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

CRIMINAL APPEAL NO.AAU 123 of 2017
[High Court of Suva Criminal Case No. HAC 287 of 2015]

BETWEEN	:	**ACURA QARANIVALU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	:	**05 October 2023**
Date of Ruling	:	**06 October 2023**

RULING

[1] The appellant had been charged in the High Court of Suva on a single count of cultivation of 32 plants of cannabis sativa, an illicit drug, weighing 11.0 kilograms on the 03 January 2012 at Vuravu Farm, Daku Village, Kadavu, in the Southern Division contrary to section 5(a) of the Illegal Drugs Control Act of 2004.

[2] After the conviction, the learned trial judge had sentenced the appellant on 07 June 2017 to 12 years of imprisonment subject to a non-prole period of 10 years.

[3] The appellant had been allowed leave to appeal against sentence by a judge of this court on 29 September 2020 while refusing leave to appeal against conviction

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

'2. The facts of your case were as follows. On 3 January 2012, the police received information that people were cultivating cannabis sativa plants (i.e. Marijuana plants) around the Vuravu Settlement area. A team of police officers from Kadavu Police Station then went to one Apakuki's house to execute a search warrant. Another group of police officers raided a nearby farm where numerous marijuana plants were uprooted. Police discovered that you were drying 32 plants of marijuana at Apakuki's house.

3. They seized the plants and took it to Koronivia Research Station for analysis on 9 January 2012. It was found that the plants were cannabis sativa and they weighed 11 kilograms. You were caution interviewed by police on 7 January 2012. You admitted to police that you had been cultivating cannabis sativa plants, with others, on 3 January 2012. As a result, you were later charged for unlawful cultivating of illicit drugs.'

[5] The only evidence that could connect the appellant with the charge was his cautioned interview. The relevant paragraphs in the summing-up are as follows.

14. The prosecution's case were as follows. Upon information received, D/Sergeant 1739 Adriu Naitukuni (PW1) led a team of 5 police officers to execute a search warrant at one Apakuki's house at Vuravu Settlement. It was the 3rd of January 2012. According to the prosecution, information was received that people were cultivating cannabis sativa plants in the area. <u>According to the prosecution, at Apakuki's house, the police saw 24 marijuana plants, belonging to the accused, been hung out in the open to dry.</u> They seized the plants and later took it by fibre glass boat to Kadavu Police Station.

15. Enroute to Kadavu Police Station, the police saw and arrested the accused in another fibre glass boat. They also took him to Kadavu Police Station. The 24 marijuana plants were packed, tagged and kept in the exhibit room, to be transported later to Koronivia for analysis. On 7 January 2012, the accused was caution interviewed by D/A Corporal 3036 Amani Satuwere (PW5) at Kadavu Police Station. He was given his legal rights, formally caution and given the standard rest breaks. <u>During the interview, the accused admitted cultivating cannabis sativa plants, with others, in Kadavu.</u>

22. 'The State's case against the accused was based on the direct verbal evidence of four police officers and an ex-police officer, that is, D/Sergeant 1739 Adriu Naitukuni (PW1); Waisale Saru (ex-police officer and PW2); WPC 3623 Taraivini Vusoni (PW3); Sergant 1785 Sakaraia Tuberi (PW4); and D/A Corporal 3036 Amani Satuwere (PW5). The State's case also relied on the direct evidence of the government analyst, Ms Miliakere Nawaikula (PW6).

23. D/Sergeant Adriu (PW1) said, on 3 January 2012, he received information that people were cultivating marijuana in the Vuravu Settlement area. He organized a party of 5 police officers to execute a search warrant on one

Apakuki's house in the area. He took his party from the Kadavu Police Station to Apakuki's house via a fibre glass boat. At the house, they executed the search warrant. PW1 said, they found 24 marijuana plants been hung up to dry at Apakuki's house. PW1 said, according to the information he received, the 24 plants were said to belong to the accused. PW1 said, they seized the plants and took the same to Kadavu Police Station.

24. *Waisale Saru (PW2) next gave evidence. PW2 said, he was a police officer on 3 January 2012, and was part of the team that raided Vuravu Settlement that day. PW2 said, his team went to a farm at Vuravu Settlement. At the farm, they uprooted numerous marijuana plants. PW2 said, they received information that some marijuana plants had been uprooted and dried at a nearby house. PW2 said, they later went to the house and saw 24 marijuana plants been dried. PW2 said, they later seized the 24 plants and took them to Kadavu Police Station. It would appear that these were the same marijuana plants PW1 was talking about above.'*

[6] The leave to appeal ruing states that the trial judge had fallen into the error of double counting in picking a high starting point of 12 years of the tariff of 07-14 years because of the quantity of 11kg of cannabis sativa plants and then taken the same large quantity of 11kg of cannabis sativa plants as the sole aggravating factor to increase the sentence by further 03 years.

[7] Leave to appeal against sentence had also been granted on the footing namely the general state of confusion prevalent in the sentencing regime on cultivation of illicit drugs among trial judges which was at that time unresolved by the Court of Appeal or the Supreme Court.

Law on bail pending appeal.

[8] The legal position is that the appellants have the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellants have to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very

high likelihood of success in appeal. However, appellants can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[9] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[10] If the appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[11] In **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023) the Court of Appeal set new sentencing guidelines for cultivation of cannabis as follows.

'[38] **SENTENCING TABLE** (cultivation of cannabis sativa).

Culpability / Harm	*LEADING ROLE*	*SIGNIFICANT ROLE*	*LESSER ROLE*
Category 1	***Starting point 18 years' custody***	***Starting point 14 years' custody***	***Starting point 9 years' custody***
	Category range	***Category range***	***Category range***

	16 – 20 years' custody	*12 – 16 years' custody*	*7 years' – 12 years' custody*
Category 2	***Starting point*** *14 years' custody*	***Starting point*** *9 years' custody*	***Starting point*** *5 years' custody*
	Category range *12 years– 16 years' custody*	***Category range*** *7 years'– 12 years' custody*	***Category range*** *3 years– 7 years' custody*
Category 3	***Starting point*** *9 years' custody*	***Starting point*** *5 years' custody*	***Starting point*** *18 months' custody*
	Category range *7 years'– 12 years' custody*	***Category range*** *3 years'– 7 years' custody*	***Category range*** *1 year – 3 years' custody*
Category 4	***Starting point*** *5 years' custody*	***Starting point*** *18 months' custody*	***Starting point***
	Category range *3 years' – 7 years' custody*	***Category range*** *1 year – 3 years' custody*	***Category range*** *Non-custodial – suspended sentence*

[12] From the summing-up and the sentencing remarks, the appellant's role could be either a leading or significant role and no definite conclusion could be arrived at on that without the trial transcripts. Though, the number of plants had been mentioned as 36 in the information, it is not entirely clear whether it was 24 or 36 plants. However, given that he was cultivating marijuana with others it is more plausible that his is a significant role rather than a leading role in the operation. It terms of the number of plants, he falls into category 03. Thus, his sentence should be determined on the basis of a starting point of 05 years and a range of 03-07 years as conceded by the respondent. Otherwise, it should be on a starting point of 09 years and a range of 07-12 years.

[13] In any event, starting with 12 years for 11kg of cannabis based on Sulua guidelines [07-14 years for over 04 kg - **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012)] and adding further 03 years for the same weight as the only aggravating factor making it 15 years with the possible error of possible double counting, it is very unlikely that the appellant's sentence to be eventually decided by the Full Court would be close to his current head sentence of 12 years. It appears that the application of new ***Seru*** guidelines for cultivation of cannabis is going to be favourable to the appellant and therefore by following the approach in **Zhang v R** [2019] NZCA 507 as referred to in ***Seru***, I am obliged to apply ***Seru*** guidelines for

the appellant's offending. If ***Seru*** guidelines are applied most probably the appellant's sentence would be around 07 years, more or less but not by a significant margin.

[14] The appellant has already served 06 years and almost 04 months. With the time he spent in remand his period of incarceration could be even longer. The judges' notes and transcripts have not yet been received by the Court of Appeal Registry in order to prepare the appeal records for Full Court hearing. No timeline could be predicted for that at this stage. Therefore, if the appellant is not released on bail pending appeal, there is a risk that he would end up serving a longer sentence than what the Full Court would impose upon him in the end.

[15] Thus, the appellant seems to have got favourable answers to the criteria in section 17(3) of the Bail Act namely (a) the likelihood of success in the sentence appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard.

[16] The approach taken by the appellate court in an appeal against sentence 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)]. Thus, the final sentence on the appellant must be left to the Full Court to decide but he has made out a strong case for bail pending appeal at this stage.

[17] Therefore, I am inclined to release the appellant on bail pending appeal.

Order

1. Bail pending appeal is granted subject to the following conditions.

   (i) The appellant shall reside at Lepanoni Settlement, Pacific Harbour with his family.

   (ii) The appellant shall report to Pacific Harbour Police Station every Saturday between 6.00 a.m. and 6.00 p.m.

(ii) The appellant shall attend the Court of Appeal and all other courts when noticed on a date and time assigned by the registry of the Court of Appeal and registries of other courts.

(iii) The appellant shall provide in the persons of Tevita Saqabobo (elder brother of the appellant of Lepanoni Settlement, Pacific Harbour – VIC No. 2177 387 00316) and Laijia Selabuco (father of the appellant of Naigani, Batiki Village, Lomaiviti - VIC No. 1011 290 00565) to stand separately and jointly as sureties.

(iv) The sureties shall produce to the CA Registry sufficient proof of their identities, residence addresses and contact details (phone, email etc., if any).

(v) Appellant shall be released on bail pending appeal upon condition (iv) and (v) above being complied with.

(vi) Appellant shall not reoffend while on bail.

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