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

CRIMINAL APPEAL NO.AAU 0036 of 2017
[High Court of Suva Criminal Case No. HAC 064 of 2015S]

BETWEEN	:	**WAISAKE KALOULIA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. V. Diroiroi for the Appellant**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	:	**06 January 2021**
Date of Ruling	:	**08 January 2021**

RULING

[1] The appellant had been charged 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 committed on 21 January 2015 at Davecadra farm, Wainibuka, Tailevu, in the Central Division. The information read as follows.

> ***'Statement of Offence***
>
> ***UNLAWFUL CULTIVATION OF ILLICIT DRUGS:*** *Contrary to section 5 (a) of the Illicit Drugs Control Act 2004.*
>
> ***Particulars of Offence***
>
> ***WAISAKE KALOULIA*** *and* ***KAMINIELI NAQELECA****, on the 21st day of January 2015, at Davecadra farm, Wainibuka, Tailevu, in the Central Division, without lawful authority, cultivated 160.6 kilograms of Cannabis Sativa or Indian Hemp, being illicit drugs*

[2] At the conclusion of the summing-up, on 30 January 2017 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 31 January 2017 to 19 years of imprisonment subject to a non-prole period of 15 years.

[3] The President of the Court of Appeal had noted on 03 May 2019 that the appellant had preferred a timely notice of appeal against conviction and sentence. The appellant had followed it up with amended grounds of appeal and submissions. Amended notice of appeal and written submissions had been tendered on behalf of the appellant by the Legal Aid Commission 19 August 2020. The State had tendered its written submissions on 19 November 2020.

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

> *'3. The facts were straightforward. On informations received from police informers, the police raided Accused No. 1's house at Nabulini Village, and found dried cannabis sativa leaves on him, on 21 January 2015 at 3.30 am. Accused No. 1 admitted to police he had a marijuana farm in Davecadra, Wainibuka, Tailevu. The police proceeded to the farm, which was 7 hours walk from Nabulini Village through thick bushes, a river and various streams. At the farm, the police saw Accused No. 2. He fled after seeing the police. The police uprooted 484 cannabis sativa plants, and took the same to Korovou Police Station. The plants were later confirmed as cannabis sativa and weighed 160.6 kilograms. Both accuseds were later caution interviewed by police. They both admitted the above drugs were theirs. They were later charged and convicted for cultivating the same.*
>
> *4. As far as Accused No. 1 was concerned, the main evidence against him was his alleged confession to the police when caution interviewed on 22 January 2015. His caution interview statements were tendered as Prosecution Exhibit No. 1(A) and 1(B). In his interview statements, he admitted cultivating the 160.6 kg of Indian hemp tendered in court as Prosecution Exhibit No. 3.....'*

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

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

CONVICTION

Ground 1

The Learned trial Judge erred in law and in fact in allowing prosecution to led evidence of uncharged acts and not directing the assessors on how to approach uncharged acts.

Ground 2

The Learned trial judge erred in law and in fact by not directing the assessors to consider the Appellant's case separately from his co-appellant, thereby prejudicing his right to fair trial.

Ground 3

The Learned trial Judge erred in law and in fact in not directing the assessors when considering the confessional statements, that one's confession cannot be used against the other, thereby prejudicing the Appellant's right to a fair trial.

Ground 4

The Appellant's trial counsel had not adequately defended the Appellant given that the Appellant had witnesses to provide evidence at the voire dire inquiry, as the sole evidence relied upon by prosecution is the Appellant's confession.

SENTENCE

Ground 1

The Learned Trial Judge erred in principle in enhancing the Appellant's sentence by considering the weight of the illicit drugs as an aggravating factor.

01st ground of appeal

[8] The appellant's argument relates to the evidence of the police officer who led the raid and who had stated in evidence that they found dried cannabis sativa leaves in the appellant's house. For reasons best known to the prosecution the appellant had not been charged with possession of cannabis sativa. Nor had there been any information of the weight of the dried leaves of marijuana or whether it had been tested and found to be marijuana. The appellant states that the trial judge had failed to warn the assessors to disregard the said evidence in considering the issue of guilty or otherwise of the appellant for cultivation which, according to him, had highly prejudiced the appellant. The state concedes that the trial judge had in deed not administered such a warning but argues that the trial counsel should have raised it with the trial judge for a redirection.

[9] The appellant's complaint assumes significance in the light of the fact that the only evidence against him was his cautioned interview which he had challenged but ruled and admitted as admissible by the judge. In the first place, it is beyond comprehension as to why the prosecution had thought it fit not to level a charge of possession of marijuana. Even if the impugned evidence was inadvertently led as claimed by the state the prosecution should have sought a redirection from the trial judge to the assessors to disregard that evidence as it was on an uncharged act. The state had not sought to justify that evidence as being part of the *res gestae* either. The appellant's

trial counsel too had failed to seek a redirection on this piece of evidence. Even without any prompting by either party the trial too should have been alert to warn the assessors on this item of evidence. In those circumstances, I am not inclined to lay the blame entirely on the appellant's trial counsel for not raising the matter with the trial judge.

[10] **Rokete v State** [2019] FJCA 49; AAU0009.2014 (7 March 2019) the Court of Appeal dealt with a complaint of leading evidence of an uncharged act by the prosecution as follows.

> *'[35] Once again the appellant complains of an alleged non-direction by the trial Judge with regard to an uncharged act on the evidence of his having escaped from Ba Police Station during interview. Admittedly, this had not been raised by the counsel for the appellant when the trial Judge asked for any redirections. The appellant relies on **Senikarawa v State** AAU0005 of 2004 S: 24 March 2006 [2006] FJCA 25 and **Vesikula v State** AAU0070 of 2014: 23 October 2018 [2018] FJCA 176 in support of his argument. The litmus test for leading evidence of an uncharged act is whether the probative value of the evidence outweighs the prejudice to the accused.*

[11] Goundar J in **State v Nayacalagilagi** [2009] FJHC 48; HAC165.2007 (17 February 2009); stated:

> *"If the jury inadvertently hears inadmissible evidence, any prejudice could be avoided or dispelled by a clear warning to disregard the evidence and enable a fair trial. However, if the circumstances are such that the prejudice to the accused could not be dispelled by a warning to the jury, a mistrial is declared as an appropriate remedy to ensure a fair trial for the accused."*

[12] It could be reasonably assumed that not only the evidence of the police officer but also the cautioned interview may have contained question/s and answer/s containing the uncharged act which the assessors would have become privy to if the prosecution had not taken care to conceal the same from the assessors when copies of the cautioned interview were given to them.

[13] In the circumstances, whether the probative value of the impugned evidence outweighs the prejudice to the appellant could be examined by the full court only with the availability of the complete appeal records. However, for the time being there is merits in the submission of the appellant on this ground of appeal.

02nd and 03rd grounds of appeal

[14] The appellant complains that the trial judge had not directed the assessors to consider the each accused's case separately and also failed to direct them that that one's confession should not be used against the other which had resulted in prejudicing his right to a fair trial. He cites the directions of the High Court judge in **State v Niudamu** [2017] FJHC 689; HAC129.2015 (15 September 2017) as 'impeccable' directions relating to his complaint on the second ground of appeal.

> *'10. You apply that test to the case against each accused. That is an important matter. As you are aware, fifteen accused are charged with Sedition on 34 counts in the same Information. However, they are charged separately. The law recognizes that more than one person may be charged together when offence/s are alleged to have been committed in a single transaction. It is convenient to deal with their cases together in one trial. However, they are still entitled to have their charges considered separately. In doing this you must carefully distinguish between the evidence against one accused and the evidence against the other. You must not for instance, supplement the evidence against one accused by taking into account evidence referable only to another. You must not assume that because you find there is enough evidence to convict one, that the others must be guilty. This case comes within a small compass and I do not think you will have any difficulty in keeping distinct in your minds evidence which properly and fairly relates to all of them and that which relates to one of them alone. I will refer to this when I discuss the evidence in respect of each Accused.*
>
> *49. Please bear in mind, a caution statement of an accused is only admissible against the maker of the statements. For example, what the 1st Accused person said in his caution statement is evidence against him only. If he has implicated another accused person in his caution statement, that is not evidence against the second accused person. As a matter of law, nothing in that caution statement can be regarded as evidence against other accused persons. In caution statements, you will find certain parts have been blacked out. You are not here to speculate about missing parts. Just concentrate on what is legible.'*

[15] The appellant cites **Niume v State** [2015] FJCA 132; AAU0106.2011 (2 October 2015) in support of his third ground of appeal.

> *'[16] ..... It is well established law that, while a statement made in the absence of the accused person by one of his co-accused cannot be evidence against him, if a co-accused goes into the witness box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-*

*accused (**Leonard Rudd** (1948) 32 Cr App R 138, 140; **Ram Asre v Reginam** [1965] 11 FLR 214, 218).*

[16] The state while conceding both points raised by the appellant has responded by pointing out that the trial judge had in deed stated in the summing-up that *" A confession, if accepted by the trier of fact- in this case, you as assessors and judges of fact – is strong evidence against its maker... '.* However, in my view, such a direction is inadequate, for the assessors being laymen could not have understood the legal position correctly and there could have been a danger that they did consider the cases against each of the accused together and also considered each one's confession against the other. In this kind of scenario an unequivocal and emphatic direction is required to make sure that the assessors would consider the cases of each of the accused separately and not consider any confessional statement of one accused against another.

[17] Nevertheless, the consequences of the omission may not necessarily lead to setting aside the guilty verdict but that is a matter for the full court to decide after perusing the entire appeal record. However, there is merit in the appellant's complains under both grounds of appeal for leave to appeal.

[18] In **Mohan v State** [2015] FJCA 155; AAU103.2011 (3 December 2015) affirmed by the Supreme Court in **King v State** [2019] FJSC 11; CAV0002.2016 (21 May 2019) the Court of Appeal considered a similar complaint where bad character evidence had crept in through the cautioned interview and remarked

> *22. Due to this prejudicial inadmissible evidence of bad character pertaining to both the appellants was included. This has caused a miscarriage of justice in this case.*
>
> *23. However there was ample evidence in this case on all elements of the offence which could have led reasonable assessors to convict the Appellants.*
>
> *24. I hold that although there was a miscarriage of justice by the inclusion of bad character evidence, when considering the totality of the evidence in the case it cannot be considered as a substantial miscarriage of justice. Therefore I hold that this falls within the proviso to Section 23 (1)(a) of the Court of Appeal Act. Hence I uphold the conviction."*

[19] On a complaint of the irregularity of a first time dock identification the following test was formulated in **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) following **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 and **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018)

> '[36] *Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23 (1) of the Court of Appeal Act would apply and appeal would be dismissed*

[20] The same or similar two-tiered test may be suitable to the appellant's complaints under the first ground of appeal. Firstly the appellate court would consider ignoring the evidence on uncharged act whether there was sufficient evidence on which the assessors could express the opinion that the appellant was guilty and on which the trial judge could find him guilty (*i.e.* quantity/sufficiency of the evidence available sans the impugned item of evidence). Secondly, the court would see whether the assessors and the judge would have found the appellant guilty even in the absence of evidence being challenged (*i.e.* whether the quality/credibility of the available evidence without the impugned evidence is capable of proving the case against the accused beyond reasonable doubt).

[21] 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)].

[22] 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)].

[23] Regarding the 2nd and 3rd grounds of appeal the approach of the appellate court 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:*
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> > *"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."*

04th ground of appeal

[24] The appellant criticizes the conduct of his trial counsel. The procedure to be adopted before the appellate court could entertain any ground of appeal based on allegations against the trial counsel is set out particularly at paragraph [39] followed by paragraphs [40] - [44] in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019). The appellant or his counsel has not followed the procedural steps as prescribed in ***Chand*** and therefore, I am not inclined to consider this ground of appeal.

[25] Therefore, though I cannot say with certainty at this stage whether the appellant has a reasonable prospect of success on the 01-03 grounds of appeal, it is certainly worthwhile for the full court to consider all of them with the help of the complete appeal record.

01st ground of appeal (sentence)

[26] The appellant had been dealt with under category 4 of sentencing guidelines in **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012) where the sentencing tariff for possession of cannabis sativa of 4000g or above was set between 07-14 years of imprisonment.

[27] The appellant's argument here is that the trial judge had taken the quantity of 160.6 kg as an aggravating factor and enhanced the sentence by 08 years to the starting point of 12 years when the tariff for 4 kg and above had already consumed the weight of the cannabis.

[28] The sentencing tariff of 07-14 years for any weight of 04 kg or more of cannabis sativa as stipulated in **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012) does not necessarily mean that any weight of or above 4kg should only get a sentence between 07-14 years. Depending on the higher weight above 04kg the final sentence could get increased upwards from 07 years and it could be even above 14 years if all the aggravating circumstances so warrant in any given case. Merely because the

sentence is above the tariff that does not necessarily make it illegal either. It is trite law that if the sentencing judge explains the ultimate sentence could be lower or higher than the accepted range of sentence. 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 (vide **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013).

[29] The appellant's argument is that the trial judge had double counted the weight of marijuana as an aggravating factor which the judge may have already considered in picking the starting point at 12 years towards the higher end of the tariff.

[30] 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.

[31] The Supreme Court said in **Kumar v State** [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.

[32] Some judges following **Koroivuki v State** (supra) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[33] 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.

[34] The methodology commonly followed by judges in Fiji is the two-tiered process expressed in the decision in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) which was further elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015). 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 for 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).*

[35] However, in applying the two-tiered approach the judges should endeavor to avoid the error of double counting as highlighted by the Supreme Court. The best way obviously to do that is to follow the two-tiered approach diligently as stated above. In this regard, it is always helpful for the sentencing judges to indicate what aggravating factors had been considered in picking the starting point in the middle of the tariff and then to highlight other aggravating factors used to enhance the sentence. If the starting point is taken at the lower end without taking into account any aggravating features, then all aggravating factors can be considered to increase the sentence.

[36] The observations of the Supreme Court in **Qurai v State [2015]** FJSC 15; CAV24.2014 (20 August 2015) are instructive in this regard.

'[49] In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one), and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two), before deriving the sentence to be imposed. This is the methodology adopted by the High Court in this case.

[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 described above 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 that 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 precision is not insisted upon. But this does not mean that proportionality, a 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 of a diverse range of considerations that are integral to the sentencing process. The two-tiered 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 methodology more useful than other judges.

[37] This court is faced with exactly the same dilemma in this appeal. It is not clear what other factors the trial judge had considered in selecting the starting point other than the weight of cannabis, for the trial judge had not set out any other aggravating factors. It could therefore be reasonably assumed that it is the weight of the cannabis as an aggravating feature that may have gone into the decision of picking the starting point at 12 years. If so, there could be double counting when the sentence was enhanced by further 08 years in consideration of the weight once again for the second time.

[38] I previously had the opportunity of examining a similar complaint in **Salayavi v State** [2020] FJCA 120; AAU0038 of 2017 (03 August 2020) where I stated:

*'[30] In the present case, however, it is clear what features the learned trial judge had considered in selecting the starting point. Therefore, it becomes 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 **Nadan** may not arise. Therefore, in view of the pronouncements of the Supreme Court in **Nadan** it will be a good practice, if not a requirement, in 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.'*

[39] If ***Naikelekelevesi*** guidance is carefully followed *i.e.* 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, the danger of double counting expressed by the Supreme Court may be able to be avoided.

[40] 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).

[41] 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 that matter after a full hearing.

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

[43] Leave to appeal against sentence 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 unresolved by the Court of Appeal or the Supreme Court.

[44] 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 earlier cited before this court 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[3].

[45] These disparities and inconsistencies have been amply highlighted in six recent Rulings[4] 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] **Raivasi v State** [2020] FJCA 176; AAU119.2017 (22 September 2020) and **Bola v State** [2020] FJCA 177; AAU132.2017 (22 September 2020).

[4] **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), **Kuboutawa v State** AAU0047.2017 (27 August 2020) and **Tukana v State** [2020] FJCA 175; AAU117.2017 (22 September 2020) and **Qaranivalu v State** [2020] FJCA 186; AAU123.2017 (29 September 2020).

Order

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is allowed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL