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

CRIMINAL APPEAL NO. AAU0026 OF 2019
[Criminal Action No: HAC 355 of 2016]

BETWEEN : **ARISI KAITANI**

Appellant

AND : **THE STATE**

Respondent

Coram : Jitoko, VP
Mataitoga, JA
Qetaki, JA

Counsel : Ms T Kean for the Appellant
Ms P Madanavosa for the Respondent

Date of Hearing : 4th July, 2023

Date of Judgment : 27th July, 2023

JUDGMENT

Jitoko, VP

[1] I entirely agree with Qetaki JA's judgment and the orders proposed.

Mataitoga, JA

[2] I support the reasons and conclusions in the Judgment.

Qetaki, JA

Background and facts

[3] This is an appeal from the ruling by a single Judge (Prematilaka, JA) dated 17 June 2020 in which the appellant's appeal for enlargement of time to appeal against conviction was refused and enlargement of time against sentence was allowed. Aggrieved by the ruling the Appellant wished to renew his leave to appeal against conviction to the Full Court of Appeal on the grounds specified below. He is also appealing against sentence.

[4] The appellant (First Named Accused) had been charged with another (namely the Appellant in AAU174 (Atekini Morokorovatu) in the High Court, Suva on one count of unlawful possession and one unlawful cultivation of illicit drugs contrary to section 5(a) of the Illegal Drugs Control Act 2004.The appellant pleaded not guilty to the charges while co-accused pleaded guilty to both counts.

[5] The following information are relevant:

FIRST COUNT

Statement of Offence

Unlawful Possession of Illicit Drugs: Contrary to section 5(a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

Arisi Kaitani and Atikiatikini Matakorovatu on 15th day of September 2016 at Kadavu in the Eastern Division, unlawfully possessed 1184.4 grams of an illicit drug known as cannabis sativa.

SECOND COUNT

Particulars of Offence

Arisi Kaitani and Atikiatikini Matakorovatu on 15th day of September 2016 at Kadavu in the Eastern Division, unlawfully cultivated 7975.7 grams of an illicit drug known as cannabis sativa.

Unlawful possession, manufacture, cultivation and supply

[6] Section 5 subparagraph (a) of The Illicit Drugs Control Act 2004 ("*the Act*") states:

"5. *Any person who, without lawful authority-*
  (a) acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or
  (b) engages in any dealings with any other person for the transfer, transport, supply, use, manufacture, offer, sale, import or export of an illicit drug,
commits an offence and is liable on conviction to a fine not exceeding $1 million or imprisonment for life or both.

Section 2 of the Act defines "*cultivate*" to mean "*includes planting, sowing, scattering the seed, growing, nurturing, tending, or harvesting and also includes the separating of opium, coca leaves, cannabis and its extracts from the plants from which they are obtained; and* ***cultivation*** *has a corresponding meaning*"

[7] The appellant pleaded not guilty to the charges on 20/1/2017 and the matter proceeded to hearing. After full trial two of the assessors found the appellant not guilty for both counts.

[8] The learned trial Judge agreed with the majority of assessors and disagreed with the minority on the first count of unlawful possession of illicit drugs. He acquitted the appellant on the first count.

[9] In respect of the second count of unlawful cultivation, the learned trial Judge disagreed with the majority assessors and agreed with the minority assessor. He found the appellant guilty as charged on the second count.

[10] On 16th July 2018 the appellant was sentenced to an imprisonment term of 14 years and 2 months with a non-parole period of 10 years and 2 months.

[11] The second accused Atekini Matakorovatu had pleaded guilty to both the charges and was sentenced to 8 years and 11 months imprisonment with a non-parole period of 06 years and 11 months.

[12] In brief, the facts were: The prosecution had led evidence of nine witnesses and relied on direct evidence and the admission made by the accused in the caution interview to prove the two charges. The accused had given evidence and called one witness. Having considered the evidence of police witnesses PW1, PW2, and PW3 and the military officer PW4 who took part in the raid, the learned trial Judge had accepted their evidence that they saw the appellant uprooting plants in the farm before they were arrested. Given the demeanor and deportment of the accused when he gave evidence taken together with all relevant evidence led in this case, the learned Judge had found the appellant's evidence that he was arrested on his way while he was looking for herbal medicine and brought to the farm thereafter, not credible and reliable..

Before a single judge

[13] Being aggrieved by the decision of the learned trial Judge, the appellant applied to this Court for enlargement of time seeking leave to appeal against conviction. Leave to appeal against sentence had been allowed.

[14] The grounds of appeal against both conviction and sentence filed before the single judge are as follows:

Grounds against conviction:

1. *That the learned trial Judge erred in law and facts by not directing himself and the assessors on the principles of Turnbull, given that the appellant disputed identification, therefore as a result of the non- direction has caused a substantial miscarriage of justice.*
2. *That the guilty verdict is inconsistent.*
3. *That the learned trial judge did not provide cogent reasons in disagreeing with the majority opinion of the assessors that the appellant is not guilty for the offence of unlawful cultivation of illicit drugs.*
4. *That the learned trial judge ought to have given the parties the opportunity to raise any objections (if any), of him hearing the case against the appellant, given that the trial Judge had heard the facts and sentenced the co-accused who pleaded guilty to both offences, which the Appellant is being charged with.*

Ground against sentence

That the learned trial judge erred in law and principles by using the same aggravating factor to select a starting point of 7 years, and then giving 11 years to the same aggravating factor, resulting in the excessive enhancement of the sentence.

[15] The appellant also filed a renewal notice against conviction, before the matter was fixed for hearing before this Court with the same grounds of appeal as pursued before a single judge.

[16] By paragraph 2.6 of the Appellant's Supplementary Written Submissions filed by the Legal Aid Commission on 26 June 2023 the appellant had indicated that he will be abandoning ground 1 of the renewal grounds filed on 19/6/2020.

Enlargement of Time application

[17] The law in respect of enlargement of time is well settled: **Kumar v State; Sinu v State** [2012] FJSC 17; 2 CAV 0001.2009 (21 August 2012). Where an appeal is filed out of time, an appellant must make an application in the prescribed form pursuant to section 40 of

the Court of Appeal Act 1949.The principles to be considered when determining an application for enlargement are:

(i) The length of the delay;

(ii) The reason for the delay:

(iii) Whether there is a ground of merit justifying this Honorable Court's consideration, of if the delay is substantial whether there is a ground which would probably succeed:

(iv) Whether the respondent would be unfairly prejudiced by the delay.

[18] The appellant was sentenced on 16 July 2018 and his application to appeal his conviction and sentence were filed on 16 April 2019. A delay of 8 months is in my view unreasonable, especially without good reasons. In **Julien v Miller,** Criminal Appeal No AAU0076 of 2007, the Court of Appeal per Justice Byrne whilst rejecting an application for leave to appeal out of time appeared to say that the delay of more than 3 months would be unreasonable. At paragraph [3] he said:

> *"In any event, were these applications for leave have been made much earlier and within what I would have thought was a reasonable time of 3 months at the latest beyond the 30 days prescribed by the Act....*

[19] The length of the delay does not support the appellant's application for an extension of time. In his affidavit, the appellant swears that he had given his grounds of appeal to a Corrections Officer named Mosese who told him that it will be filed after typing. A month later he was informed to re-submit his papers since the earlier one given to them have been misplaced. The appellant had ample time to file the papers earlier than after 8 months.

Appellant's Case

[20] The appellant through his legal representative (Legal Aid Commission) had submitted written submissions, which he relied on, as well as the oral submissions made on his behalf on the hearing of his appeal against conviction and sentence.

[21] <u>On ground 2</u>, the appellant referred to **<u>Balemaira v State</u>** [2013] FJSC 17; CAV0008.2013 (6 December 2013) which when discussing the issue of what makes a verdict unreasonable or inconsistent, states that:

> *"In view of the criteria for an inconclusive verdict outlined in Balemaira v State CAV 0008/2013 (supra), the learned trial judge's decision to rule out the Appellant being in possession while finding him guilty of cultivation on the same day is illogical."*

[22] The appellant states that whether a guilty verdict is unreasonable or inconsistent requires careful consideration of the evidence, and the principles to be applied in such cases were summarized by the Court of Appeal in **<u>Nemani Tuinavavi & Semi Turagabete</u>**, Criminal Appeal N0. HAC 0002/2005 at paragraph [23[as follows:

> *"The law on inconsistent verdicts is accepted by both Appellants and respondents is as summarized by the Canadian Supreme Court in **<u>R v Pittiman</u>** [2006] 1 SCR 381.It is similar to that of the High Court of Australia in **<u>Mackenzie v The Queen</u>** [1966] 190 CLR 348 (per Gauron, Gummow and Kirby JJ), and in **<u>Osland v The Queen</u>** [1998] HC 75.It is that a conviction will only be set aside if the different verdicts brought by the jury are such that no reasonable jury, applying themselves properly to the facts, could have arrived at those verdicts. It is the Appellant who must satisfy the court that the verdicts are unreasonable or "an affront to logic and common sense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty".*

[23] The above principles were endorsed in **<u>Lole Vulaca v The State</u>**, Criminal appeal No. CAV 0005 of 2011(21 November 2013), where this Court endorsed the above principles at paragraph [67]:

> *"As was observed by the High Court of Australia in **<u>Mackenzie v R</u>** (1996) 190 CLR 348 at 366-7 (Gaudron, Gummow and Kirby JJ), the test that is applied in dealing with questions of inconsistent verdicts, "is one of reasonableness. "In the course of its judgement, the High Court of Australia cited a passage in an unreported judgement of Devlin J in **<u>R v Stone</u>** (13 December 1954), to the effect that an accused who asserts that the two verdicts are inconsistent with each other. "must satisfy the court that the two verdicts cannot stand together."*

[24] On the nature of the inquiry to be carried out, the appellant submits that this was aptly described in the Canadian case of **R v McShannok** (1980) 44 CCC (2nd) 53 (Ont C.A.) at 56 as follows:

> *"Where on any realistic view of the evidence, the verdicts cannot be reconciled on an any rational or logical basis the illogicality of the verdict tends to indicate that the jury must have been confused as to the evidence or must have reached some sort of unjustifiable compromise. We would, on the ground that the verdict is unreasonable alone, allow the appeal, set aside the verdict, and direct and acquittal to be entered."*

[25] In **R v Beaudry** [2007] 1 SCR 190, 2007 SCC, 5, pages 217-8 (Charon J):

> *"Fish J is correct in saying that a verdict can be unreasonable even if it can be supported by evidence and that, in such a case, the court should order a new trial rather than entering an acquittal."*

[26] Finally, the appellant submitted that the only logical explanation for the not guilty opinion of the assessors what had occurred (see 6 and 7 of Appellant's written submissions) are as follows:

> *"Firstly, the only logical explanation for the not guilty opinion by the majority assessors on count 1 is that they did not believe the State's evidence with respect to the offence of Possession. After disbelieving the State's evidence in terms of count 2, the assessors then did not accept that the Appellant cultivated nor possessed allegations made against him .Both offences occurred on the same day. If they did not accept that, the Appellant possessed the seeds and loose material how it would be possible for them to accept that he cultivated the plants on the same date. If his lordship accepted from the State that they had not proven their case beyond reasonable doubt that the appellant had the custody and control of those loose material then it would be unreasonable for him to also convict him for the first count of cultivation. We submit that the guilty opinion on count 2 is therefore illogical....*
>
> *Secondly, there was no logical reasoning by His Lordship to acquit the Appellant on not having possession of the loose materials, as it could have been from the cultivated plants, but he is said to have cultivated the marijuana plants.*
>
> *Since the seeds were allegedly found in the farm and the farm house was not his or under his control, how was it that he could or would even be cultivating in the farm where the farm house was?*

What I also picked out from the court record was the mention of an informer. However, this 'informer' did not come to give evidence. However, his information to the police officers was mentioned quite abit in the court proceedings."

[27] On ground 3, the appellant argues that, whether the learned trial Judge had embellished the test under section 237 of the Criminal Procedure Act 2009 for not agreeing with the opinions of the assessors, is a question of law alone. Section 237 states:

> *"(1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall ten require each of the assessors to state their opinion orally, and shall record each opinion.*
>
> *(2) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be -*
> *(a) written down; and*
> *(b) pronounced in open court.*

[28] It is the appellant's submission that the statutory requirement is quite clear, however, looking at the judgement, and specifically paragraph 13 thereof, although the disagreement with the assessors was stated in relation to count 2, the reasons are not so clear. The learned trial judge merely refers to *"for the reasons given above"*. Such is not clear, and the appellant is not sure as to what reasons he is referring to and if anything, all the other paragraphs as per the judgement is just an analysis or breakdown of the evidence and not the reasons.

[29] It was further submitted that the requirement that a trial Judge who has reasons not to agree with the majority opinion of the assessors should pronounce his reasons for differing with such opinion *"is a fundamental safeguard that ensures that justice is done in every case according to law."* The objective of such a requirement is to explain to the assessors, the prosecution and the accused as well as to the society at large, the reasons for the decision, so that the social conscience can rest in the knowledge that justice was done. Candid reasons set out in the judgement of the trial judge, can be of great assistance when an appellate court is called upon to review the decision on appeal.

[30] The appellant is clearly of the view that the paragraphs in the judgement being challenged do not amount to cogent reasons, and if anything, it only touches on the credibility of DW2, and evidence he accepted, however, the reasons why is not clear. For example-what was the reason for not accepting the evidence of the appellant? There was no evidence of inconsistency from the appellant. Why did the trail judge not give any weight to DW2's evidence, which appear to corroborate the appellant's evidence? See page 12 Submission of Appellant. Why did more weight have to be given to other prosecution witnesses who if anything gave evidence in Court......?

[31] The appellant relies on **Lautabui v State** [2009] FJSC 7: CAV0024.2008 (6 February 2009) in which it is stated:

> *"The authorities to which we have referred make it clear that the reasons for the judge not agreeing with the majority opinion of the assessors must be cogent and in sufficient detail to enable this court critically to examine them in the light of the whole of the evidence and reach a conclusion on whether the decision to reject the majority opinion of the assessors is justified.*
> *If the requirement of the section to give clearly stated cogent reasons for departing from the opinions of the assessors are not adequately complied with, this court may conclude that the convictions should be quashed and a new trial directed."*

[32] It was further submitted by the appellant that the requirement that a judge must have "*cogent reasons*" from differing from the assessors also find support in **Shiu Prasad v Regina, Rokopeta v State and Likunitoga v State.** In order to give a judgement containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least in the case where the accused have given evidence the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. **Lautabui v State** (supra).

[33] On ground 4, it is the appellant's argument that even though the appellant had pleaded not guilty, the learned trial judge ought to have brought the question to the appellant's attention to see if the appellant had any objections to the learned Trail Judge presiding in his case. The reasons being; (i) that the co-accused pleaded guilty to the same charges laid against the appellant, and there are references in the trial record in which the co-accused had been mentioned, there were only two people charged so the Summary of Facts (SOF) indirectly already implying the appellant was "*the other person*". The appellant urges that in paragraph 19 of the Summing Up, there was no need for the trail Judge to bring up the issue of "*join plan or agreement*".

[34] Reliance was placed on the observation of Honorable Justice Nawana J in **Yang Xieng Jiong v State** [2019] FJCA 17; AAU0077.2015 (7 March 2019) that:

> *".....the learned trial judge should have disclosed his participation at the proceedings against the two other accused connected to the incident and recused himself from hearing the case to ensure the expected objectivity in the trial against the appellant."*

[35] With reference to paragraphs 19 and 20 of the Summing up (where the learned trial Judge made reference to the case of the co-accused Criminal Appeal AAU0174 of 2017 Atekini Matakorovatu, the appellant contends that in order to achieve the objectivity in the appellant's trial, the learned trial Judge should have acknowledged his involvement in the proceedings against the co-accused connected to the incidents and recused himself from hearing the case. Given he was the same judge considering the two cases, the State also had a responsibility to bring this issue to his attention as well. That the learned trial judge has not raised any issue on the co-accused "*camping at his farm*" although it was on record through the evidence of the appellant on cross-examination by the State.

[36] In relation to ground 5 challenging the Sentencing, the appellant argued that considering **Seru v State** AAU 115 of 2017 a recent decision of this Court, it can be seen that the number of plants and in terms of harm (as per the Sentencing Table in the new Sentencing Guidelines) fall in Category 1. That category consists of "*Large scale cultivation capable*

of producing industrial quantities for commercial use with a considerable degree of sophistication and organization. Large Commercial quantities. Elaborate projects designed to last over an extensive period of time. High degree of sophistication and organization. 100 or more plants."

[37] The appellant continues by arguing that it is a matter of argument between Mr. Atekini (co-accused) and the appellant as to which person has more or less culpability. That the appellant has always maintained it was not his farm and he was not found on the farm but on the roadside and was taken to the farm. Also, that the co-accused had already pleaded guilty to the said offence for both possession and cultivation and as such no explanation or reasoning need to be inferred that Atekini the co-accused was playing the leading or significant role. The co-accused's record of interview evidencing his admission to the possession and cultivation of illicit drugs as charged and statement of facts was not taken into consideration by the learned trial Judge. It was submitted *"that Atekini who played a more significant role in terms of cultivation has admitted the same"*. Irrespective of the appellant's caution interview which was not admitted and accepted by his Lordship. There was no other evidence of culpability by the appellant.

[38] He may have been seen by the prosecution witnesses pulling out marijuana plants for about a minute as per their evidence but this does not mean that he played a leading or significant role.

[39] In support of the ground the appellant submitted that the fact that there was already 100 plants cultivated already warranted a sentence between 7-14 years.by stating in sentencing the appellant in paragraph 13 that –

> *... "the number of plants you have cultivated beyond the 100 plants which is used to identify the tariff should be taken into account as an aggravating factor since that was not considered in selecting the starting point "was in fact an error and incorrect."*

[40] The appellant submitted that to add 11 years just for the number of plant as an aggravating factor "was unfair and excessive for the appellant considering that the co-accused had 6 years deducted as he pleaded guilty and a deduction of 2 years for both the appellant and the co-accused for mitigating factors. There was no separate discount for being first offenders. The appellant's contention is that the number of plants had already been considered in the tariff and that although not considered as a starting point in sentence, *"It was not fair to then consider 11 years as aggravating factors. In summary, he used the same factors twice to calculate starting point and then as aggravating factors."*

[41] The appellant drew support from **State v Mocevakaca** FJHC 1987; [1990] 36 FLR 19 LR (14 February 1990) per Fatiaki J (as he then was), in relation to young wrongdoers:

> *"This court has said before and I say it again that our prisons are already too full of young Fijian men and the courts have a duty to try and reverse that trend wherever it is possible and just. In other words, every effort must be made to keep young first offenders out of prison even I might add at the risk of being lenient."*

Respondent's Case

[42] The respondent had filed its written submissions on 3 July 2023 in response to the appellant's Written Submissions. It also made oral submissions at the hearing of the appeal.

[43] In response to the appellant's submissions challenging the sentence imposed by the learned trial judge on both the appellant and his co-accused who had pleaded guilty, the respondents reply are quoted in full below:

"***Law on Appeal against Sentence***

> *12. In **Kim Nam Bae v The State** (unreported Criminal Appeal AAU 15 of 1998, (26 February 1999) the court set out the proper approach to appeals against sentence:*

*"It is well established law that before this Court could disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If a trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the appellate court may impose a different sentence. The error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v The King** [1936] HCA 40; (1936) 55CLR 499)."*

13. *The test before the full bench of the Court of Appeal is governed by section 23(1) (a) of the Court of Appeal Act Cap.12 where the court may set aside the verdict of any ground where there appears to be a miscarriage of justice: -*

Determination of appeal in ordinary cases

23-(3) On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash sentence passed at the trial and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed or may dismiss the appeal or make such other order as they think just.

13. *In Mr. Kaitani's submission at paragraph 4.1 of his submissions they have referred to the case of **Jone Seru v State** AAU115 2017 which is the guiding judgement on cultivation. The same has been reproduced in the submissions of Mr Kaitani. However, it is Mr. Kaitani's submission that it has always been the stance of Mr. Kaitani that it was never his farm and he was not found on the farm but on the roadside and then was taken to the farm. It is important to note that both the appellants Kaitani and Mr Matakorovatu were jointly charged with the charge of cultivation which makes them equally responsible for the offence that they have committed. The only difference is that Mr Kaitani decided to plead not guilty and proceed to trial.*

14. *The single judge at the leave in his leave to appeal ruling for Atekini Matakorovatu at paragraph 25 held that: "there is an urgent need for the Court of Appeal or the Supreme Court to revisit the sentencing guidelines on cultivation of illicit drugs in the light of the current situation which has surfaced. Whether sentencing in offences involving cultivation should be based on weight of cannabis or the number of plants or a combination of both cultivated in any given extent of land where cannabis plants are found with all other factors being considered as aggravating or mitigating offence would be a vital question to answer."*

15. *It is also important to note that because the number of plants falls in Category 1 which is 100 or more plants as per the guideline set out in **Jone Seru v State** (supra) and in terms of culpability both Appellants had significant role to play.*

Therefore in these types of cases as per the guideline judgement the starting point would be 14 years and the category range would be 12- 16 years in custody.

Analysis

[44] The Illicit Drugs Control Act 2004 is an Act to regulate and control the cultivation, manufacture, importation, sale, supply, possession and use of illicit drugs and controlled chemicals and related matters.

[45] Part 2 provides for Offences. Section 5 makes provision related to unlawful possession, manufacture, cultivation and supply of illicit drugs. This is the section under which the appellant and the co-accused were charged under. A person convicted for an offence under section 5 is label on conviction to a fine not exceeding $1 million or imprisonment for life or both.

[46] The term "*illicit drug*" means any drug listed in schedule 1 of the Act. Cannabis is listed in Part 1 of Schedule 1 with other drugs in line with Schedule IV of the Convention on Narcotic Drugs 1961.

[47] The appellant's submissions are stated in paragraphs [20] to [41], and that of the respondent is at paragraphs [42] and 43].

Ground 2:

[48] *That **the guilty verdict is inconsistent**.* The appellant contended that since he was acquitted with the charge of "*unlawful possession*" of illicit drugs it was illogical to convict him for unlawful "*cultivation*" and therefore the verdicts are inconsistent.

[49] This ground was considered by the single judge who concluded that the ground is misconceived. It was observed that the reasoning behind the High Court acquitting the

appellant on Count 1 is to be found in paragraph 11 of his judgement (page 116 High Court Record), as follows:

> "*11. In relation to the first count, I find that the evidence led by the prosecution leaving aside the cautioned interview which I have decided to disregard may be parts of the plants that would have been cultivated by the accused. But the prosecution had failed to prove that the accused had the custody and control of those, does not establish beyond reasonable doubt that the accused was in possession of the loose material that were found in the farm including the farm house. Those loose material maybe parts of the plants that would have been cultivated by the accused. But the prosecution had failed to prove that the accused had the custody and control of those loose material...*"

[50] Looking closely at sections 5(a) and 32 of the Act, "*possession*" in my view cannot be proved without establishing that the accused was in control of the illicit drugs. The learned trial judge, on the first count, is of the opinion that possession could not be sustained in the absence of the cautioned interview which had not been accepted by the trial judge to attribute any ownership to or knowledge of the appellant of the farm house where loose material supposed to be cannabis was found. I agree with that finding.

[51] Possession of illicit drugs may be presumed as a fact only if it was proven by the prosecution beyond reasonable doubt that the illicit drug "*was under the control of the accused*"-Section 32 of the Illicit Drugs Control Act 2004. That was not the case here as the prosecution was not able to prove beyond reasonable doubt that the illicit drug was "*under the control*" of the accused/appellant.

[52] It needed to be asked whether conviction or acquittal on a charge of unlawful possession is a prerequisite to acquittal on a charge of unlawful cultivation. Section 5(a) as drafted is clear that all the acts specified are independent of each other. Section 5(a) of the Act treats "*possession*" as an independent activity or element (from the other specified activity or element including "*cultivation*") that if proven, constitutes an offence of its own under the Act, and as a consequence attracts a penalty. To be in possession requires that one must be in a control.

[53] In interpreting section 5(a) of the Act, it is clear that a person potentially may be liable for any activity independently from the other activities. It is not a prerequisite for acquittal under "unlawful possession" to be also acquitted for "*unlawful cultivation*" of illicit drugs. Neither it is illogical. They are independent of each other, as they have different elements which the prosecution, subject to the Act, must prove beyond reasonable doubt.

[54] The conviction of the appellant on the second count was based on the eye-witness evidence of the police officers on cultivation. The Judge's reasons are:

> "8. *Having considered the evidence of police witnesses PW1, PW2, PW3, and the military officer PW6 who took part in the raid, I accept the evidence of those witnesses that they saw the accused uprooting plants in the farm before the accused was arrested. Given the demeanor and deportment of the accused when he gave evidence taken together with all the relevant evidence led in this case, I do not find the accused's evidence that he was arrested on his way while he was looking for herbal medicine and brought to the farm thereafter, credible and reliable.*
>
> 9. *I accept the evidence of the aforementioned prosecution witnesses that they uprooted 824 plants from the farm where they found the accused and the other person who is now serving (hereinafter referred to as the "co-accused") uprooting plants and I accept the evidence of the ninth prosecution witness that those are cannabis sativa plants which is an illicit drug.*
>
> 10. *Given the above evidence which I have found to be credible and reliable, I am satisfied beyond reasonable doubt that the prosecution had proven the elements of the second count beyond reasonable doubt. The inconsistency in the evidence given by PW1 with regard to the issue whether or not the 824 plants included the plants that were uprooted by the accused and co-accused which was not properly clarified by the prosecution, in my view, does not damage the prosecution case that the two accused were involved in cultivating 824 cannabis sativa plants.*"

[55] The conviction of the appellant for "*unlawful cultivation*" despite the appellant's acquittal for "*unlawful possession*" of illicit drugs, is proper under law (Section 5(a) of the Act). The appellant, according to the evidence adduced at the trial and accepted by the learned trial Judge was seen uprooting cannabis plants, as affirmed in the judgment that is under

challenge. The two decisions namely, acquittal on count 1 on charge of unlawful possession, and conviction on count 2 on unlawful cultivation were properly based under case law and statute.

[56] The two verdicts are not inconsistent and they are well based and can stand together: **Balemaira v State** [2013] FJSC 17; CAV 0008 of 2013 (6 November 2013); **Vulaca v State** [2013] FJSC 16; CAV 0005.2011 (21 November 2013).The guilty verdict is not inconsistent. This ground is dismissed.

Ground 3:

[57] ***That the learned Trial judge did not provide cogent reasons in disagreeing with the majority opinion of the assessors that the Appellant is not guilty for the offence of unlawful cultivation of illicit drugs.*** The learned Trail Judge is required under law to provide cogent reasons for disagreeing with the majority decision of the assessors which in this case was a majority decision of not guilty on count 2, unlawful cultivation of illicit drugs.

[58] The reasons for disagreeing with the majority of the assessors were stated in paragraphs 4, 5, 6, 7, 8, 9 and 10. Paragraphs 8-10 are quoted in paragraph [14] above of this judgement. Additionally, paragraph 37 above, which clearly sums up the learned Trial Judges view on the matter:

> *"13 I am unable to agree with the majority opinion of the assessors in relation to count two for the reasons given above. I find the accused guilty of the second count and I would convict him accordingly".*

[59] Section 237 (4) of the Criminal Procedure Act requires that "*cogent reasons*" must be given when a judge disagrees with, the majority decision of the assessors. I have read the judgement of the learned trial Judge and the record of the trial noting the evidence adduced by witnesses for the prosecution and of the appellant. In my view, the reasons provided by the learned trial judge under the circumstances of this case and on the totality

of the evidence are cogent and meets the standard and requirement and cogency test and standards.

[60] The reasons provided in the judgement taken together with the summing up made in accordance with section 237 (4) of the Criminal Procedure Act do satisfy the requirements when a trial judge disagrees with the majority opinion of the assessors: See **Ram v Director of Public Prosecutions** [1999] FJSC 1; CAV 0001 of 1998S (5 March 1999); **Lautabui v State** [2009] FJSC 7; CAV 0024.2008 (6 February 2009); **Baleilevuka v State** [2019] FJCA 209; AAU 58 of 2015 (3 October 2019) **and Singh v State** [2020]1; CAV0027 of 2018 (27 February 2020). The ground dismissed.

Ground 4:

[61] ***That the learned Trial Judge ought to have given the parties the opportunity to raise any objection (if any), of him hearing the case against the appellant, given that the trial Judge had heard the facts and sentenced the co-accused who pleaded guilty to both offences, which the appellant is being charged with.*** The co-accused had earlier pleaded guilty before the same trial Judge. This ground is levelled against the learned trial Judge in not allowing the appellant an opportunity to raise a challenge or objection against him taking charge of the appellant's trial given that he had knowledge of the facts etc. The ground has no legal basis as it is the accused or his counsel who ought to have raised the objection before the trial Judge who could consider and rule on it.

[62] If there is any reservation for the judge to continue to hear the case against the remaining accused, it ought to be raised at the commencement of the trial. In **Yang Xieng Jiong** [2019] FJCA 17; AA0077 of 2015 (7 March 2019), the facts were different and cannot be applied to the facts of this case.

[63] There is nothing in the record to show that the appellant had raised issues or made any recusal application. The co-appellant's guilty plea had not influenced the learned trial Judge's view of the appellant, to the appellant's detriment. As is evident, although the

co-appellant had pleaded guilty to both counts, the learned trial Judge had acquitted the appellant of the first count on *"unlawful possession"* clearly demonstrating that the co-appellant's guilty plea had not influenced the trail Judge's decision in any way. The ground is dismissed.

Sentencing:

[64] ***That the learned trial Judge erred in law and principles by using the same aggravating factor to select a starting point of 7 years, and then giving 11 years to the same aggravating factor, resulting in the excessive enhancement of the sentence.*** "This ground is a challenge against the sentence handed down by the learned trial Judge. The test for leave to appeal against sentence is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points measured against the four principles established in **Kim Nam Bae v The State** Criminal Appeal No AAU0015.The guidelines are: whether the learned sentencing Judge:

(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.

It will be necessary to review the sentencing principles applied by the learned Trial Judge to properly address and resolve this ground.

[65] Cultivation of illicit drugs is a very serious offence and viewed as such by the Fiji Parliament as reflected in the maximum penalty set under section 5 of the Act.

[66] Essentially the appellant is arguing that the learned trial Judge had made an error in enumerating aggravating circumstance.

[67] In sentencing the appellant, the learned Trial Judge said:

"11. Coming back to your case, you have been involved in cultivating 824 plants with another. Your sentence should therefore be within the range of 7 to 14 years

imprisonment as you have been engaged in a large scale commercial cultivation which is more than 100 plants.......

12. *I would select 7 years imprisonment as starting point of your sentence.*

13. *According to the categorization, I selected the starting point based on the fact that you have cultivated more than 100 plants and did not take into account the fact that you cultivated 824 plants. In my view the number of plants you have cultivated beyond the 100 plants which is used to identify the tariff should be taken into account as an aggravating factor since that was not considered in selecting the starting point.*

14. *In your case, you have cultivated 724 plants more than the minimum number of plants stipulated for category 4. Considering the said quantity of plants which clearly suggests that you have been involved in a very large scale cultivation but also bearing in mind that another person was also involved in this cultivation, I would add 11 years to your sentence. It is pertinent to note that, since cultivating 100 plants warrants a minimum of 7 years for each set of 100 plants you have cultivated; that would bring the term of imprisonment to 56 years. I decided to mention this, merely for you to understand the seriousness of the offence you have committed."*

[68] The trial Judge had made an error in enumerating the aggravating circumstances in Sentencing. The tariff of 7 years was fixed taking account of the 100 plants threshold for a 7- 14 years tariff. The aggravating factor stems from the quantity over the 100 plants that is based on the 724 plants, which went beyond the 100 thresholds, from which the tariff was fixed. 11 years was added as a consequence. That is double counting or counting the same factor twice to enhance the sentence: **Senilolokula v State; Saqanaivalu v State**

[69] However, as submitted by the respondent in its Written Submission (See paragraph 34 above) , there were other aggravating factors which were not taken account of by the learned trial Judge, for example, the health implications of the unlawful cultivation of illicit drugs on a community. That being a serious consideration leading to the enactment into law by Parliament of the Illicit Drugs Control Act 2004.

[70] The learned trial Judge also reduced the sentence further due to mitigating circumstances, and to also take account of the period the appellant had already served in prison, ending

up with a total of 14 years and 2 months imprisonment with a non-parole period of 10 years and 2 months.

[71] In the recent case of **Jone Seru v The State** Criminal Appeal No. AAU 115 of 2017 (25 May 2023) The Court of Appeal, mindful of the complexities associated with sentencing of accused for possession and cultivation of cannabis sativa, have set out a guideline judgement in accordance with Sentencing and Penalties Act. Were the guideline be in use, the appellant's case would be in Category 1 given the number of plants being over 100 plants.

[72] I agree with the respondent's submission that due to the number of plants, this case falls into Category 1 which is 100 or more plants as per guideline set out in **Jone Seru v State** *(supra)*.

[73] Further, in terms of culpability both the appellant and the co-accused had significant role to play. In these types of cases, the starting point under the guideline judgment would be 14 years and the category range would be 12-16 years. Due to the above, I find no good reason to disturb the sentence handed down by the learned trial judge.

[74] The learned Judge had not acted upon a wrong principle: allowed extraneous or irrelevant matters to guide or affect him: not based on mistake of facts has not failed to take into account some relevant consideration. The ground is dismissed.

Conclusion

[75] The application for enlargement of time to appeal for leave to appeal against conviction is declined. On the merits the appeal against conviction is refused. The appeal against sentence is disallowed. The conviction and sentence are affirmed.

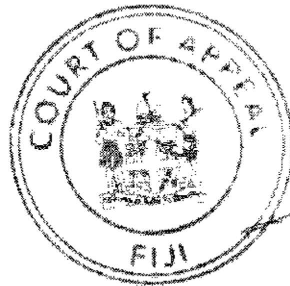
Order of the Court

1. *Leave to appeal for enlargement of time refused.*

2. Appeal against conviction and sentence are disallowed.

3. Conviction and sentence affirmed.

Hon. Justice Filimone Jitoko
VICE PRESIDENT, COURT OF APPEAL



Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

<u>**SOLICITORS:**</u>

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent