the single Judge of this Court on the applicant to appeal on the issue of probable double counting and for the full Court to consider the appropriate sentence.

[10] The learned single Judge, in his Ruling, had made the following pertinent observations (see pages 4-8 of Record of High Court of Fiji):

> *"[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 the matter after a full hearing.*
>
> *[23] The appellant should be given leave to appeal against the sentencing error. The appropriate sentence is a matter for the full court to decide [Also see: **Salayavi v State** [2020] FJCA 120; AAU0038.2017 (3 August 2020) and **Kuboutawa v State** [2020] AAU 0047.2017 (27 August 2020) for detail discussions].*
>
> *[24] Leave to appeal 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."*

The Law

[11] The proper approach to appeals against sentence is set out in **Kim Nam Bae v The State** [1999] FJCA 21; AAU15 of 1998 (26 February 1999) as follows:

> *"It is well established 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 account some relevant consideration, then the appellate court may impose a different sentence itself **(House v King)*** [1936] HCA 40;(1936) 55 CLR 499)"

[12] Section 23(3) of the Court of Appeal Act specifies this Court's powers in appeals against sentence, as follows:

> *"On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should be passed, quash the 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."*

Court of Appeal-Full Bench

[13] The Ground of appeal before the full Court is the same ground pursued by the appellant at the leave stage, see paragraph [8] above.

[14] Both the appellant and the State had filed written submissions which had been filed in the Court of Appeal Registry. Appellant filed 2 Submissions, on 26 January 2023 and 31 August 2023. The State filed its Submissions on 4 September 2023.

[15] The appellant had filed 2 written submissions. In the first he submitted (see submission filed on 26 January 2023):

> *"3.43 The Appellant in this matter complains that the Learned Trial Judge had erred in law and in fact in sentencing the Appellant using Kini Sulua guideline when the case is one on cultivation."*
>
> *"3.45 The Learned Judge had considered Sulua case to determine that the appellant's case fell within category 4 and that the relevant tariff was 7-14 years imprisonment."*
>
> *"3.46 It is our submission that in order to determine which category of Sulua case the Appellant's case fell under, the Learned Judge would have considered the weight of the drugs-8 kilograms."*
>
> *"3.47 Thereafter, the Learned Judge considered the aggravating factors as follows: "The number of cannabis sativa plants (46) which were uprooted suggests that the accused was engaged in a commercial supply of the drugs for earning a living, in the caution interview the accused admitted this as well."*

"3.8 The number of plants and the inference drawn that it was for commercial purposes was the only aggravating factor identified in this matter. It is our submission that the Learned Judge had incorrectly identified the amount of drugs as an aggravating factor as this had already been considered when applying the relevant tariff of 7-14 years imprisonment. Consequently, the increase of 4 years for this single aggravating factor was wrong in principle."

"3.9 Furthermore the Learned Judge had considered 10 years imprisonment as the starting point. This was towards the middle range of the tariff."

[16] To conclude the first submission, the appellant submitted that the sentence of 12 years imprisonment with a non-parole period of 11 years was harsh and excessive due to the error of double counting. The said submissions also provided insights into;

(i) The Dangerous Drugs Act which covered the offences of possession and cultivation of cannabis prior to its replacement by the Illicit Drugs Control Act, especially section 8 (Offences) and the Third Schedule which categorized the sentence to the type of offending;

(ii) The Illicit Drugs Control Act 2004 which repealed the Dangerous Drugs Act, Cap114 which criminalizes the possession, cultivation of cannabis ,and other associated acts with cannabis under section 5(a) of the Act;

(iii) The disparity in sentences received by offenders, which led the full Court of Appeal in 2012 to review the sentences received by offenders and established a guideline in the case of **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012)

[17] The appellant's latter submissions (latter submission filed on 31 August 2023 covered issue discussed in the Guideline Judgment of this Court on cultivation of cannabis as issued in the case **Jone Seru v The State** [2023] FJCA 67; AAU115 of 2017 (25 May 2023) a case that sets the precedent and guideline in sentencing on cases of cultivation of illicit drugs.

Crux of Appellant's Submission- Double Counting

[18] The appellant submitted that the learned trial Judge had considered and applied **Sulua's** (supra) case to determine that the appellant's case fell within Category 4 and that the relevant tariff was 7-14 years imprisonment. That in order to make that determination (Category 4 of **Sulua)** the learned trial Judge would have considered the weight of the drugs -8 kilograms. The trial Judge did exactly that. He stated:

> *"12. It is apparent from the Kini Sulua case that the quantity of illicit drugs will determine the tariff applicable to a particular case although it was a case of possession of cannabis sativa. In this case the weight of the cannabis cultivated by the accused is 8kg which comes within category 4 of Kini Sulua's case.*
>
> *13. The applicable sentencing tariff in this case is a sentence between 7 and 14 years imprisonment."*

[19] The appellant also submitted that *"The number of plants and the inference drawn that it was for commercial purposes was the only aggravating factor identified in this matter……the learned Judge had incorrectly identified the amount of drugs as an aggravating factor as this had already been considered when applying the relevant tariff of 7 to 14 years imprisonment. As such, the increase in sentence by 4 years for this single aggravating factor was wrong in principle.*

[20] I agree with the said submission which challenges the decision on the basis of double counting which the learned trial Judge had committed. The learned trial Judge stated:

> *"14. The number of cannabis sativa plants (46) which were uprooted suggests that the accused was engaged in a commercial supply of the drugs for the purpose of earning a living. In the caution interview the accused admitted this as well."*

[21] Further, the appellant submitted that the learned trial judge had considered 10 years imprisonment as the starting point which is towards the middle-range of the tariff, without providing reasons to justify selecting 10 years as starting point. In **Koroivuki v State** [2013] FJCA 15, it was held that:

'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."

"Therefore, it can reasonably be assumed that the number of plants (being the only aggravating factor) had been considered to justify the need to pick a starting point in the sentence towards the middle range of the tariff. Consequently, an addition of 4 years for the same aggravating factor again was incorrect in principle."

[22] Counsel for the appellant also made oral submissions at the hearing of the appeal. In its second written submission and at the hearing the appellant through its counsel having set out the Sentencing Table and the categorization of the number of plants, the culpability of the offender and level of harm related to the sentencing table (Leading Role, Significant role, Lesser role), made the following submissions:

"The Appellant in this matter had planted 46 plants hence in applying the above categorization, the Appellant would fall into category 3 and in the leading role as he is the owner of the farm. Hence as per the table in ***Jone Seru v State*** *(supra) the appellant's sentence would fall in the range of 7-12 years with 9 years as the starting point.*

3.2 From the summary of facts and the admissions in the caution interview, it is apparent, that it had been a small scale operation and that the appellant had cultivated the cannabis for himself with a view to obtain profits.

3.3 When sentencing the Appellant His Lordship, the sentencing judge picked the starting point of 10 years imprisonment with ***Kini Sulua & Michael Ashley Chandra v State*** *in mind. His Lordship then added 4 years as aggravating factors and deducted 1 year for mitigating factors and good character and another 1 year for the early guilty plea. Hence the appellant ended up with the final sentence of 11 years and 4 and a half months imprisonment with a non-parole period of 9 years imprisonment after deducting the period of custody."*

[23] The cases **Koroivuki v State and Kumar v State** were cited in support of the appellant's aforesaid submissions. It was submitted that as a result the appellant's current sentence is harsh and excessive. Finally, that the application of the guideline sentence of **Jone Seru**

(supra) starting point of 9 years and the sentencing range of 7 years to 12 years is prudent for this case.

State's Submissions

[24] The respondent conceded that the sentencing judge in this case erred in principle in adopting the tariff in **Sulua** (supra), the application of which has since been reviewed by this Court in **Jone Seru v State** AAU115 of 2017 (25 May 2023), which, having reconsidered **Sulua** found that it should not be applied in cases of cultivation, and issued a new guideline to assist the lower courts when sentencing in such cases.

[25] The respondent submitted that if this Court agrees that the sentencing judge erred in principle in adopting the tariff in **Sulua**, and quash the sentence, the Court may pass such other sentence is substitution as the Court thinks ought to have been passed; in such a case the other sentence to be passed in substitution ought to be guided by the guideline issued by the Court of Appeal in **Jone Seru v State** (supra).

[26] Mr Tobua admitted that the cannabis patch of 46 plants was his alone; that he was growing the plants for commercial purposes. In the circumstances the case can be classified based on **Seru** as a high culpability (leading role), category 3 harm case, making a starting point of 09 years and sentencing range of 07 to 12 years imprisonment appropriate in this case.

Analysis

[27] The appellant had been dealt with under category 4 of sentencing guideline in **Sulua v State** where the sentencing tariff for possession of cannabis sativa of 40000g or above was set between 07-14 years.

[28] 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 and half months.

[29] The central concern is that it appears 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.

[30] A survey of case law on double counting in sentencing suggest the following:

(a) **Senilolokula v State**, the Supreme Court raised concerns regarding selecting the *'starting point'* in 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 woods for the trees.

(b) **Kumar v Kumar**, [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.

(c) Some judges pick the starting point from the lower or middle range of the tariff as in **Koroivuki v State** [2013] FJCA 15.Other judges' start with the lower end of the sentencing range as the starting point. In **Koroivuki**, it was held that: *"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.

[31] Judges in Fiji are known to commonly follow the two tiered process (Method) expressed in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008). 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 of 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).

[32] **Naikelekelevesi** (supra) was further elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015), which is of assistance to sentencing judges. The Court instructed:

"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 ...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 the 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 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 od a diverse range of considerations that are integral to the sentencing process. The two-tiered er 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 method more useful than other judges."

[33] This appeal raise the same issues encountered by the Supreme Court in the above case. The trial judge in selecting the starting point only considered commercial farming arising from the number of plants (corresponding to the weight of cannabis).Although the objective seriousness had been mentioned to justify the starting point, the trial judge had not elaborated as to what matters constituted "*objective seriousness*" other than commercial farming was inferred from the number of plants (and weight) again for the second time, commercial farming which was derived from the number of plants (and weight of 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 4 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 the additional 4 years.

[34] A similar complaint was raised in **Salayavi v State** [2020] FJCA 120; AAU0038 of 2017 (03 August 2020), where it was stated (per Prematilaka JA):

"In the present case, however, it is clear what features the learned trial judge had considered in selecting the starting point, Therefore, it became 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 **Nandan** *may not arise. Therefore, in view of the pronouncements of the Supreme Court in* ***Nandan*** *it will be a good practice, if not*

a requirement, 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."*

[35] A careful observance of the guideline set in **Naikelekelevesi** *(*supra*)* will avoid the danger of double counting expressed by the Supreme Court. 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.

[36] Given all that has been raised, 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, it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v State** [2006] FJCA 5; CAV0006U.2005S (4 May 2006).

[37] I am mindful of that both the appellant and the respondent have made submissions on the kind of sentence that this Court could pass should it decide to quash the current sentence., There is a common desire that the new guidelines set in **Jone Seru v The State** (supra*)* be applied.

[39] The appellant, in concluding its submission state:

"It is respectfully submitted that the application of the guideline sentence of Jone Seru the starting point of 9 years and sentencing range of 7 years to 12 years is prudent for the case herein."

[40] The respondent, at paragraphs 13 and 16 of its submissions stated**:**

"13. Mr Tobua admitted that the cannabis patch of 46 plants was his and his alone, and that that he was growing the plants for commercial purposes. In these circumstances it is respectfully submitted that this case can be classified based on Seru as a high culpability (leading role), category 3(harm case) making a starting point of 9 years and a tariff of 7 to 12 years imprisonment appropriate in this case "

"16. It is respectfully submitted that sentence starting point of 9 years is appropriate in this case, with a final head sentence within the 7-12 year tariff."

[41] The appeal against the current sentence of 11 years 4 and half months, with a non-parole period of 9 years, has merit. In exercise of the powers under section 23 (3) of the Court of Appeal Act, the sentence is quashed. In substitution thereof, the appellant is sentenced to 10 years and 4 and half months imprisonment, with a non-parole period of 8 years, particularly given his guilty plea and other mitigating factors identified by the trial judge.

Orders of Court:

1. *Appeal against sentence is allowed.*
2. *Sentence of term of 11 years and 4 and a half months imprisonment, with non-parole period of 9 years is quashed.*
3. *Appellant is sentenced to a term of 10 years 4 and half months imprisonment, with a non-parole period of 8 years with effect from 19 February 2019*

Hon Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon Mr Justice Isikeli Mataitoga
JUSTICE OF APPEAL

Hon Mr 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