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

CRIMINAL APPEAL NO.AAU 63 of 2021
[High Court at Suva Criminal Case No. HAC 024 of 2019L]

BETWEEN	**:**	**MESULAME KURINACOBA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Ms. T. Kean for the Appellant**
	:	**Mr. R. Kumar for the Appellant**
Date of Hearing	**:**	**08 March 2023**
Date of Ruling	**:**	**09 March 2023**

RULING

[1] The appellant had been charged in the High Court at Suva on one count of unlawful cultivation of 1589 plants of Cannabis Sativa (198Kg) or Indian hemp, an illicit drug contrary to section 5(a) of the Illegal Drugs Control Act of 2004 committed between the 01 October 2016 and 06 March 2017 at Navosa in the Western Division.

[2] After trial, the assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted and applying **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012) guidelines, the judge had sentenced him on 20 November 2019 to 17 years of imprisonment with a non-parole period of 15 years.

[3] The appellant's appeal against conviction is out of time by over 08 months. 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).

[4] The delay of this conviction appeal is substantial. The appellant had stated in his affidavit that he personally drafted his appeal grounds within 03 weeks of conviction but not said whether they had been lodged in the Court of Appeal Registry. However, according to his application for enlargement of time to appeal he had signed amended grounds of appeal and submissions on 18 August 2020. Thus, the appellant had not given a convincing explanation for the delay.

[5] Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction 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.

[6] The trial judge had set out briefly the facts as follows in the sentence order:

> *'2. The brief facts were as follows. Between 1 October 2016 and 6 March 2017, you maintained a cannabis sativa farm and cultivated 1,589 cannabis sativa (marijuana) plants higher up in the mountains of Navosa, in the Western Division. Through the "police drug intelligence unit", your activities were discovered. You led police to your farm, where they uprooted the above plants, took it to Navosa Police Station for analysis and the same were later discovered to be cannabis sativa plants, weighing 198 kilograms. In the last 5 days, you had been tried before myself and three assessors and you had been found guilty as charged.'*

[7] However, the main item of evidence against the appellant had been his cautioned interview and charge statement.

[8] The Legal Aid Commission has urged a single ground of appeal against conviction as follows:

> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and fact when he ruled that the caution interview was voluntary and admissible in breach of section 13 of the Constitution when he was arrested.*

[9] The appellant's submissions have not spelt out what rights under the Constitution had been denied to him. There had been a *voir dire* inquiry to determine the voluntariness of the cautioned interview and the trial judge having guided himself by **Ganga Ram & Shiu Charan v Reginam,** Criminal Appeal No. 46 of 1983, has in his *voir dire* ruling given reasons for the admissibility of the appellant's confession *inter alia* as follows:

> *7. The voluntariness of the caution interview statements was disputed by the parties. Accused said police "banged the table" in front of him, and he was scared. Accused said police forced him to admit the marijuana farm was his. As a result, he admitted the offence. The police, however, denied the above allegations. The police said, accused was treated properly while in police custody and he was given his rights during the interview. Police said, accused gave his interview and charge statements voluntarily.*
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> *8. After considering both the prosecution and defence's case, I came to the conclusion that the accused gave his interview and charge statements to the police voluntarily and out of his own free will. On the evidence, I also found that the police were not unfair to the accused, while he was in their custody. Even the accused admitted under cross-examination, that the police were not harsh to him, while he was in their custody.*

[10] One cannot find fault with the directions on the cautioned interview to the assessors either.

> *[29] ……, when considering the above alleged confessions by the accused, I must direct you as follows, as a matter of law. 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 deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his caution interview and charge statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the caution interview and charge statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely for you.'

[11] These directions are substantially in line with the recommended directions in **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) where the correct law and appropriate direction on how the assessors should evaluate a confession was summarized at [26] as follows:

*(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*

*(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the confession (vide **Volau**).*

*(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide **Volau**).*

*(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily (vide **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

*(v) However, **Noa Maya** direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the confession is voluntary, Noa Maya direction is irrelevant and not required (vide **Volau** and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.*

[12] Even in the judgment the trial judge had given his mind to the admissibility of the cautioned interview and the charge sheet as follows:

'8. I also accept that the accused voluntarily admitted the offence to police, when caution interviewed and when formally charged. I find that there was no unfairness in the way police conducted the accused's interview and formal charging. In my view, on the evidence, the accused voluntarily admitted the offence. His confession, I find to be true.'

[13] Though, the appellant had not appealed against sentence, the state counsel urged this court to consider whether enlargement of time to appeal against sentence should be granted in view of the unsettled state of affairs prevalent on the sentencing tariff for cultivation of cannabis as opposed to possession.

[14] There is a substantial body of judicial opinion in the High Court that ***Sulua*** guidelines 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].

[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), **State v Tuidama** [2021] FJCA 73; AAU0003.2017 (16 March 2021) and **State v Taginakalou** [2022] FJCA 133; AAU012.2020 (9 August 2022)

[15] The appeal in **Jone Seru v State** AAU 115 of 2017 is listed for hearing before the full court of the Court of Appeal on 02 May 2023 where the State is seeking a guideline judgment with regard to cultivation of cannabis and therefore, it is best that the full court would revisit the sentence against the appellant with the benefit of those sentencing guidelines expected to be pronounced in the above appeal.

Orders of the Court:

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is allowed.

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