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

CRIMINAL APPEAL NO.AAU 12 of 2020
[High Court at Suva Criminal Case No. HAA 003 of 2019S]
[Magistrates Court of Nausori Crim. Case No.122 of 2018]

BETWEEN : **STATE**

Appellant

AND : **VILIKESA TAGINAKALOU**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. S. Shameem for the Appellant**
: **Ms. S. Ratu for the Respondent**

Date of Hearing : **08 August 2022**

Date of Ruling : **09 August 2022**

RULING

[1] The respondent had been charged in the Magistrates Court at Nausori on one count of possession of 41.6 grams of Cannabis Sativa or Indian hemp, an illicit drug contrary to section 5 (a) of the Illicit Drug Control Act, 2004 on 07 September 2018 at Naiyala Bus Shelter, Tailevu in the Central Division and cultivation of 6302 grams of Cannabis Sativa (201 plants of cannabis sativa) or Indian hemp, an illicit drug contrary to section 5(b) of the Illegal Drugs Control Act of 2004 committed on the 07 September 2018 at Nadra Farm, Nabulini, Tailevu in the Central Division.

[2] The respondent in person had pleaded guilty and admitted the summary of facts. On 20 September 2018, applying **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012) sentencing guidelines, the Magistrate sentenced him as follows. On count 01, the respondent was fined $200 with 20 days imprisonment for default and on

count 02, he was sentenced to 07 years imprisonment with a non-parole period of 6 years 3 months.

[3] The respondent had appealed against his sentence to the High Court which had set aside the conviction and sentence and made *inter alia* the following orders:

(i) The appellant is to be re-tried according to law
(ii) If the prosecutor intends to still charge the appellant with count no. 02, case to be transferred to the High Court for trial;

[4] The state had challenged, belatedly though (more than 47 days of delay), the decision of the High Court seeking affirmation of the conviction and sentence in terms of section 22 of the Court of Appeal Act, by way of an application for extension of time to appeal dated 20 February 2020 along with an affidavit explaining the delay. Appellant's written submissions had been filed on 25 October 2021 and the Legal Aid Commission appearing for the respondent had filed its written submissions on 08 December 2021.

[5] The factors to be considered in the matter of enlargement of time 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? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[6] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained. No party in breach of the relevant procedural rules and timelines has an entitlement to an extension of time and it is only in

deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[7] The delay of this appeal is substantial considering that it a state appeal. The state counsel who appeared in the High Court had explained in an affidavit that all legal opinions relating to appeals must be sent to the Appeals Division in Suva to be vetted by a senior officer and that decision making process resulted in the delay. Thus, the reasons for the delay appears not to be due to any lack of diligence on the part of the DPP. However, I would now see whether there is a **real prospect of success** for the belated grounds of appeal against the High Court decision in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] Grounds of appeal urged on behalf of the appellant are as follows:

> *Ground 1*
>
> *THAT the Learned High Court Judge erred in law when he held that the Resident Magistrate had no jurisdiction to hear the matter.*
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> *Ground 2*
> *THAT the Learned High Court Judge erred in law when he held that the conviction and sentence in the Nausori Magistrates Court were null and void.*
>
> *Ground 3*
> *THAT the Learned High Court Judge erred in law when he remitted the case to the Nausori Magistrate Court.*

[9] All orders made by the learned High Court judge flows from his decision to set aside the conviction and consequently the sentence. Thus, the main question of law is whether the High Court judge erred in law in setting aside the conviction.

[10] It appears from the High Court judgment that the basis on which the learned judge set aside the conviction is that the second count involving cultivation of 6302g (6.3 kg

and 201 plants) of illicit drugs makes it a category 4 offence in terms of sentencing guidelines in **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012), and therefore the case ought to have been dealt with in the High Court. Thus, the magistrate should have transferred the case to the High Court for trial and because he did not do so, he erred. The reasoning may imply that the magistrate did not have jurisdiction to try the second count. Is it because of patent lack of jurisdiction or because the sentence range is 07-14 years for category 4 offences of possession and thus, partially outside the sentencing powers of the magistrate is not clear from the judgment.

[11] In **Ratuyawa v State** AAU121 of 2014: 26 February 2016 [2016] FJCA 45 a similar issue as to whether or not the Magistrates Court had jurisdiction to try and sentence an accused for unlawful cultivation of illicit drugs (namely 221 plants of Cannabis Sativa, weighing 69.5 kilograms) contrary to section 5(a) of the Illicit Drugs Control Act, in view of the majority decision in ***Sulua*** came up. The Court of Appeal arrived at an affirmative finding in favour of the Magistrates Court jurisdiction by stating that the Magistrates Court has the jurisdiction to try all offences created by the Illicit Drugs Act 2004 in view of the clear provisions in Section 5(2) of the Criminal Procedure Act, 2009 subject to the limitations set out in section 5 pertaining to sentence. The court *inter alia* remarked:

> '*21. I am of the view that the learned High Court Judge was in error to have quashed the conviction of the Magistrate's Court. What the learned High Court Judge should have done was to have called for the record from the Magistrates Court and maintained the conviction and only vary the sentence, in view of the fact that the sentence was totally inadequate……..'*

[12] The Court of Appeal once again reiterated the above position in **State v Mata** [2019] FJCA 20; AAU0056.2016 (7 March 2019):

> *'[12] Therefore, it is clear from a collective reading of section 5 of the Illicit Drugs Control Act and sections 5(2) and 7 of the Criminal Procedure Act that the Magistrates Court has jurisdiction to try offences created under section 5 of the Illicit Drugs Control Act and impose any sentences upon the accused subject to the limitations prescribed under section 7 of the Criminal Procedure Act.'*

[13] Thus, it is plainly clear that setting aside the conviction was wrong in law. As stated in ***Ratuyawa*** what the High Court judge should have done was to have maintained the conviction and only vary the sentence if he felt that the sentence was grossly inadequate. It appears obliquely that the High Court judge had thought the sentence to be inadequate and felt that to remedy that the conviction too should be set aside and have the appellant tried anew in the High Court in order to be sentenced according to ***Sulua*** guidelines.

[14] However, the appeal before the High Court judge was only against sentence. The only way the High Court judge could have dealt with the conviction was by exercising revisionary powers. He had not specifically stated that he was doing so. Assuming that he was, there is no indication in the impugned judgment that both parties had been heard in the matter of conviction. If so, it is also a fundamental error.

[15] Moreover, there is a substantial body of judicial opinion in the High Court that ***Sulua*** guidelines in any event do not and cannot apply to offences relating to unlawful cultivation of illicit drugs as opposed to possession. The Court of Appeal has discussed this issue in great detail in a number of Rulings[1]. Thus, a clear pronouncement in this regard is called for from the Court of Appeal or the Supreme Court as soon as possible.

[16] Therefore, merits of the appellant's complaint against the High Court decision compels this court to allow extension of time to appeal. However, the state counsel (two) who had appeared in the High Court had failed to bring to the notice of the High Court judge ***Ratuyawa*** or ***Mata*** but it is not clear whether they had been put on notice by the High Court judge of his concern regarding the Magistrate's jurisdiction.

[1] For example **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), **Naqeleca v State** [2021] FJCA 7; AAU0093.2017 (8 January 2021) and **State v Tuidama** [2021] FJCA 73; AAU0003.2017 (16 March 2021).

Orders

1. Enlargement of time to appeal against the decision of the High Court is allowed.
2. The notice of appeal filed by the appellant against the decision of the High Court may proceed to the Full Court on the questions of law articulated above.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL