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

CRIMINAL APPEAL NO.AAU 0003 of 2017
[High Court of Suva Criminal Case No. HAA 29 of 2016]
[Magistrates Court of Nausori Crim. Case No. 104 of 2015]

BETWEEN	:	**STATE**
		Appellant
AND	:	**SAILOSI TUIDAMA**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Kiran for the Appellant**
	:	**Mr. T. Lee for the Respondent**
Date of Hearing	:	**15 March 2021**
Date of Ruling	:	**16 March 2021**

RULING

[1] The respondent had been charged in the Magistrates Court of Nausori on a single count of Cultivation of Illicit Drugs contrary to section 5(a) of the Illegal Drugs Control Act of 2004 committed on 11 November 2015 at Davuilevu Settlement, Nasau, 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 Drug Control Act No. 9 of 2004.*

Particulars of Offence

SAILOSI TUIDAMA *on the 11th day of November, 2015 at Davuilevu Settlement, Nasau, Wainibuka, Tailevu in the Central Division, without lawful excuse, cultivated 2.68 kilo grams of Cannabis Sativa or Indian hemp an illicit drug.*

[2] The respondent had pleaded guilty on his own freewill after waving the right to counsel and admitted the statement of facts. The Magistrate had convicted the respondent and applying **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012) sentencing guidelines, sentenced him to 4 ½ years of imprisonment with a non-parole period of 04 years on 11 December 2015.

[3] The respondent had appealed against the sentence to the High Court which had set aside the sentence imposed by the Magistrate and substituted that with a custodial sentence of 18 months (1 ½ years).

[4] The state had challenged the sentence imposed by the High Court in terms of section 22 of the Court of Appeal Act by way of an application for extension of time to appeal due to the delay of 01 month and 10 days and tendered written submissions on 16 October 2019. The Legal Aid Commission appearing for the respondent had filed its written submissions on 27 May 2020.

[5] The state had explained in an affidavit dated 19 January 2017 the reasons for the delay as a combination of administrative issues including steps to be followed in the appeal process within the organization, officers of the ODPP going on annual leave and sudden bereavement leave taken by the officer in carriage (OIC) of the matter.

[6] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[7] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[8] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[9] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'.** In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

> *'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a **'real prospect of success'** (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal.....'*

Length of delay and reasons for the delay

[10] The length of the delay is not substantial and the reasons for delay appear to be reasonably acceptable in the light of the short delay of 01 month and 10 days.

[11] However, one must not lose sight of the comments of Byrne J. in **Julien Miller v The State** AAU0076/07 (23 October 2007) that

> *'... that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'*

Merits of the appeal

[12] In **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."

[13] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the short delay and the reasonably acceptable explanation, the prospects of the appeal would warrant granting enlargement of time.

[14] 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 untimely preferred against sentence to be considered arguable there must be a real 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.

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

*(i) 'That the learned High Court Judge erred in law and in fact when he failed to apply the sentencing guidelines set out in **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012)*

(ii) 'That the learned High Court Judge erred in law and in fact when he failed to take into account the weight of 13 green plants in sentencing the respondent in this case.

[16] Both grounds of appeal could be considered together for convenience as they are interlinked. The respondent had been dealt with under category 3 of sentencing guidelines in **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012) by the Magistrate where the sentencing tariff for possession of cannabis sativa of 1000g to

4000g was set between 03-07 years of imprisonment. The Magistrate had picked the starting point at 06 years and after giving a discount of 1½ years for what he had considered to be mitigating factors, guilty plea and the period of remand the final sentence had been fixed at 4 ½ years.

[17] In appeal, the High Court judge had held that the starting point of 06 years picked by the Magistrate was substantially disproportionate to the objective seriousness of the offence. He had also agreed with the respondent that the discount given for mitigating factors, guilty plea and period of remand did not reflect the totality of the appellant's plea and mitigation. However, the learned High Court judge had disagreed that the non-parole period was too close to the head sentence. Accordingly, the sentence appeal had been allowed on the first two grounds of appeal and the High Court judge had proceeded to determine the appropriate sentence.

[18] In doing so, the High Court judge had not followed the sentencing guidelines expressed in ***Sulua***. His reasons for deviating from the sentencing tariff set in ***Sulua*** are found in paragraphs 24 and 25 of the impugned judgment dated 14 November 2016. They can be summarised as follows.

(i) Sentencing tariff in ***Sulua*** was based on the weight of dried cannabis sativa leaves whereas the respondent's case concerned 'green' plants.

(ii) The weight of 2.68 kg of 13 'green' plants would include the weight of stems and the water content in the fresh plants.

(iii) It is not mentioned by the Govt. Analyst whether the roots had been excluded in specifying the weight of those plants.

(iv) Therefore, the sentencing guidelines based on ***Sulua*** cannot be applied and it is unlikely that the dry weight of the 13 fresh plants would fall into the third category of ***Sulua*** guideline (i.e. 03-07 years of imprisonment).

[19] The learned High Court judge had also expressed the view that if the weight of cannabis sativa is to be applied as the decisive criteria as recommended in ***Sulua*** guidelines in the matter of sentence, the weight as at the time of sentencing should be available.

[20] Therefore, the High Court judge had preferred to adopt the categorisation set out in **Meli Bavesi v State** [2004] FJHC 93; HAA 0027 of 2004 in sentencing the appellant for cultivation of cannabis sativa but thought that tariff for the third category and fourth category in ***Sulua*** should apply to the second and third categories in ***Bavesi***. Accordingly, the High Court judge had proceeded to sentence the respondent in terms of the following sentencing formula.

> *a. The growing of a small number of plants for personal use by an offender on a non-commercial basis - 1 to 2 years imprisonment;*
>
> *b. Small scale cultivation for a commercial purpose with the objective of deriving a profit - 3 to 7 years imprisonment;*
>
> *c. Large scale commercial cultivation- 7 to 14 years imprisonment.*

[21] Consequently, the High Court judge had picked 03 years as the starting point, given 1/3 discount for the early guilty plea and reduced 06 months for other mitigating factors and come up with a head sentence of 18 months. With the period of remand being deducted the ultimate sentence had been set at 17 months.

[22] It is this sentence that the state is challenging in this appeal based on the High Court judge not following ***Sulua*** guidelines and his failure to take into account the weight of 13 green plants. It argues that the established tariff in ***Sulua*** does not make a distinction between dried leaves or green leaves and mature plants or young plants which are relevant only in the matter of calculating the sentence as aggravating or mitigating factors but not in relation to the tariff *per se*. The state cites **State v Vuicakau** [2018] FJHC 12; HAC01 of 2018 (19 January 2018) as an example where the court had considered the circumstances such as green plants, roots etc. in the matter of sentence for cultivation but still applied the tariff in ***Sulua.***

[23] However, state does recognise that there are difficulties in applying ***Sulua*** guidelines to cultivation of illicit drugs. Similarly, the scope of the terms such as *'small number of plants', 'small scale cultivation'* and *'large scale commercial cultivation'* suggested in ***Bavesi*** also can be subjective and inconclusive in its application. The same goes with *'personal use', 'commercial purpose'* and *'commercial cultivation'*.

[24] There has been a commendable attempt to address this issue of subjectivity and inconclusiveness in **State v Nabenu** [2018] FJHC 539; HAA10 of 2018 (25 June 2018) by specifying the number of plants belonging to each category of cultivation coupled with the purpose of cultivation by adopting ***Tuidama*** and accommodating concerns expressed in **Dibi v State** [2018] FJHC 86; HAA96.2017 (19 February 2018). ***Nabenu*** has been followed by some High Court judges subsequently[1]. Yet, some other High Court judges continue to follow and apply ***Sulua*** guidelines[2].

[25] It is now well documented that 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 apply different or modified sentencing regimes on the premise that ***Sulua*** cannot be applied to cultivation and there is no guideline judgment especially for cultivation of marijuana[3]. Those cases go on the basis 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[4]. 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

---

[1] **State v Koro – Sentence** [2019] FJHC 730; HAC 48 of 2019Ltk (25 July 2019), **State v Kaitani – Sentence** [2018] FJHC 605; HAC 355 of 2016 (16 July 2018), [**State v Dukubure** [2017] FJHC 310; HAC076 of 2017 (28 April 2017) followed ***Tuidama.***]

[2] **State v Koroitamana – Sentence** [2018] FJHC 798; HAC69 of 2017 (27 August 2018), **State v Saleyuwai** [2018] FJHC 11; HAC 02 of 2018 (19 January 2018), **State v Ravia – Sentence** [2019] FJHC 381; HAC 255 of 2017S (30 April 2019), **State v Tobua – Sentence** [2019] FJHC 97; HAC 140 of 2018 (19 February 2019)

[3] See for example **State v Bati** [2018] FJCA 762; HAC 04 of 2018 (21 August 2018) which still referred to ***Sulua***.

[4] **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)

accused as a measure of his responsibility as the basis for possible guidelines in 'cultivation' cases deviating from ***Sulua*** guidelines[5].

[26] However, the huge and disconcerting disparity between these two schools of sentencing regimes could be best highlighted by the examples of ***Koro*** where applying ***Nabenu*** guidelines the accused on a plea of guilty for cultivating 40.17 kg (196 plants) of cannabis sativa received a sentence of 07 years and 07 months of imprisonment while in ***Tobua*** applying ***Sulua*** guidelines the accused on a plea of guilty for cultivating 08 kg (46 plants) of cannabis sativa received a sentence of 11 years and 4 ½ months of imprisonment.

[27] The issue of the proper sentencing regime for cultivation cases and the disparities and inconsistencies of sentences for cultivation of cannabis sativa have been amply highlighted in seven recent Rulings[6] in the Court of Appeal and therefore, the same discussion need not be repeated here. However, suffice it to say that sooner the Court of Appeal or the Supreme Court sets down in a guideline judgment the applicable tariff for cultivation of cannabis sativa the better it is for the system of criminal justice in the country. Uniformity of sentences imposed on accused similarly placed is one of the cornerstones of rule of law, due process of law and equality before law.

[28] Therefore, I am inclined to allow this appeal to proceed to the full court in terms of section 22(1) and (1A) of the Court of Appeal Act on the lack of uniformity and existing disparity of sentences prevalent as a result of the two sentencing regimes being applied on offences of cultivation of illicit drugs among trial judges amounting to a question of law which is yet to be resolved by the Court of Appeal or the

---

[5] **Raivasi v State** [2020] FJCA 176; AAU119.2017 (22 September 2020) and **Bola v State** [2020] FJCA 177; AAU132.2017 (22 September 2020).

[6] **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) and **Nageleca v State** [2021] FJCA 7; AAU0093.2017 (8 January 2021)

Supreme Court. Whether the there is an error of law in the sentence passed on the respondent by the High Court would depend on how the above issue is resolved.

Prejudice to the respondent.

[29] The respondent has not submitted any prejudice in the event of enlargement of time being granted.

Order

1. Enlargement of time to appeal against sentence is allowed.

2. The notice of appeal filed by the appellant against sentence may proceed to the Full Court on the question of law as to the proper sentencing tariff for offences of cultivation of illicit drugs contrary to section 5(a) of the Illegal Drugs Control Act of 2004 and consequently whether there is an error of law in the sentence passed on the respondent by the High Court.

COURT OF APPEAL FIJI

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL