IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION: CAV 0023 OF 2023
[Court of Appeal No: AAU 71/2019]
[High Court (Suva) No: HAC 255/2017]

BETWEEN : **NEMANI RAVIA**

Petitioner

AND : **THE STATE**

Respondent

Coram : The Hon. Mr Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr Justice William Young, Judge of the Supreme Court

Counsel: Ms L Ratudara for the Petitioner
Ms S Shameem and Ms M Naidu for the Respondent

Date of Hearing: 17 October, 2024

Date of Judgment: 29 October, 2024

JUDGMENT

Gates, J

[1] I agree with the judgment of Calanchini J, its reasons and orders.

Calanchini, J

Introduction

[2] This is a petition for leave to appeal the decision of the Court of Appeal delivered on 28 September 2023. Following a trial in the High Court before a Judge sitting with three assessors, Nemani Ravia (the Petitioner) was convicted on one count of unlawful cultivation of illicit drugs, namely 87 plants of cannabis sativa weighing 34.2 kilograms contrary to section 5(a) of the Illicit Drugs Control Act 2004. On 30 April 2019 he was sentenced to 12 years imprisonment with a non-parole term of 10 years.

Background Proceedings

[3] Being aggrieved by the orders of the High Court the petitioner filed a timely appeal against conviction and sentence. The Petitioner relied on four grounds of appeal against conviction and two grounds against sentence. Leave to appeal against conviction and sentence was granted on a limited basis.

[4] In the Court of Appeal the Petitioner relied on two grounds of appeal against conviction. The appeal against conviction was dismissed. As for the sentence appeal, the Petitioner's complaint was that the sentence was harsh and excessive considering the starting point and the possibility of double counting. The Court of Appeal dismissed the appeal against sentence.

Petition for leave to appeal

[5] The Petitioner filed a timely Petition challenging the Court of Appeal's decision dismissing his sentence appeal. The Petitioner now relies on one ground of appeal against sentence:

"That the learned trial judge erred in law and in fact in sentencing the Petitioner, considering the starting point selected and the possibility of double counting resulting in a sentence that is harsh and excessive."

[6] The ground was expressed in similar terms in the Court of Appeal.

Jurisdiction

[7] Pursuant to section 98(4) of the Constitution, an appeal from a final judgment of the Court of Appeal may not be brought to the Supreme Court unless the Supreme Court has granted leave to appeal under section 7(2) of the Supreme Court Act 1998. Leave to appeal must not be granted unless (a) a question of general legal importance is involved; (b) a substantial question of principle affecting the administration of criminal justice is involved; or (c) substantial and grave injustice may otherwise occur if leave is not granted. It is for the Petitioner to establish that the Petition satisfies one of the requirements specified before the appeal can be considered. In accordance with the usual practice of the Court the hearing of the Petition for leave to appeal against sentence will, if necessary, be treated as the hearing of the appeal.

The Sentence Decision

[8] In sentencing the Petitioner the trial Judge referred to and relied on the decision of the Court of Appeal in **Sulua v The State** [2012] FJCA 33; [2012] 2 FLR 111. At page 143 the Court (Temo and Fernando JJA with Marshal JA dissenting) identified four categories of possession of cannabis determined by weight for the purpose of sentencing. The Judge noted that the weight of the cultivated cannabis in this case was 34.2 kilograms. As a result the Petitioner fell into category 4 which provided for a penalty range of 7 to 14 years imprisonment for possessing 4 kilograms or more of cannabis.

[9] The Judge selected 10 years as his sentencing starting point. It is apparent that in doing so he has taken into account the fact that 34.2 kilograms is more than eight times the entry

point into category 4 and is at the mid-point of the sentencing range for category 4 weight. To that sentence the Judge has added a further four years as an aggravating factor. The only reason for doing so is the reference to the weight of the cultivated cannabis in paragraph 6 of his sentencing decision. It is this aspect of the sentence that the Petitioner seeks to challenge in this Court, having failed in his attempt to do so in the Court of Appeal. After deducting 1 year 9 months as mitigation and 3 months as time served, the sentence was 12 years imprisonment.

[10] This challenge is based on the phrase referred to as "*double counting*." This means taking into account more than once in the sentencing process those factors which aggravate the sentence. Given that the cultivation in this case involved relatively simple farming, the process could not be described as sophisticated in the sense that it could be said to constitute an aggravating factor. In effect the trial Judge has appeared to have selected his starting point at the mid-range of category 4 on the basis of the only aggravating factor that he had identified in his decision. The Judge has then used that same factor, i.e. the weight of cannabis, as the basis for adding a further four years on account of it being an aggravating factor.

[11] As Keith J had noted in Navuda v The State [2023] FJSC 45; CAV 13 of 2022 (26 October 2023) at paragraph 42:

> *"(In Naikelekelevesi) [2008] FJCA 11, the court itself said,"in determining the starting point . . . the court is taking cognizance of the aggravating features of the offence". In other words, the aggravating features of the offence are to be reflected in the selection of where within the tariff the starting point should be. The aggravating factors to be taken into account once the proper starting point has been identified are what Naikelekelevesi described as "the aggravating features of the offender". If all the aggravating features of the case relate to the offence rather than the offender, there will be no basis for enhancing the starting point over and above its appropriate place in the sentencing range…."*

[12] In this case the Judge has relied on the weight of the cultivated cannabis to identify a starting point and then to enhance that starting point as an aggravating factor. Any

argument that the starting point may have been enhanced on the basis that this case was one involving cultivation whereas the facts in **Sulua** involved possession of cannabis had been rejected by the Court of Appeal in **Sulua** itself. At page 144 of the reported decision the majority said:

> *"Section 5(a) of the Illicit Drugs Control Act 2004 treated the verbs "acquires, supplies, posses, produces, manufactures, cultivates, uses or administers an illicit drug" equally. All the verbs are treated equally _ _ _. It follows that the penalties applicable to possession, must also apply (to the other forms of offending). Consequently, the four categories mentioned above apply to each of the verbs the section 5(a) of the 2004 Act."*

[13] However, it does not necessarily follow that the sentence imposed by the trial Judge must be set aside or reduced by the same period that reflects any error in the steps taken by the Judge in arriving at the sentence. On appeal the issue for the Court is the ultimate sentence that must be considered.

[14] Since the Court of Appeal decision in this matter there have been a number of decisions that have considered the approach to be taken when sentencing for the offence of cultivating cannabis. These decisions have necessarily considered whether the decision in **Sulua** should apply to the offence of cultivating cannabis and whether the existing categories according to weight are applicable to cultivating cannabis. In the recent decision of **Ratu v The State** [2024] FJSC 10; CAV 24 of 2022 (25 April 2024) this Court had cause to consider the guideline judgment of the Court of Appeal in **Seru v The State** [2023] FJCA 63.

[15] However, the issue that gives rise to this appeal against sentence and the issue that the petitioner claims made his sentence harsh and excessive was not in issue in the **Ratu** appeal. I consider that in this appeal the ultimate sentence should be reduced by the amount by which trial Judge had double counted the one aggravating factor that had been identified.

Harsher sentences

[16] It is necessary to add some final observation about this topic of sentencing for cultivating of cannabis. In Fiji in recent years and certainly since 2004, cultivation offences have come before the courts in ever increasing numbers. Although never a sophisticated form of cultivation, cannabis grows extremely well in Fiji weather conditions. Its proliferation has not resulted from sophisticated cultivation. Unlike in so many other jurisdictions, cannabis represents the principal menace to younger Fijians. Without the resources that other jurisdictions possess for detecting, investigating and treating offenders, users and addicts, Fiji must in the short term rely on deterrence as its principal weapon for its own war on drugs. Severe sentencing for cannabis offences must still be seen as a risk not worth taking.

Conclusion

[17] I would grant the petitioner leave to appeal sentence. The petition raises a question of general legal importance on which a grave and substantial injustice may occur if leave is not granted. I would allow the appeal and reduce the sentence to 8 years imprisonment with a non-parole term of 7 years.

Young, J

[18] I agree with Calanchini J that the sentence of 12 years imprisonment imposed on the petitioner was calculated on a basis that double-counted the weight of the cannabis which the petitioner had grown. The starting point adopted (of 10 years) reflected that weight but it was then allowed for again as an aggravating factor, which added four years to the sentence. It follows that the sentence should be reduced by four years. For these reasons, I agree with Calanchini J as to the reduction in the sentence to eight years. I have no issue with the non-parole period that he proposes.

Orders:

1) *Leave to appeal against sentence is granted.*
2) *Appeal against sentence allowed.*
3) *The sentence imposed by the High Court is quashed.*
4) *Petitioner is sentenced to 8 years imprisonment with a non-parole term of 7 years.*

The Hon Mr Justice Anthony Gates
JUDGE OF THE SUPREME COURT

The Hon Mr Justice William Calanchini
JUDGE OF THE SUPREME COURT

The Hon Mr Justice William Young
JUDGE OF THE SUPREME COURT