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

CRIMINAL APPEAL NO.AAU 117 of 2017 (AAU 133/2018)
[High Court of Suva Criminal Case No. HAC 106 of 2016S]

BETWEEN	:	**ELISEO TUKANA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**14 September 2020**
Date of Ruling	:	**22 September 2020**

RULING

[1] The appellant had been charged with two others (AAU 119 of 2017 & AAU 132/2017) in the High Court of Suva on a single count of Cultivation of Illicit Drugs contrary to section 5(a) of the Illegal Drugs Control Act of 2004. The information read as follows.

> ***'Statement of Offence***
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> ***UNLAWFUL CULTIVATION OF ILLICIT DRUGS***: *Contrary to section 5 (a) of the Illicit Drugs Control Act 2004.*
>
> ***Particulars of Offence***
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> ***SULIASI BOLA, ELISEO TUKANA*** *and* ***MIKAELE RAIVASI*** *between the 1st day of July 2015 and the 04th day of December 2015 at Kadavu in the Eastern Division, without lawful authority cultivated 951 plants of cannabis sativa, an illicit drug weighing a total of 134.1 kilograms.*

[2] At the conclusion of the summing-up, on 14 August 2017 the assessors had unanimously opined that the appellant (02nd accused in the High Court) was guilty as charged. On 15 August 2017 the appellant had been convicted and on 16 August 2017 sentenced to 16 ½ years of imprisonment subject to a non-prole period of 13 years

[3] The appellant had signed a notice of appeal on 16 August 2017 (received by the CA registry on 18 August 2017) only against conviction and it had been registered under AAU 117 of 2017. Additional grounds of appeal against conviction had been tendered on 12 September 2017. The appellant had later filed another document called 'Application for leave to appeal against conviction and sentence' on 14 December 2018 and the CA registry had assigned AAU 133 of 2018 under the mistaken belief that it was a new appeal. However, it does not contain any grounds of appeal against sentence but only against conviction. Legal Aid Commission had filed an amended notice of appeal and written submissions on behalf of the appellant on 29 June 2020 against conviction. The State had tendered its written submissions on 01 July 2020.

[4] The brief summary of facts according to the summing-up is as follows.

> *'15. According to the prosecution, the three accused had been cultivating cannabis sativa plants an illicit drug, in the interior hills of Gasele. Upon information obtained from police informers, a group of police officers travelled from Rakiraki village to the interior. There were led by Suliasi Bola who showed them the marijuana plants and farm. The police counted and uprooted 969 marijuana plants, which they later took to Kadavu Police Station. On 7 December, 2015, the plants were analysed by a government analyst and were found to be cannabis sativa weighing about 134.2 kilograms. The three accused were arrested by Police.*
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> *16. They were separately caution interviewed by police. Suliasi Bola was interviewed on 4, 5 and 6 December 2015 by DC 3691, Joape Qio (PW3). Eliseo Tukana was interviewed on 4, 6 and 8 December 2015, 2015 by DC 3650 Semi Daunitutu (PW 7). Mikaele Raivasi was interviewed by DC 3630 Simione Nakuna (PW 10). In their caution interview statements, all accused allegedly confessed to unlawfully cultivating marijuana, an illicit drug in Kadavu between 1 July and 4 December, 2015. In his charge statement, Eliseo Tukana also confessed to unlawfully cultivating cannabis sativa in Kadavu at the material time. All the accused were taken before the Kadavu Magistrate Court on 10 December, 2015 and formally charged with unlawfully cultivating cannabis sativa plants, an illicit drug.'*

[5] Therefore, it appears that the only evidence against the appellant had been his cautioned interview which he had challenged on the basis that the police threatened to beat him up if he did not admit the crime and was scared when he saw the 01st accused in the High Court crying. The appellant had been interviewed on 04, 06 and 08 December 2015 and he had not made any confession on the first day but on the second day and third day he is supposed to have confessed to his involvement. He had made a similar confession in his charge statement on 08 December 2015 as well.

[6] In his additional grounds of appeal filed in person by the appellant he had stated that the learned trial had failed to hold a *voir dire* inquiry regarding the disputed cautioned interview as to its voluntariness and admissibility. None of the counsel was in a position to give an affirmative answer to this court as to whether there had been a *voir dire* inquiry and whether a ruling had been delivered. None of them was in possession of a copy of any ruling delivered consequent to such *voir dire* inquiry either.

[7] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[8] Grounds of appeal urged on behalf of the appellant are as follows and the same as in AAU 119 of 2017.

Against Conviction

Ground 1 - That the Learned Trial Judge erred in law and in fact when he misdirected the Assessors by directing them that if they accept the accused's alleged confession in their interview and/or charge statements then they must find them guilty as charged thus causing a grave miscarriage of justice to the Appellants.

Ground 2 – That the Learned trial Judge erred in law and in fact when he did not properly assess the voluntariness of the admissions in the caution interview and charge statements and the weight and reliance that should have been placed on it.

01st ground of appeal

[9] The appellant's criticism is based on paragraph 34 of the summing-up where the trial judge had directed the assessors as follows. He contends that the judge had misdirected the assessors on their use of the admissions in the appellant's caution interview and relies on **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) to support his contention. The appellant seems to argue that the trial judge had simply directed the assessors to find guilty if they accepted his confession.

> *'34. If you accept the accused's alleged confession in their interview and/or charge statements, you must find them guilty as charged. If otherwise, you must find them not guilty as charged. It is a matter entirely for you.'*

[10] The directions to assessors on how to evaluate a confessional statement had been considered in detail in the decisions of **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51), **Tuilagi v State [2017] FJCA 116; AAU0090.2013 (14 September 2017)** and then in ***Korodrau*** the Court of Appeal contemplated the effect of the omission to give those directions on the verdict as follows.

> *'[54] Having examined several previous authorities the Court of Appeal in **Volau v State** AAU0011of 2013: 26 May 2017 [2017] FJCA 51 stated as a general proposition on how to direct the assessors on a caution interview as follows.*
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> > *' 20 (iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that*

assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them.'

[55] However, the Court of Appeal in ***Volau*** *also correctly stated (referring to* ***Prasad v The Queen*** *[1981] 1 A. E. R 319 and* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30]) that the likely effect of any misdirection, non-direction or irregularity on the aspects of making, voluntariness, probative value (i.e. truth) and weight (i.e. sufficiency) of a confessional statement upon the decision of the assessors should be judged in the light of the now well-established position in Fiji that the decision on guilt or innocence of an accused is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict.*

[56] The Supreme Court had earlier remarked in ***Boila v The State*** *CAV005 of 2006S: 25th February 2008 [2008] FJSC 35 'The adequacy of a particular direction will necessarily depend on the circumstances of the case'.*

[57] Before ***Volau*** *the Supreme Court in* ***Khan v State*** *CAV 009 of 2013: 17 April 2014 [2014 FJSC 6] where the Petitioner's counsel had argued that the directions on how to approach the answers in the caution interview were inadequate and there were no adequate directions on weight, said that 'There is no incantation which must be read here. The required guidance need not be formulaic.'*

[58] The Supreme Court reinforced these remarks recently in ***Tuilaselase v State*** *CAV0025 of 2018: 25 April 2019 [2019] FJSC 2 where the complaint was that the trial judge had misdirected himself when he failed to give any direction to the assessors and to himself on the truth and weight of the caution statement, by stating as follows.*

> *'26.The enquiry into whether the directions to the assessors were sufficient must therefore be fact specific. The weight to be afforded to the confession in this case, was clear. The detailed nature thereof would almost inevitably give rise to a conviction. As to the truth of the statement, there was never any suggestion by the petitioner that even if voluntarily made the statement may be untrue. In this light, I believe the direction given by the trial judge in paragraph 38 of his summing up was quite sufficient....'*
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> *In paragraph 38 referred to by the Supreme Court in* ***Tuilaselase*** *in the summing up as given below has no specific reference to the aspect of 'truth' and or 'weight'.*

> *".....However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of facts, you are entitled to rely on them for or against the accused".*
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> *[59] What is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt (see* ***Volau, Boila, McGreevy v Director of Public Prosecutions*** *[1973] 1 WLR 276,* ***Kalisoqo v R*** *Criminal Appeal No. 52 of 1984) which the trial judge had given in the summing up.*

[11] The Court of Appeal finally remarked in ***Korodrau*** as follows.

> *[60] Therefore, it appears that (though due reverence is still accorded) there is no longer any uncompromising insistence on rigid adherence to the traditional formula in the summing up on the caution interview in Fiji. No dogmatic or ritualistic words or forms are demanded or at least the departure from the ideal recipe would not be considered fatal to a conviction provided the appellate court is satisfied that taking into consideration all the circumstances surrounding the making of the confession and totality of the evidence led at the trial, the reasonably minded assessors would not have expressed a different opinion and the trial Judge would not have arrived at a different verdict in his judgment (being the ultimate decider of facts and law) on the admissibility, weight and truth of the caution interview and the consequential guilt or innocence of the appellant."*

[12] A summing-up should be considered in its totality and not in watertight compartments. I think the most objectionable word in the impugned paragraph is *'must'*. Undoubtedly, the use of it could have been avoided. However, on the other hand in paragraph 35 of the summing-up the trial judge had directed the assessors that they must find the appellant not guilty if they accepted his position that the confession had been obtained by false promises by the police. Similarly, the trial judge had given balanced directions in paragraph 38 of the summing-up in that he had directed them that burden of proof beyond reasonable doubt lied with the prosecution and never shifted at any stage of the trial and the appellant did not have to prove his innocence or anything. The assessors had been further directed that if they were satisfied beyond reasonable doubt and they were sure of the appellant's guilt them must find him guilty but if they were not to accept the prosecution version of events and not satisfied beyond reasonable doubt and they were not sure of the appellant's guilt, they must find the appellant not guilty.

[13] Considering the fact that the appellant's conviction or acquittal depended totally on his confession and that the trial judge had used the same word 'must' even in his directions on the acquittal of the appellant as pointed out above, the impugned word 'must' in paragraph 34 cannot be said to have caused a miscarriage of justice. What the trial judge had stated in paragraph 34 had been evened out in subsequent paragraphs.

[14] In any event, the trial judge in paragraph 32 of the summing-up has given adequate directions to the assessors to consider whether the appellant had made the confession, whether it was true and the question of voluntariness *vis-ă-vis* the weight to be attached to the confession.

[15] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[16] The appellant argues that it is clear from paragraph 30 of the summing-up that the appellant had not confessed on the first day of the interview but on the subsequent two days he had confessed and it is highly improbable that he would have not confessed voluntarily on the first day but only on the subsequent days. The summation of his argument is that he had given confessional answers in the cautioned interview (and in the charge statement) by guesswork, on the subsequent days due to the threat of assault and fear of having seen the 01st accused crying.

[17] However, it appears from the summing-up that the trial judge had placed the appellant's position regarding how the appellant came to confess to the crime clearly before the assessors in paragraphs 19 and 29 and the fact that he had not made a confession on the first day but on two subsequent days in paragraph 28 of the summing-up.

[18] Therefore, I cannot see a reasonable prospect of success in this ground of appeal.

Sentence

[19] The appellant has not appealed against sentence. Mr. Burney indicated at the leave to appeal hearing that the state would not object to the appellant canvassing his sentence in appeal given the current state of confusion arising from the present sentencing practices for cultivation offences and this court granting leave to appeal against sentence.

[20] It is clear from paragraph 5 of the sentencing order that the trial judge had treated the appellant's case under the forth category identified in **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012) where the sentencing tariff had been set at 07-14 years of imprisonment for possession of cannabis sativa of 4000g or above.

[21] In paragraph 6 of the sentencing order the judge had identified one aggravating factor namely the huge quantity of 134.2 kg of cannabis sativa plants 'cultivated' by the appellant.

[22] The trial judge had started with 12 years in sentencing the appellant and added further 07 years for the large amount of 134.2 kg of cannabis sativa plants 'cultivated' making it 19 years and after giving discount for mitigating factors, the judge had ended up with a sentence of 16 ½ years of imprisonment on the appellant.

[23] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting' and question the appropriateness in identifying the exact amount by which the sentence is increased for each of the aggravating factors stating that it is too mechanistic an approach. Sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[24] The Supreme Court once again said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that whatever methodology judges choose to use, the ultimate sentence should be the same. 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. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.

[25] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[26] Unfortunately the trial judge had fallen into the error of double counting in picking a very high starting point of 12 years of the tariff of 07-14 years because of the large quantity of 134.2 kg of cannabis sativa plants and then taken the same large quantity of 134.2 kg of cannabis sativa plants as the sole aggravating factor to increase the sentence by further 07 years.

[27] Thus, this sentencing error has a reasonable prospect of success in appeal. However, 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, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[28] The appellant should be given leave to appeal against sentence on his sentencing error. The appropriate sentence is a matter for the full court to decide [Also see **Salayavi v State** AAU0038 of 2017 (03 August 2020) and **Kuboutawa v State** AAU0047.2017 (27 August 2020) for detailed discussions].

[29] The state concedes that leave to appeal against sentence could 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 unresolved by the Court of Appeal or the Supreme Court.

[30] Some High Court judges and Magistrates apply sentencing guidelines in **Sulua v State** *(supra)* in respect of cultivation as well while some other High Court judges have suggested different sentencing regimes on the premise that there is no guideline judgment especially for cultivation of marijuana[1] meaning that ***Sulua*** guidelines may not apply to cultivation and the sentences not following ***Sulua*** guidelines have been based by and large on the number of plants and scale and purpose of cultivation[2]. State has cited the scale of operation measured by the number of plants (incorporating potential yield) and the role of the accused as a measure of his responsibility as the basis for possible guidelines in 'cultivation' cases deviating from ***Sulua*** guidelines. Interestingly, having applied ***Sulua*** guidelines the trial judge himself had considered the role played by the 03rd accused *i.e.* assisting the others to weed the marijuana farm on two occasions, as a mitigating factor to reduce his sentence by 8 ½ years.

[31] These disparities and inconsistencies have been amply highlighted in four recent Rulings[3] in the Court of Appeal and therefore, the same discussion need not be repeated here.

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[1] See **State v Bati** [2018] FJCA 762; HAC 04 of 2018 (21 August 2018)

[2] **Tuidama v State** [2016] FJHC 1027; HAA29.2016 (14 November 2016), **State v Matakorovatu** [2017] FJHC 742; HAC355.2016 (29 September 2017), **Dibi v State** [2018] FJHC 86; HAA96.2017 (19 February 2018) and **State v Nabenu** [2018] FJHC 539; HAA10.2018 (25 June 2018).

[3] **Matakorovatu v State** [2020] FJCA 84; AAU174.2017 (17 June 2020), **Kaitani v State** [2020] FJCA 81; AAU026.2019 (17 June 2020), **Seru v State** [2020] FJCA 126; AAU115.2017 (6 August 2020) and **Kuboutawa v State** AAU0047.2017 (27 August 2020)

Order

1. Leave to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence (within 30 days) is allowed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL