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

CRIMINAL APPEAL NO.AAU 31 of 2018
[High Court of Suva Criminal Case No. HAC 360 of 2016S]

BETWEEN	:	**ALIFERETI RATOKABULA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	:	**18 February 2021**
Date of Ruling	:	**19 February 2021**

RULING

[1] The appellant had been charged in the High Court of Suva on a single count of Unlawful Cultivation of Illicit Drugs contrary to section 5(a) of the Illegal Drugs Control Act of 2004 committed on 26 September 2016 at Naqara Village, Ono, Kadavu in the Southern Division. The information read as follows.

'Count

Statement of Offence

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: Contrary to section 5 (a) of the Illicit Drugs Control Act 2004

Particulars of Offence

ALIFERETI RATOKABULA on the 26th of September 2016, at Naqara Village, Ono, Kadavu in the Southern Division, without lawful authority cultivated 170 plants of Cannabis Sativa, an Illicit Drug, weighing 21.95 kilograms.

[2] At the conclusion of the summing-up, on 08 March 2016 the assessors had unanimously opined that the appellant was guilty as charged. On the same day the learned trial judge had agreed with the assessors, convicted the appellant and sentenced him on 09 March 2016 to 12 years of imprisonment subject to a non-prole period of 11 years.

[3] On 29 March 2018 the appellant had signed a timely notice of application for leave to appeal against conviction. Amended notice of appeal and written submissions had been tendered on his behalf by the Legal Aid Commission on 23 October 2020. The State had tendered its written submissions on 25 November 2020.

[4] The brief summary of facts according to the sentencing order is as follows.

> *2. The brief facts were as follows. On 26 September 2016, you were 24 years old. You were married with a young daughter. You lived in Naqara Village, Ono, Kadavu with your family and father. You were a subsistence farmer and planted yaqona, dalo and cassava for a living. Prior to 26 September 2016, the police received information that you were cultivating marijuana. On 26 September 2016, after 7.15 am, the police raided your farm and uprooted 170 marijuana plants.*
>
> *3. You were spotted by police returning from the farm after watering your marijuana plants. With the help of the Village Headman, they located your house and upon questioning, admitted the marijuana plants were yours. The 170 marijuana plants and you were later taken to Kadavu Police Station. At Kadavu Police Station, you were caution interviewed by police. You admitted the 170 marijuana plants were yours. The plants were analysed by the government analyst, and she confirmed the same were cannabis sativa plants, an illicit drug. The plants weighed a total of 21.95 kilograms.*

[5] 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.

[6] Grounds of appeal urged on behalf of the appellant are as follows.

Conviction

Ground 1

That the Learned Trial Judge erred in law and fact when he allowed the evidence of PW3 – PC 4490 Sevanaia without the proper Turnbull guideline being followed and without any Turnbull warning being advanced to the Assessors nor to himself thus causing a miscarriage of justice.

Ground 2

The Learned Trial Judge erred in law and fact when he allowed the evidence of PW3 – PC 4490 Sevanaia without establishing if the said alleged admission made by the Appellant to PW3 was done so after he was cautioned and without any warning to the Assessors and himself on the risk of accepting such evidence.

Ground 3

The Learned Trial Judge erred in law and fact when he failed to consider the doubts in the State's case in terms of the evidence against the Appellant as such causing the learned Trial Judge to unfairly sum up the Defence case to the Assessors.

Ground 4

The Learned Trial Judge erred in law and fact when he convicted the Appellant when the evidence adduced by the State was strongly discredited that it could not have supported the conviction.

01st ground of appeal

[7] The appellant argues that the trial judge had failed to give Turnbull directions regarding the identification of the appellant by the police officers (PW3 and PW4) as both of them had only seen an i-taukei man in front of them on the track beside the marijuana farm where they had also observed recently watered 170 plants. How much of that i-taukei man they had observed or how long the witnesses had seen him is not clear. Later they had described him to the village headman who had taken them to the appellant's house where they had confronted him. It appears that the village headman may have thought that the description of the i-taukei man had matched or at least

resembled that of the appellant. It is not clear whether the village headman had given evidence at the trial.

[8] Thus, this is not a situation where the appellant had been identified by the police officers walking in front of them, for if that be the case when they saw him at his house they should have recognized him as the person whom they saw earlier. Therefore, there was no identification or recognition of the appellant by the police witnesses. The village headman had anyway not seen him on the track. Therefore, I do not think that Turnbull guidelines have a direct application to this scenario except perhaps to the extent to resolve whether PW3 and PW4 could have had an adequate opportunity to see him even to give an accurate description of whom they saw which led the village headman to determine that it could be the appellant and take the police officers to his house.

[9] The state had argued that its case rested on the admissions made by the appellant but did not rely on PW3's identification of the appellant and therefore Turnbull guidelines were irrelevant.

[10] However, in my view, considering the prejudicial nature of the evidence of PW3 and PW4 regarding their confronting the appellant at his house as the man who was seen walking on the track near the marijuana farm (coupled with his oral admission of guilt), the trial judge should have warned the assessors of the possibility of mistaken description by PW3 and PW4 in their account of the i-taukei man walking on the track and also the possible mistake on the part of the village headman to make sure that the prejudicial value of such evidence did not outweigh the probative value of such evidence. The observations in **Lal v State** [2018] FJCA 147; AAU154 of 2014 & AAU 8 of 2015 (04 October 2018) are relevant in this regard. In this context a direction based on Turnbull guidelines cannot be totally excluded as totally irrelevant regarding the observation of the i-taukei man by PW3 and PW4. It may still be useful and applied suitably.

[11] Such a warning to the assessors, in my view, was also necessary in order to make sure that the impugned evidence of PW3 and PW4 under this ground of appeal did not lead the assessors to attach more credibility and weight to the informal oral admission of guilt by the appellant and the formal cautioned interview recorded later.

[12] However, since the prosecution sought to establish appellant's identity and the act of cultivation only through his cautioned statement which is independent of the above evidence, the appellate court has to consider whether the appellant's criminal liability had been established without the impugned evidence of PW3 and PW4 challenged under this ground of appeal.

[13] Therefore, the want of an appropriate warning as aforesaid might have caused a miscarriage of justice but whether it was a substantial miscarriage of justice has to be determined by examining the trial proceedings which are not available at this stage.

02nd ground of appeal

[14] The appellant's argument relates to the evidence of the police officer (PW3) that the appellant made a verbal confession before he was cautioned or arrested that the marijuana farm belonged to him. The appellant argues that the said admission should not have been admitted in evidence primarily because of the application of The Judges' Rules 1964 or at least the trial judge should have given a warning to the assessors to consider the admissions supposedly made to PW3 by the appellant at his house cautiously as no caution had been administered to him or his rights been explained to the appellant prior to the oral confession.

[15] The state has submitted that prior to the appellant's first confession that cannabis farm was his, the police officers had no grounds to suspect the appellant of having committed any offence and the information that the police had was that the farm belonged to one Tomasi (Tomu). It was only after the appellant had told PW3 and PW4 that the farm belonged to him that a caution was administered and he was arrested and taken to the police station.

[16] Confession to the Police is *prima facie* admissible as relevant unless it was obtained by oppression or trickery or was unreliable [vide **Heinrich v State** [2019] FJCA 41; AAU0029 of 2017 (07 March 2019) or involuntary in the sense that it had not been obtained either by fear of prejudice or hope of advantage (vide **Ibrahim v R** [1914] A.C. 599 at 609]. The Judges' Rules 1964 are not rules of law and their non-observance will not necessarily lead to a confession being excluded or rejected from evidence unless it was not made voluntarily [vide **State v Rokotuiwai** – Ruling on Voir Dire [1996] FJHC 159; Kaa 0009r of 1995s]

[17] Therefore, the first admission of guilt by the appellant to PW3 and PW4 was still admissible but I think the trial judge should have warned the assessors that no caution had been administered and no rights had been explained to the appellant by that time and therefore they should decide what weight to be attached to it.

[18] The trial judge had not done so and unfortunately he directed the assessors on the first admission to PW3 and PW4 and the formal cautioned statement together in the summing-up at paragraphs 30-33. The circumstances under which they were obtained were materially different. There was a possibility that the assessors would have felt sure of or derived strength to accept the formal cautioned statement because of the first oral admission when they should have considered both separately. I think the lack of warning in this regard and not directing the assessors separately might have caused a miscarriage of justice but whether it was a substantial miscarriage of justice has to be determined by examining the trial proceedings which are not available at this stage.

03rd ground of appeal

[19] The appellant challenges the formal record of interview on the basis that (i) the witnessing officer being not present during the interview but he had signed the copies of the document later (as signified by his original signature on both the top copy and the carbon copy) and (ii) there being no answer to the question (as signified by the blank space) when asked whether the appellant wished to read the interview in the i-taukei version but having the answer 'no' in the English translation. The interviewing officer had stated that he had forgotten to write the appellant's answer in the i-taukei version which the trial judge is said to have had accepted. The appellant contends that

the answer 'no' had been fabricated in the English version. He cites these examples to buttress his position that he was not given an opportunity to read over the cautioned interview and he never said 'no' to reading the cautioned statement before signing.

[20] The appellant argues that these matters were not considered at the *voir dire* ruling and not brought to the attention of the assessors in the summing-up. As stated by the appellant these matters are not in fact reflected in the *voir dire* ruling dated 09 March 2018. the summing-up or the judgment though the state has submitted that these two issues were thoroughly ventilated at the *voir die* inquiry.

[21] The appellant had not given evidence but kept these issues alive at the trial proper through cross-examination of police witnesses. He is supposed to have raised them at the *voir dire* inquiry directly by his own evidence but it is not reflected in the ruling. The trial judge had rejected the appellant's version that the confession was not voluntary and accepted the cautioned interview as admissible. The trial judge had administered a correct direction on the assessors regarding the cautioned interview at paragraph 32.

[22] The state argues that the trial judge is not required to record in the summing-up every piece of evidence or every word of testimony as long as it is fair, objective and balanced [vide **Tamaibeka v State** [1999] FJCA 1;AAU0015u of 1997s (08 January 1999]. It is also argued that there is no nexus between the 'minor' discrepancies highlighted by the appellant and the allegation of obtaining the confessions by force. According to the state, to cite them as examples of the confession being involuntary is untenable.

[23] The defense counsel had however not raised with the judge a redirection into these aspects at the summing-up as advised in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018)] and to that extent the credibility and weight of these complaints diminish.

04th ground of appeal

[24] This ground of appeal is repetitive of matters raised under the previous grounds of appeal dealt with already and the appellant seems to argue that because of those issues the verdict is unreasonable or cannot be supported having regard to the evidence.

[25] Having considered the above grounds of appeal, I am not convinced at this stage without the benefit of the complete appeal record that no single ground of appeal has a reasonable prospect of success in having the verdict set aside in appeal. Whether they are collectively capable of doing so is a matter for the full court to decide with the advantage of having the trial proceedings should the appellant renew his leave to appeal application.

[26] The above approach in consistent with the powers conferred on the appellate court under section 23 of the Court of Appeal Act *i.e.* having considered the admissible evidence against the appellant as a whole, could the appellate court say that the verdict was unreasonable; whether there was admissible evidence on which the verdict could be based [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)].

[27] In other words, could the trial judge also have reasonably convicted the appellant on the admissible evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) and **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[28] In the appeal process, the full court may also consider the application of proviso to section 23 (1) of the Court of Appeal Act in this appeal on the question whether there is any substantial miscarriage of justice and the test therein would be the one enunciated in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)

> *'[55] The approach that should be followed in deciding whether to apply the* ***proviso to section 23*** *(1) of the* Court of Appeal Act *was explained by the Court of Appeal in* ***R v. Haddy*** [1944] 1 KB 442. *The decision is authority for the proposition that* ***if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice****. This*

decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.

[56] This test has been adopted and applied by the Court of Appeal in Fiji in ***R –v- Ramswani Pillai*** *(unreported criminal appeal No. 11 of 1952: 25 August 1952);* ***R –v- Labalaba*** *(1946 – 1955) 4 FLR 28 and* ***Pillay –v- R*** *(1981) 27 FLR 202. In* ***Pillay –v- R*** *(supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in* ***R –v- Weir*** [1955] NZLR 711 *at page 713:*

> *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt.* ***If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."***

[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

> *In* ***Vuki –v- The State*** *(unreported AAU 65 of 2005: 9 April 2009) this Court observed at paragraph 29:*
>
> *"The application of the* ***proviso to section 23*** *(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."*

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL