IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU 65 of 2013
High Court Criminal Case No. HAC 14 of 2012

BETWEEN : **STATE**

Appellant

AND : **SAIRUSI LAVETA**
VILIMONI VAGANALAU

Respondents

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Ms. Kiran. S for Appellant**
Mr. Fesaitu. M with Miss. David. L for Respondents

Date of Hearing : **12 November 2019**

Date of Judgment : **28 November 2019**

JUDGMENT

Gamalath, JA

[1] I have read in draft the judgment and the proposed orders of the Court as presented by Prematilaka, JA. The only area of uncertainty in relation to the construction of Section 5(2) of the Criminal Procedure Act 2019, Chapter 21 is about the phrase that "it may be tried in the Magistrate's Court in accordance with any limitation placed on the jurisdiction of classes of Magistrate prescribed in any law dealing with the administration and jurisdiction of the Magistrates Court". The proper meaning that needs to be attached to these words requires clarification. In my opinion, the quantum of the sentence that can be legally imposed by a court plays a pivotal role in determining the forum jurisdiction. The quantum of sentence may be prescribed in a statute creating an offence or by guideline judgments where the tariffs for each category of offences are laid down. If a sentence prescribed by law exceeds the limits of a Magistrate's sentencing powers, I am of the opinion that such cases cannot be dealt with by a Magistrate, for his jurisdictional powers are circumscribed by the prescribed sentences and subject to that, I agree with the conclusions of Prematilaka, JA.

Prematilaka, JA

[2] This appeal by the State in terms of section 22(2) of the Court of Appeal Act arises from the judgment dated 12 April 2013 of the High Court that, acting in revision, had set aside the convictions and the sentences entered by the Suva Magistrates Court against both respondents.

[3] Under the first count both respondents had been charged with cultivation of 86 plants weighing 5000 grams of Cannabis Sativa, an illicit drug without lawful authority, under the second count the 02nd respondent alone had been charged with possession of dried leaves weighing 1.4 grams of Cannabis Sativa, an illicit drug without lawful authority, under the third count the 01st respondent alone had been charged with possession of dried leaves weighing 185.5 grams of Cannabis Sativa, an illicit drug

without lawful authority and under the fourth count the 01st respondent alone had been charged with possession of Indian Hemp seeds weighing 48.9 grams, an illicit drug without lawful authority. All offences had been allegedly committed on 6 February 2012 at Nacomoto Village, Naceva, Kadavu in the Eastern Division contrary to section 5(a) of the Illicit Drugs Control Act No.9 of 2004.

[4] Upon their guilty plea, both respondents had been sentenced on the first count on 29 June 2012 to 80 months (06 years and 08 months) imprisonment and with the period of remand having been deducted, the final sentence had been 06 years and 03 months. The 02nd respondent had been sentenced to 06 months imprisonment on the second count. The learned Magistrate had refrained from sentencing the 01st respondent on the third count and he had sentenced the 01st respondent to 12 months imprisonment on the fourth count. All sentences accompanied a non-parole period of 35 months (02 years and 11 months) and were ordered to run concurrently.

[5] Subsequently, pursuant to section 260 of the Criminal Procedure Act 2009, the file and the record of the proceedings in the Magistrates Court had been reviewed by the High Court.

[6] Section 260(1) of the Criminal Procedure Act 2009 provides that:

> *'The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to:*
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> *(a) the correctness, legally or propriety of any finding, sentence or order recorded or passed; and*
> *(b) the regularity of any proceedings of any Magistrates Court.'*

[7] Acting in revision in terms of Section 260(1) of the Criminal Procedure Act 2009, the learned High Court Judge in the judgment dated 12 April 2013 had *inter alia* quashed the convictions and sentences and remitted the case to the Magistrates Court for the learned Magistrate to transfer it to the High Court for the respondents to be tried on all counts afresh. The respondents were directed to be kept in remand pending their appearance in the High Court. The State is now appealing against the said judgment of the High Court.

[8] It is pertinent to quote from the impugned judgment of the High Court to understand the basis on which the learned High Court Judge had made the above orders.

> *'5. After carefully reading the court record, including the learned Magistrate's sentencing remarks, it would appear that the learned Magistrate failed to follow the binding authority of* ***Kini Sulua, Michael Ashley Chandra v The State*** *(supra). For a start, count no. 1 was a category 4 drug offence. It involved an allegation that both accused were cultivating 86 plants of Indian Hemp, weighing 5,000 grams, on 6th February, 2012. The tariff for this category is a sentence between 7 to 14 years imprisonment. It is the most serious of the four categories mentioned in* ***Kini Sulua, Michael Ashley Chandra v State*** *(supra). Count No. 1 is only triable in the High Court….'*
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> *'6. Count No. 2 and 4 were category 1 drug cases. The weight of the drugs found on the accused were less than 100 grams. The courts are encouraged to pass non-custodial sentences for those in this category. Six months imprisonment in count no. 2 for possessing 1.4 grams of Indian Hemp is unjust, and flies in the face of the abovementioned Court of Appeal authority. Likewise, the sentence of 12 months imprisonment for possessing 48.9 grams of Indian hemp seed in count no.4, is unjust and flies in the face of the abovementioned Court of Appeal authority. As for count no.3, I tend to agree with the learned Magistrate….'*

[9] Thus, it is clear that the learned High Court Judge in the impugned judgment in the exercise of revisionary powers vested in the High Court by section 260(1) and 262(1) of the Criminal Procedure Act, 2009 had set aside the convictions and sentences passed on both respondents in view of the decision in **Sulua v State** AAU0093.2008: 31 May 2012 [2012] FJCA 33, on the premise that the learned Magistrate had no jurisdiction to deal with the case in as much as the tariff set in ***Sulua*** for the offence set out under the first count was 07 to 14 years of imprisonment. The learned High Court Judge had also found fault with the sentences on count 2 and 4 as unjust and not in keeping with ***Sulua*** guidelines.

[10] According to the impugned judgment the respondents had appeared in person before the High Court but no submissions on their behalf are found in the copy record. However, written submissions had been tendered on behalf of the appellant and the State had requested the High Court to vary the sentence in line with ***Sulua*** guidelines.

[11] The appellant's appeal had been belated but the single Judge of the Court of Appeal on 24 January 2014 had granted extension of time to file a notice of appeal in view of the issue of law in the appeal concerning the jurisdiction of the Magistrates court to hear and determine cases under section 5(2) of the Criminal Procedure Decree 2009.

[12] By its notice of appeal, the appellant had sought to have the respondents' convictions affirmed and the sentences varied under section 22(3) of the Court of Appeal Act. The sole ground of appeal urged is as follows;

> *'That the learned review judge erred in law in quashing the convictions of the Respondents on the basis that the Magistrates' Court had no jurisdiction to try the matter by virtue of the majority Court of Appeal decision in Kini Sulua, Michael Ashley Chandra v State; Criminal Appeal No.AAU 0093 of 2008 when there exists statutory provisions namely sections 4 and 5 of the Criminal Procedure Decree No.43 of 2009 which deals with jurisdiction of criminal trial matters.'*

[13] Therefore, the State is contesting the said judgment of the learned High Court Judge on the basis that the learned Magistrate had jurisdiction to convict and sentence the respondents in terms of section 5(2) of the Criminal Procedure Act, 2009 read with section 5 of the Illicit Drugs Control Act No.9 of 2004. It is argued that section 5(2) of the Criminal Procedure Act read with section 5 of the Illicit Drugs Control Act gives jurisdiction to the Magistrates Court to try offences governed by the Illicit Drugs Control Act subject to the limitations placed on the Magistrates Court by any law dealing with administration and jurisdiction of the Magistrates Court. For example, when the High Court invests a magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the magistrate's jurisdiction under section 4(2) of the Criminal Procedure Act, such magistrate may not impose a sentence in excess of the sentencing powers as provided under the Criminal Procedure Act.

[14] Therefore, the ground of appeal articulated in this appeal is clearly a question of law only and therefore an appeal lies directly to this Court in terms of section 22(1) read with section 22(2) of the Court of Appeal Act. Though section 22(1) permits an

appeal to the Court of Appeal from a decision of the High Court made in its appellate jurisdiction only, a decision given by the High Court such as the one canvassed in this appeal, in its revisionary jurisdiction too is deemed to be a decision in appellate jurisdiction of the High Court by virtue of section 22(2).

[15] Section 5 of the Illicit Drugs Control Act No.9 of 2004 states as follows.

> *'5. Any person who without lawful authority-*
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> *(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, transport, 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 $1,000,000 or imprisonment for life or both.'*

[16] Section 5 of the Criminal Procedure Act, 2009 states

> '5. – (1) *Any offence under any law other than the Crimes Decree 2009 shall be tried by the court that is vested by that law with jurisdiction to hear the matter.*
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> *(2) When no court is prescribed in any law creating an offence and such offence is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Court in accordance with any limitations placed on the jurisdiction of classes of magistrate prescribed in any law dealing with the administration and jurisdiction of the Magistrates Courts.'* (emphasis added)

[17] A plain reading of section 5 of the Illicit Drugs Control Act No.9 of 2004 shows that it does not prescribe any particular court to try offences created by that section. It is also clear that, therefore, section 5(2) of the Criminal Procedure Act makes it possible for the Magistrates Court to try offences created under section 5 of the Illicit Drugs Control Act subject to the limitations of the jurisdiction of the Magistrates Court prescribed in any law.

[18] Section 7 of the Criminal Procedure Act sets out the jurisdiction of the Magistrates Court regarding the sentences that could be passed by a Magistrates Court as follows.

> *'7.— (1) A magistrate may, in the cases in which such sentences are authorised by law, pass the following sentences, namely—*
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> *(a) imprisonment for a term not exceeding 10 years; or*
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> *(b) fine not exceeding $15,000.*
>
> *(2) A magistrate may impose consecutive sentences upon a person convicted of more than one offence in a trial, but in no case shall an offender be sentenced to imprisonment for a longer period than 14 years.*
>
> *(3) The sentencing limits prescribed in sub-section (1) may be further restricted in relation to magistrates of certain classes as provided for in any law dealing with the establishment and jurisdiction of the Magistrates Court.*
>
> *(4) Where any magistrate of a certain class sentences an offender for more than one offence in a trial, the aggregate punishment shall not exceed twice the amount of punishment which that magistrate has jurisdiction to impose.'*

[19] Therefore, it is clear from a collective reading of section 5 of the Illicit Drugs Control Act and sections 5(2) and 7 of the Criminal Procedure Act that the Magistrates Court has jurisdiction to try offences created under section 5 of the Illicit Drugs Control Act and impose any sentences upon the accused subject to the limitations prescribed under section 7 of the Criminal Procedure Act. The learned High Court Judge seems to have mixed up the jurisdiction of the Magistrates Court with its powers of sentencing. On the one hand the jurisdiction of the Magistrates Court to try offences under the Crimes Act and upon extended jurisdiction is given in section 4(1)(c) of the Criminal Procedure Act while its jurisdiction to try offences under other laws such as Illicit Drugs Control Act is given in section 5(2). On the other hand the sentencing powers of the Magistrates Court are given in section 7 read with section 4(3) and section 9 of the Criminal Procedure Act.

[20] The mere fact that the range of sentence prescribed for an offence, which is otherwise triable by the Magistrates Court [other than indictable offences falling under section

4(1) (a) and offences triable summarily by the High Court as described in section 4(1)(b) of the Criminal Procedure Act], is beyond the range of sentencing powers of the Magistrates Court does not *ipso facto* take away the jurisdiction of the Magistrates Court to try that offence. All that happens is that the sentence that the Magistrates Court could impose would be limited to its sentencing powers given by law.

[21] In **State v Mata** AAU0056 of 2016: 7 March 2019 [2019] FJCA 20 the Court of Appeal dealing with a situation where an offence falling under category 4 in ***Sulua*** guidelines had been tried in the Magistrates Court, considered whether the Magistrates Court is deprived of the jurisdiction to try and determine the matter and said as follows

> '*Moreover, the presumption against the ouster of jurisdiction militates against the decision of the Learned High Court Judge. Exclusion of jurisdiction of courts must be either by clear, unambiguous and express terms (see generally* ***Maxwell on Interpretation of Statutes*** *12th Edition pages 153-159) or by such terms that would lead necessarily to the inference of such exclusion and it cannot be done by implied reasoning (see* ***N S Bindra Interpretation of Statutes*** *12th Edition page 233). Peacock CJ. in* ***Prosunno Coomar Paul v Koylash Chunder Paul*** *8 WR 428, 436 said*
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> *' The jurisdiction of the ordinary courts of judicature is not to be taken away by putting a construction upon an Act of the legislature which does not clearly say that it was the intention of the legislature to deprivesuch courts of their jurisdiction.'*

[22] In terms of ***Sulua*** sentencing guidelines possession of 4000 grams and above of Cannabis Sativa would attract a tariff between 07 to 14 years of imprisonment. Quantity of 1000 to 4000 grams would attract a custodial sentence of 03 to 07 years with less than 2500 grams would receive less than 04 years of imprisonment. For possession of 100 to 1000 grams of Cannabis Sativa the tariff is between 01 to 03 years of imprisonment with possession of less than 500 grams would attract a sentence of less than 02 years of imprisonment. Possession of any quantity up to 100 grams of Cannabis Sativa would require a non-custodial sentence but in 'worst cases' a 'short and sharp' prison sentence could be considered. The guidelines also refer to

other acts set out in section 5(a) of Illicit Drugs Control Act. The other acts named in section 5(a) are *'acquires, supplies, produces, manufactures, cultivates, uses, or administers'* an illicit drug. Since those acts have been included in the same provision along with possession, sentencing guidelines in ***Sulua*** are equally applicable to such acts as well. In fact according to the judgment in ***Sulua*** its guidelines are applicable to all prohibitive acts set out in section 5(b) of Illicit Drugs Control Act as well.

[23] It is true that 06 years and 03 months with a non-parole period of 02 years and 11 months on count one against both respondents have fallen short of ***Sulua*** guidelines which sets out a custodial sentence of 07 to 14 years for a quantity of over 04 kg. The sentence of 06 months on count two against the 02nd respondent and sentence of 12 months on count four against the 01st respondent have exceeded the usual tariff under category 1 in ***Sulua*** guidelines requiring a non-custodial sentence for a quantity up to 100 grams except in 'worst cases' where a 'short sharp prison sentence' can be considered.

[24] The Learned Magistrate had referred to ***Sulua*** guidelines in the sentencing order dated 29 June 2012 and therefore, would have been mindful of the fact that the Court of Appeal has also stated in ***Sulua*** that

> *'Categories numbers 1 to 4 merely sets the tariff for the sentence, given the weight of the illicit drugs involved. The actual sentence will depend on the aggravating and mitigating factors, in the particular circumstances of the case, and it may well fall below or above the set tariff.'*

[25] The Court of Appeal in **State v Volatui** AAU80 of 2015**:**4 October 2018 [2018] FJCA 154 stated

> *'[30] There would be no distortion of the established tariff if the sentencing Judge recognizes and makes use of the tariff to start the sentencing process and applies the correct criteria regarding the aggravating and mitigating factors in arriving at the final sentence. In such an exercise, the final sentence may sometimes go below or above the established tariff……*' (emphasis added)

[26] Therefore, in the light of ***Sulua*** guidelines, the sentences imposed on the respondents by the learned Magistrate cannot be seriously faulted. Nor has the State pointed out

any such error other than to state that the final sentence is outside the tariff. The impugned decision of the learned High Court Judge too does not appear to have been influenced by any perceived inadequacy of the sentences passed on the respondents by the learned Magistrate. If so, the Learned High Court Judge could have revisited the sentences by virtue of revisionary powers vested in the High Court in the same proceedings and imposed a sentence which the Magistrate could have imposed under section 7 of the Criminal Procedure Act but not beyond that (see **Nawalu v State** CAV0012 of 2012:28 August 2013 [2013] FJSC 11).

[27] It should also be remembered that in any event the quantum alone can rarely be a ground for an intervention in appeal (see **Raj v. State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12) unless the impugned sentence is caught up within the guidelines for challenging a sentence stated in **House v The King** [1936] HCA 40; (1936) 55 CLR 499), **Bae v State** AAU0015u of 98s: 26 February 1999 [1999] FJCA 21 and approved by the Supreme Court in **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14. There is no sentencing error committed by the learned Magistrate of such a magnitude requiring the intervention of this Court as I do not see the sentencing order of the learned Magistrate coming under any of the above guidelines for challenging a sentence in appeal.

[28] The Learned High Court Judge's finding that count 1 is only triable in the High Court against the Respondents and his decision to remit it to the Magistrates Court for the Magistrate to transfer the case for trial to the High Court appears to be based on the statement in ***Sulua*** that *'Category 4 is to be tried in the High Court, ……..' (emphasis added)*

[29] In my view, the above pronouncement in ***Sulua*** should be treated as a mere guidance and not as a binding statement of law, for the jurisdiction of the Magistrates Court to try any offence under section 5(a) and 5(b) of Illicit Drugs Control Act vested in it by the legislature in terms of section 5 of the Criminal Procedure Act cannot be taken away by a judicial pronouncement. The decision in ***Sulua*** should not be deemed or taken to have intended such an outcome.

[30] The prescribed tariff of 07 to 14 years of imprisonment for a category 4 offence may have prompted the Court of Appeal to have come up with the above guideline in ***Sulua*** as to the appropriate court for such offences, for under section 7(1) of the Criminal Procedure Act the Magistrates Court cannot impose any sentence above 10 years of imprisonment or more than $15,000 as a fine for one offence subject to sections 7(2) and 7(4).

[31] The Court of Appeal in ***Mata*** identified the course of action that should be taken by the Magistrate where the appropriate sentence would be outside the sentencing powers of the Magistrates Court in the following words.

> *'However, it should be kept in mind that in terms of section 190 of the Criminal Procedure Act the Magistrate is empowered to transfer a person convicted by the Magistrates Court to the High Court for sentencing and greater punishment. Therefore, there is no reason to fear that offenders tried and convicted in the Magistrate Court for category 4 offences would go inadequately punished. Neither is there any reason to distrust good judgment of the Magistrates in the matter of sentence.*

[32] Earlier, in **State v Wakeham** HAC001 of 2010: 23 February 2010 [2010] FJHC 54 Gounder J. dealing with the jurisdiction of the Magistrates Court to try and determine various offences said as follows which, I think, reflects the correct legal position.

> '*[4] The Criminal Procedure Decree 2009 has fixed the lacuna in law. Under the Criminal Procedure Decree 2009, the offences are classified as an "indictable offence", an "indictable offence triable summarily" and a "summary offence".*
>
> *[5] An "indictable offence" can only be tried in the High Court.*
>
> *[6] An "indictable offence triable summarily" can be tried in the High Court or a Magistrates' Court at the election of the accused person.*
>
> *[7] A "summary offence" is tried in a Magistrates' Court.*
>
> *[8] However, if a legislation creating an offence does not classify it as an "indictable offence" or a "summary offence", a Magistrates' Court can hear the matter. This power is vested pursuant to section 5(2) of the Criminal Procedure Decree 2009.*
>
> *'[9] The offences under the Illicit Drug Control Act 2004 are not classified as either indictable or summary offences. There is now a power vested in the*

Magistrates' Court to hear the charges brought under the Illicit Drug Control Act 2004. Thus, there is no need to transfer these cases to the High Court to seek an extension of jurisdiction to a Magistrates' Court to hear these cases.'
(emphasis added)

[33] In **Ratuyawa v State** AAU121 of 2014: 26 February 2016 [2016] FJCA 45 where a similar issue as to whether or not the Magistrates Court had jurisdiction to try and sentence the accused for unlawful cultivation of illicit drugs, namely 221 plants of Cannabis Sativa, weighing 69.5 kilograms contrary to section 5(a) of the Illicit Drugs Control Act, in view of the majority decision in ***Sulua***, had been dealt with and the Court of Appeal arrived at an affirmative finding in favour of the Magistrates Court jurisdiction.

'16. Section 5 of the Illicit Drugs Control Act 2004 which creates the offence of cultivation of illicit drugs does not prescribe the court nor state whether the offence is an indictable or a summary offence. I am therefore of the view that the offence is triable by the Magistrate's court subject to the limitations set out in section 5 pertaining to sentence. There is no evidence of the Magistrate having acted contrary to such limitations.'

'20. ……. I am of the view that the Magistrates Court had the jurisdiction to try all offences created by the Illicit Drugs Act 2004 in view of the clear provisions in Section 5(2) of the Criminal Procedure Decree 2009 and a Court is not competent to amend the Illicit Drugs Act, prospectively or with retrospective effect. That is a matter for the Legislature and to act contrary to this would be a violation of the principle of Separation Powers ingrained in our Constitution.

'21. I am of the view that the learned High Court Judge was in error to have quashed the conviction of the Magistrate's Court. What the learned High Court Judge should have done was to have called for the record from the Magistrates Court and maintained the conviction and only vary the sentence, in view of the fact that the sentence was totally inadequate. Since the Appellant had pleaded guilty before the High Court, I would therefore dismiss his appeal against conviction as I consider that no substantial miscarriage of justice had occurred.'(emphasis added)

[34] The Court of Appeal in ***Mata*** reiterated and reaffirmed ***Ratuyawa***. Both decisions had been delivered after the impugned judgment of the High Court. However, unfortunately the Learned High Court Judge had not even considered at all section 5 of the Illicit Drugs Control Act and sections 5(2) and 7 of the Criminal Procedure Act prior to his decision that count 1 is only triable in the High Court and therefore, by extension the Magistrates Court lacked jurisdiction.

[35] Consequent to the impugned decision of the High Court dated 12 April 2013 the case had been remitted to Suva Magistrates Court where the Director of Public Prosecutions (DPP) had filed a *nolle prosequi* on 04 October 2013 informing the Magistrate that the State does not intend to continue the proceedings against both respondents in respect of all counts. According to section 49 (2) and (3) of the Criminal Procedure Act once a *nolle prosequi* is entered the accused person should be at once discharged or released but the discharge shall not operate as a bar to any subsequent proceedings against the accused on the basis of the same facts. Thus, *nolle prosequi* does not have the effect of an acquittal [see **Balame Qaregare v Reginam** (1972) 18FLR 127].

[36] Therefore, once this Court sets aside the impugned decision of the High Court dated 12 April 2013, the convictions and sentences in the Magistrates Court would automatically become operative and there is no bar for the DPP to resort to any subsequent proceedings against the accused on the basis of the same facts. Whether this could be done by getting the respondents to serve the remainder of the custodial sentence or by way of fresh proceedings to be instituted against them either in the Magistrates Court or in the High Court on the same facts is open to interpretation. This Court, however, is not required to make a pronouncement on that issue in these proceedings and therefore, refrains from making a pronouncement in that regard.

[37] However, the State Counsel appearing for the appellant informed this Court at the appeal hearing that the reason for entering the *nolle prosequi* was that the dossier containing the necessary evidence to secure a conviction against the respondents could not be traced and had become unavailable. Both respondents had served their custodial sentences from 29 June 2012 to 12 April 2013 *(i.e*. 09 months and 13 days)

and had been in remand from 12 April 2013 to 04 October 2013 (*i.e.* 06 months and 02 days).

[38] Another aspect that troubles this Court in this appeal is the fact that it had taken over 06 years from the date of *nolle prosequi* for the appeal to come up for hearing in the Court of Appeal. I do not think that it would now be fair for the State to get respondents to suffer the remaining portion of the sentence of imprisonment or to face fresh proceedings after more than 06 years of leading normal lives in the society, provided they have been law abiding citizens during the period they have enjoyed freedom. It is time for the State to devise a mechanism to have the appeals of this nature to come up for hearing before the Court of Appeal without unreasonable delays.

[39] As a final word of advice, I would like to caution that it is always advisable for a Magistrate who tries offences set out under section 5(a) and 5(b) of Illicit Drugs Control Act to be mindful of the sentencing powers of the Magistrates Court and if it could be reasonably contemplated upon entering a conviction that the possible sentence would be beyond its powers, to transfer the person convicted by the Magistrates Court to the High Court for sentencing and greater punishment in terms of section 190 of the Criminal Procedure Act. Such a course of action would obviate appeals such as the present one by the State and make the offender serve an appropriate sentence in the end.

[40] Therefore, I conclude that the impugned decision of the High Court should be set aside by virtue of powers vested in this Court under section 22(3) of the Court of Appeal Act on the ground of the wrong decision of the question of law involved in this appeal. In the circumstances, I allow the appeal.

Bandara, JA

[24] I agree with reasoning and conclusions reached by Prematilaka JA.

The Orders of the Court :

(i) *Appeal is allowed.*

(ii) *The Judgment of the High Court dated 12 April 2013 is set aside.*

(iii) *Convictions and sentences of the respondents by the Magistrates Court are affirmed.*

Hon. Mr. S. Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice N. Bandara
JUSTICE OF APPEAL