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

CRIMINAL APPEAL NO. AAU0036 OF 2017
CRIMINAL APPEAL NO: AAU0093 of 2017
[Criminal Action No: HAC 64/2015S]

BETWEEN : **1. WAISAKE KALOULIA**
2. KAMINIELI NAQELECA

Appellants

AND : **THE STATE**

Respondent

Coram : **C Prematilaka, RJA**
P Andrews, JA
R Dobson, JA

Counsel : **Ms L. Ratidara and Ms R. Nabainivalu for the Appellants**
Ms. S. Shameem for the Respondent

Date of Hearing : **8th May, 2024**

Date of Judgment : **30th May, 2024**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Dobson, JA and agree with the reasons, conclusions and proposed orders hereof.

Andrews, JA

[2] I agree with the reasoning and outcome of the judgment of the Hon. Justice Dobson.

Dobson, JA

[3] These two appellants were each charged with one count of cultivating cannabis. After trial, they were found guilty by the unanimous opinion of the assessors and the trial Judge on 30 January 2017. On 31 January 2017, they were sentenced:

(a) in the case of the first appellant, to a term of 19 years' imprisonment with a non-parole period of 15 years; and

(b) in the case of the second appellant, to a term of 18 years' imprisonment with the same non-parole period of 15 years.

[4] The difference between the length of the two sentences imposed was a reflection of the longer period of time spent in custody on remand by the second appellant.

[5] Both have been granted leave to appeal their convictions and their sentences.

Factual background

[6] Police officers executed a search warrant of the home of the first appellant in the early hours of one morning in January 2015. They discovered a relatively small quantity of leaf material, assumed to be cannabis. When confronted with it, the first appellant admitted it was his, and made certain other admissions relating to cultivation of cannabis at an isolated rural location.

[7] Apparently in reliance on information from an informant, but also from what they had gathered in executing the search warrant at the first appellant's home, a team of Police officers embarked on the journey to the identified location. That involved a seven-hour trek through forested terrain to arrive at the location referred to throughout the trial as the Davecadra farm.

[8] On arrival, one of the officers spotted a man running away whom he identified as the second appellant. The officers found a cannabis plantation being cultivated, and seized 484 cannabis plants. Because of the weight, and the length of their return journey, the Police officers cut the roots off a substantial portion of the plants before returning with the remainder.

[9] The second appellant was apprehended at his home some 12 days later.

[10] Both men made unqualified admissions that they were involved in growing the cannabis for the purpose of making money by selling it.

[11] Both appellants later sought to exclude the caution interviews in which their admissions had been made, essentially on the ground that they had been forced by violence and threats of further violence. Their challenges to the admissibility of the statements made at the caution interviews were determined at a voir dire, with the Judge rejecting their claims and ruling the statements to be admissible.

First appellant's appeal against conviction

[12] The first ground on which leave had been given for the first appellant was that the prosecution adduced evidence of uncharged conduct, that is, the discovery of leaf material in the Police search of his home that was suspected of being cannabis. There was no evidence that it was tested and confirmed as such. Whether such evidence should be admitted at a criminal trial is an issue of whether the probative value of that evidence outweighs the prejudice to the accused.[1]

[13] The State's narrative of how it gathered evidence to bring the charge against the first appellant makes it tolerably clear that the finding of the leaf material during the warranted search of his home triggered the acknowledgement by the first appellant that it was cannabis and that he was growing cannabis at Davecadra. As such, the evidence was admissible as part of the res gestae or the narrative of how the prosecution's case was constructed. There was, however, no suggestion

[1] See *Vesikula v The State* [2018] FJCA 176, adopting observations from *Senikarawa v The State* [2006] FJCA 25.

that it was adduced here as similar fact evidence of additional offending, similar to that involved in the charge. The State acknowledged that this evidence had been led inadvertently. If the narrative of the search of the first appellant's home had left out any reference to finding the leaf material and confronting the first appellant with it, there would be a risk that assessors would speculate as to what had led the first appellant to make the admissions he did, identifying cultivation of cannabis at Davecadra.

[14] I take the view that this challenged evidence was admissible as part of the factual narrative leading to the discovery of the cannabis being cultivated at Davecadra and the first appellant's admissions, which were subsequently recorded in the caution interview. It may have been preferable for the State's evidence on the execution of the warrant at the first appellant's home to have been rationalised without it. There was no protest by defence counsel at the trial. Even so, the prospect that its prejudice to the first appellant outweighed its probative value (which was not an issue the Judge was required to confront) could add some weight to other concerns about the course of the trial that might lead to a finding of a miscarriage of justice.

[15] The second ground of the first appellant's conviction appeal was that the Judge had failed to direct the assessors that they had to consider the charge against each of the appellants separately, and could not rely on evidence from one that might be treated as adding to the State's case against the other. The third ground was in essence a subset of the second in that the Judge was criticised as erring in law by not directing the assessors, when they considered the confessional statements, that the content of one confession could not be used against the other.

[16] There were no adequate directions on these points. Counsel for the State sought to rely on a component of the summing up in which the Judge directed the assessors as follows:

> 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.

[17] However, the point that the content of a confession is not admissible against a defendant other than its maker is not adequately addressed in that direction. Nor did it give any adequate warning that the assessors had to assess the strength of the State case against each appellant separately.

[18] On all three of these criticisms of the trial, counsel for the State submitted that trial counsel had the opportunity to invite the Judge to redirect on the points and, in the absence of doing so, the appellants cannot now complain that the absence of a correcting direction on the points amounts to any material miscarriage of justice.[2] I accept that each of the deficiencies was, or ought to have been, relatively obvious at the time, and was therefore something that counsel for the appellants could have raised with the Judge. In the context of this appeal, I am not satisfied the absence of request to re-direct provides a complete answer to the risk of the assessors taking a misleading view of the evidence.

[19] A fourth ground of appeal raising inadequacies by trial counsel was denied leave and was not pursued any further.

[20] The State made partial concessions on the criticisms argued for the first appellant, but defended the conduct of the trial by pointing out that trial counsel had not sought any redirection on the inadequate summing up to the assessors. Counsel for the State submitted that a conviction was inevitable, on the basis of the admissions in the statement taken at the caution interview. The State submitted that the proviso in s 23(1) of the Court of Appeal Act 1949 (the Act) should apply because the strength of the State's case without any reliance on the matters criticised was such that no substantial miscarriage had occurred.

[21] Invoking the proviso is to be approached with some care.

[22] In the appeal in this Court in *Aziz v The State*,[3] the Court considered the approach to the proviso by reference to certain decisions of the English Court of Appeal. The judgment in *Aziz* includes the following:

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2 *Raj v State* [2014]FJSC 12 at [35], *Tuwai v State* [2016]FJSC 35 at [100]-[102].
3 *Aziz v The State* [2015] FJCA 91.

[55] The approach that should be followed in deciding whether to apply the proviso to section 23(1) of the Court of Appeal Act was explained by the Court of Appeal in **R v. Haddy** [1944] 1 KB 442. The decision is authority for the proposition that if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.

[56] This test has been adopted and applied by the Court of Appeal in Fiji in **R –v- Ramswani Pillai** (unreported criminal appeal No. 11 of 1952; 25 August 1952); **R –v- Labalaba** (1946 – 1955) 4 FLR 28 and **Pillay –v- R** (1981) 27 FLR 202. In **Pillay –v- R** (supra) the Court considered the meaning of the expression *"no substantial miscarriage of justice"* and adopted the observations of North J in **R –v- Weir** [1955] NZLR 711 at page 713:

> "The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt. If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."

[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

In **Vuki –v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:

> "The application of the proviso to section 23(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."

[23] More recently, in the judgment in *Degei v The State*,[4] this Court adopted the approach from *Aziz* and supplemented it with references to Australian decisions, including that of the High Court of Australia in *Baini v R*.[5] The Court cited *Baini* on what amounted to a substantial miscarriage of justice in the following terms:

> "[91] **Baini v R** (supra) at [33] set down the test of inevitability of the conviction in the following words to identify 'substantial miscarriage of justice':

[4] *Degei v The State* [2021] FJCA 113.
[5] *Baini v R* [2012] HCA 59, (2012) 246 CLR 469.

> '....Nothing short of satisfaction beyond reasonable doubt will do, and an appellate court can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a "substantial miscarriage of justice" if the appellate court concludes from its review of the record that conviction was inevitable. It is the inevitability of conviction which will sometimes warrant the conclusion that there has not been a substantial miscarriage of justice with the consequential obligation to allow the appeal and either order a new trial or enter a verdict of acquittal.'

[24] In this case, the State depended very substantially on the admissions in the caution interview of each appellant. The Judge conducted the voir dire in which they sought the exclusion of the statements in January 2017 and provided reasons for dismissing the challenge to their admissibility on 10 February 2017. In the voir dire, the Court heard from the Police inspector who carried out both arrests and from the officers who conducted the respective interviews.

[25] Both appellants gave evidence at the voir dire to similar effect, that they had been beaten at the time of their arrests and were thereafter fearful of further violence if they did not co-operate. Both appellants accepted that there had been no violence or threats during their interviews. The first appellant said that he had been told not to change his story from what he had told the Police when they executed the search warrant at his home, and said that he had signed the statement because he had been told to.

[26] The Judge rejected the appellants' evidence and ruled the statements made at the caution interviews to be admissible.

[27] Neither appellant gave evidence at trial. The content of the first appellant's caution interview included the following statements:

> A20: They escorted me out and questioned me whether I have some marijuana plant in my farm. I knew that the officers have knows the information of my farm, so I admitted to them and told them the place where I planted or cultivated marijuana. It is Davecadra Farm.
>
> Q25: Who owned the marijuana plants?
>
> A: It belongs to me and Kaminieli Karusia.
>
> Q26: How many marijuana plants?
>
> A: About 400 plants.

[26] The first appellant was shown the plants that had been removed from the farm when the Police seized them, and was asked what he could say about them:

> A: I could say that these are the plants from my farm, it's mine.
>
> Q33: How can you confirm that these plants are yours?
>
> A: Because same heights and healthy plants.

[28] At the end of the interview, there was a formulaic question and answer session about whether there had been any force asserted and whether the statement had been given of his own free will.

[29] Once the acknowledgements were made in that statement that the first appellant had not been forced to make it and that it had been given of his own free will, it constituted sufficient evidence to make out the elements of the charge against him. Counsel for the first appellant questioned the value of his acknowledgement that the plants shown to him (without roots) were those taken from the Davecadra farm and were his. His reason in acknowledging they were his does not take account of the fact that one example of cannabis plants could hardly be distinctive. However, he did not attempt to claim that he could not recognise the plants shown to him.

[30] I am satisfied that:

(a) if the State's case focused on the admissions recorded in the caution interview and had not led evidence of the uncharged conduct involving cannabis leaf at the first appellant's home; and

(b) if a clear direction had been given that nothing in the State's case against the second appellant could be taken into consideration in assessing whether the State had made out the charge against the first appellant;

then the State's case would still have been made out beyond a reasonable doubt.

[31] In the terms of *Baini*, a conviction was inevitable, and it follows that there was no substantial miscarriage of justice.

Second appellant's appeal against conviction

[32] The State's case against the second appellant was that when a team of Police officers arrived at the Davecadra farm after their seven-hour trek, one of them who was familiar with the second appellant saw him for about a minute. The man thought to be the second appellant ran away and, although the Police gave chase, he was not apprehended at the site. The evidence was that he had been seen running through the cannabis plantation.

[33] He was arrested some 12 days later. He, too, gave a caution interview that was the essence of the State case against him. It included the following admissions:

> Q10: What crops do you plant at Davecadra?
>
> A: Marijuana, bele and chillis.
>
> Q11: Are this crops is your source of income?
>
> A: Yes, plus dalo, yaqona and bananas.
>
> Q12: Where do you sell your crops?
>
> A: Suva.
>
> Q14: Who all were with you at Davecadra farming area?
>
> A: Waisake and Vilikesa.
>
> Q15: Did all of you take part in cultivating illicit drugs?
>
> A: Yes.
>
> Q16: Why did you plant marijuana?
>
> A: Because it is easy to plant and collect quick revenue.
>
> Q19: Why did you run away from the Police operation team when they came up to Davecadra?
>
> A: I was afraid of them and don't want to get hurt.

[34] The interview ended with the second appellant acknowledging that the statement was true and that he had given it of his own free will.

[35] Four grounds of appeal were argued against his conviction. The first was that the Judge had not directed the assessors on the need to link the second appellant to the cannabis seized, when the State case on that was inadequate and not put to him in his caution interview.

[36] The State's response to this criticism was that the admissions in the caution interview and the evidence of the second appellant being seen running away from the cannabis plantation was sufficient to link him to the seized plants, and that the Judge's summing up adequately covered the element of the necessary linking of the second appellant to cultivation of the plants seized from the Davecadra farm.

[37] I do not accept there was any inadequacy on this aspect of the summing up. The criticism could only be advanced realistically if the admissions in the caution interview were excluded, and that is not a valid approach.

[38] The second ground of the conviction appeal was that the Judge did not direct the assessors on the usual procedure for the Police to show seized drugs to an accused person when he or she is being interviewed, so as to afford an opportunity to dispute a relevant connection. In essence, the Judge failed to warn the assessors as to the standard of proof that could reasonably be expected on linking a defendant to the drugs in issue.

[39] Argument on this ground included an alleged inadequacy in the evidence linking the second appellant to the seized cannabis because the interviewing officer did not confront him with it during the caution interview.

[40] Certainly, a failure to put the seized drugs to an accused could cast doubt on a necessary element of the charge that had to be proven. However, depending on the facts in a particular case, there may well be other ways of making out that element of the charge. For the same reason as addressed in rejecting ground one, this second ground cannot succeed.

[41] Ground three raised an alleged error in [35] of the Judge's summing up. That was:

> "35. PW3 said, he was part of the police team that went to Davecadra farm on 21 January 2015. PW3 said, when they arrived on the cannabis sativa plant farm at about 11am on the day, he saw Accused No. 2 standing among the cannabis sativa plants. PW3 said, he observed Accused No. 2 for 60 seconds. He said, Accused No. 2 was 7 meters from him. He said, he chased him. He said, there was bright sunlight around as it was

> 11 am. PW3 said, his observation of the accused was not impeded. PW3 said, he had seen Accused No. 2 before in November 2014, December 2014 and January 2015. A special reason for remembering his face that day was that at Nabulini Village, Accused No. 1 told him that he and Accused No. 2 owned the farm. Are there any specific weakeness in PW3's identification evidence? An identification parade is often counter – productive when it's a case of recognition. In any event, if the quality of PW3's identification evidence was of a high quality, you may use the same. If it's otherwise, you may reject the same."

[42] Exception was taken to the sentence:

> A special reason for remembering his face that day was that at Nabulini village, accused number one told him that he and accused number two owned the farm.

[43] What the first appellant had said, implicating the second in ownership of the farm where the cannabis was found, was clearly inadmissible against the second appellant as evidence of that assertion.

[44] The statement by the Police officer that he found it easier to identify the second appellant when he saw a man running away at the farm, or bolstered his identification because he had been told that the second appellant had an interest in the farm, is admissible as to the reliability or otherwise of the officer's identification of the second appellant. In that context, it is not inevitably of material probative value. Identification evidence is readily challenged as unreliable, with academic research supporting grounds for concern. Here, it might be agued that the first appellant's reference to the second appellant would have triggered an expectation for the Police Officer that it was the second appellant that he was going to see, so that is who he thought he saw. However, an assessment of the probative value of it in this context is not required.

[45] For lay assessors, that distinction between admissible and inadmissible purposes for adducing a statement from the Police Officer of what the other appellant had told him would be a subtle one that would have required a very clear direction. It might have been given to them in terms such as:

> You can take the Police officer's statement of what he had been told by the first defendant into account when considering the reliability of his evidence that he was able to identify the second defendant as the man running away at the farm. However, you cannot take it into account in considering

> whether the State has proved that the second defendant was involved in the cultivation of cannabis at the farm.

[46] There was no such direction, giving rise to a material risk that the assessors may have added that evidence to the evidence properly admissible in making out the charge against the second appellant. It therefore raises the prospect of a miscarriage of justice.

[47] Ground four was that the Judge gave inadequate attention to whether the second appellant's caution interview was true. The point was made that if the co-accused's statement was excluded (as considered in ground three above), then the State's case depended entirely, or at least very substantially, on the admissions in the caution interview, justifying a closer analysis of grounds for possible doubt about its truth.

[48] The Judge did put to the assessors that it was a question of fact for them, as to whether they found the confessions to be true.

[49] The caution interview was conducted without a witnessing officer present. The interviewing officer said that was on account of a lack of manpower, but counsel on the appeal contended that there were others at the Police station at the time. In cross-examination, counsel asserted that conducting the interview without a witnessing officer was in breach of the accused person's rights. However, the Judge was not inclined to treat it as such.

[50] Counsel also sought to challenge the reliability of the record of the interview by drawing attention to the time taken, as recorded on the statement, when compared with the longer period recorded for the officer being engaged in the interview, in the Police station's diary. The Judge observed that Police station diaries are notoriously unreliable and the matter appears to have gone no further.

[51] I am not persuaded that the Judge ought to have drawn to the assessors' attention the fact that there had been no witnessing officer present as a factor they might consider as affecting their assessment of its truth. Nor was there a need to put counsel's other concerns.

[52] A point not raised in the written submissions, but pressed by counsel in oral argument, was that the Police procedure was deficient because the second appellant was not offered an opportunity to undertake a reconstruction of the alleged offending, which counsel characterised as a standard part of Police procedure. There was cross-examination on the point. The interviewing officer rejected the contention that it was unfair to not offer the second appellant an opportunity to go to the scene. The senior investigating officer, Sergeant Marika, explained that a reconstruction was not offered, essentially for security reasons. It would have involved a seven-hour trek each way with a risk of injury to accompanying officers and a risk that the appellants, who knew the area very well, might escape.

[53] Counsel for the second appellant did not make any specific suggestions as to what advantage he lost, in defending the charge without the opportunity for a reconstruction at the site. Passing reference was made to the absence of opportunity to contest the boundaries, or demarcation of the property allegedly used to grow the cannabis, but on the facts here, this was the only cultivated part of cleared forest in a much larger area. I am not persuaded that this omission from usual Police procedures gave rise to any realistic prospect of a miscarriage, given the logistical difficulties in offering such a reconstruction, and the terms of the admissions.

[54] Another argument not raised directly in written submissions, but pressed in oral submissions as part of this challenge to the verdict, was the supposedly unreliable nature of the identification evidence of the second appellant at the farm. The officer's evidence was that he had sight of the man for 60 seconds, 30 of which was when he was unsuccessfully giving chase. He knew the second appellant from previous interaction with him, and maintained a sufficiently clear view of him to be sure of his identity.

[55] Counsel argued this was not credible, given that the man was seen running away immediately, through a plantation of plants at least some of which were more or less head height. It was suggested that a view of longer than one minute would be required for a reliable identification to be made.

[56] Counsel also suggested it was reasonable to expect photographs of the location to have been produced to clarify the officer's evidence of the scene. A photographer had accompanied the police officers, but no photographs were adduced.

[57] The officer appears not to have been moved from his evidence in cross examination, and depending on circumstances, reliable identifications can be made in a matter of seconds. I am not persuaded either that the Judge ought to have given more cautious directions on the identification evidence, or that the verdict was unsafe because it should have been rejected. The second appellant's admissions confirmed he ran away when the police arrived.

[58] In summary, the prospect of a miscarriage arises on ground three, but none of the others raised in argument. The next issue is whether it could constitute a substantial miscarriage for the purposes of the proviso to s 23 of the Act. My analysis on that adopts the approach to that exercise in determining the first appellant's conviction appeal.

[59] The admissions in the caution interview are unequivocal. Once the prospect of it being forced out of the second appellant is put aside, there were ample grounds for the assessors and the Judge to find the admissions were truthful.

[60] Similarly, although caution is always required in relying on identification evidence, the relevant officer's evidence on the point was credible and the admissions included a reason from the second appellant for running from the scene which corroborates the identification evidence.

[61] This was a compelling State case based on the sighting of the second appellant at the property, his running from the Police there, and his clear admissions in the caution interview.

[62] The State's case certainly does not need the first appellant's statement implicating the second appellant to get to a point where it can safely be held to have been proven beyond a reasonable doubt.

[63] Accordingly, any miscarriage arising from the absence of a clear direction on the first appellant's evidence cannot be classified as a substantial one. The State case was made out without it and the proviso clearly applies.

[64] The second appellant's conviction appeal must accordingly be dismissed.

SENTENCE APPEALS

Bases of the appeals against sentence

[65] Both appellants indicated prior to hearing that they intended to rely on submissions that had been filed on their respective applications for leave to appeal. They had been lodged in late 2020. Given important judgments since then on sentencing for cannabis cultivation, the failure to file submissions reflecting the current position was regrettable. Essentially, both appellants submitted that the sentencing Judge had treated the offending more seriously than was warranted and had double-counted in treating the size of the operation as an aggravating factor.

[66] The Judge sentenced the appellants in accordance with his application of the guidelines for possession of cannabis in *Sulua v The State*.[6] The sentencing Judge treated the offending as coming within category 4 of categories set out in *Sulua* for possession of cannabis, depending on quantity measured by weight. He had started with a sentence of 12 years' imprisonment, with uplifts of eight years because of the large quantity of drugs involved, making a total of 20 years' imprisonment for each appellant before deducting time for periods served in custody prior to sentencing. He imposed non-parole periods of 15 years for each of the appellants.

[67] Since the sentencing, this Court has delivered a comprehensive guideline judgment reconsidering the appropriate criteria for sentencing on convictions for the discrete offences of cultivation of cannabis in *Seru v The State*.[7] More

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6 *Sulua v The State* [2012] 2 FJLR 111.
7 *Seru v The State* [2023] FJCA 67; AAU115.2017, judgment 25 May 2023.

recently, the Supreme Court has provided helpful commentary on the application of the guidelines set out in *Seru* in the appeal in *Ratu v The State*.[8]

[68] An initial issue is the extent of retrospectivity in the application of the *Seru* guidelines. In both that judgment and in *Ratu*, this Court and the Supreme Court have endorsed the approach proposed by the New Zealand Court of Appeal in *Zhang v R*.[9] That judgment set out the following approach when considering the extent of retrospectivity that could apply to guideline judgments for sentencing:[10]

> [188] The approach that has consistently been taken by this Court in previous guideline judgments is that the judgment only applies to sentences that have already been imposed, if and only if two conditions are satisfied:
>
> (a) that an appeal against the sentence has been filed before the date the judgment is delivered; and
>
> (b) the application of the judgment would result in a more favourable outcome to the appellant.

[69] The first criterion from Zhang is satisfied for both appellants, given that their applications for leave were filed (and indeed leave was granted) before the judgment in *Seru* was issued. The second criterion requires the Court, at least in these appeals, to undertake a resentencing exercise to determine whether the application of the *Seru* guidelines would result in a lesser sentence.

[70] Given that requirement, it is unnecessary to consider in any detail the Judge's reasoning for arriving at the sentences imposed. There are certainly grounds for concern that it included elements of double-counting, but that concern is not relevant if the guidelines in *Seru* are to be applied.

The *Seru* guidelines

[71] The guidelines in that judgment are in the following terms:

> [36] **CULPABILITY.** Culpability is demonstrated by the offender's role as given below. In assessing culpability, the sentencer should weigh up all the factors of the case to determine role (***leading role, significant role*** *or* ***lesser role***). Where there are characteristics present which fall

[8] *Ratu v The State* [2023] FJSC 10;CAV0024.2022 (25 April 2024).
[9] *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
[10] Footnote omitted.

under different role categories, or where the level of the offender's role is affected by the scale of the operation, the court should balance these characteristics to reach a fair assessment of the offender's culpability. Thus, it must be borne in mind that these roles may overlap or a single offender may have more than one role in any given situation. The demarcation of roles may blur at times. The sentencers should use their best judgment and discretion in such situations.

Leading role:

- *Owner, organizer, initiator or principal party in the venture. Involved in setting-up of the operation, for example obtaining the lands, premises, workers and equipment with which to carry out the cultivation. May have one or more such ventures.*
- *Directing or organizing production/cultivation on a commercial scale*
- *Substantial links to, and influence on, others in a chain*
- *Close links to original source*
- *Expectation of substantial financial or other advantage*
- *Uses business as cover*
- *Abuses a position of trust or responsibility*

Significant role:

- *Play a greater or dominant part. Running the operation.*
- *Operational or management function within a chain. May make arrangements for the plants to be brought in, and the crop to be distributed. They may help to run more than one operation and be involved in making payments, such as rental payments, albeit again on instructions from those running the operation.*
- *Involves others in the operation whether by pressure, influence, intimidation or reward*
- *Expectation of significant financial or other advantage (save where this advantage is limited to meeting the offender's own habit), whether or not operating alone*
- *Some awareness and understanding of scale of operation*

Lesser role:

- *Secondary party. Sometimes as "gardeners" tending the plants and carrying out what might be described as the ordinary tasks involved in growing and harvesting the cannabis. Simply be doing their tasks on the instructions of above in the hierarchy. May get paid for the work or subsistence.*
- *Performs a limited function under direction*
- *Engaged by pressure, coercion, intimidation, grooming and/ or control*
- *Involvement through naivety, immaturity or exploitation*
- *No influence on those above in a chain*

- *Very little, if any, awareness or understanding of the scale of operation*
- *If own operation, solely for own use (considering reasonableness of account in all the circumstances)*
- *Expectation of limited, if any, financial advantage, (including meeting the offender's own habit)*

[37] **HARM**. In assessing harm, output or potential output are determined by the number of plants/scale of operation (category 01, 02, 03 or 04). The court should determine the offence category from among 01- 04 given below:

- ***Category 1*** *– 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.*
- ***Category 2*** *– Medium scale cultivation capable of producing significant quantities for commercial use i.e. with the object of deriving profits. Commercial quantities. Over 50 but less than 100 plants.*
- ***Category 3*** *– Small scale cultivation for profits capable of producing quantities for commercial use. 10 to 50 plants (with an assumed yield of 55g per plant).*
- ***Category 4*** *– Cultivation of small number of plants for personal use without sale to another party occurring or being intended. Less than 10 plants (with an assumed yield of 55g per plant).*

[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 *16 – 20 years' custody*	***Category range*** *12 – 16 years' custody*	***Category range*** *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*

[39] Aggravating and mitigating features. This is not an exhaustive list.

Statutory aggravating factors:

- *Previous convictions, having regard to a) nature of the offence to which conviction relates and relevance to current offence; and b) time elapsed since conviction (see **Naureure v State** [2022] FJCA 149; AAU151.2020 (12 December 2022) at [32] –[39] for a detailed discussion on this aspect)*
- *Offence committed on bail*

Other aggravating factors include:

- *Exploitation of children and/or vulnerable persons to assist in drug-related activity*
- *Exercising control over the home of another person for drug-related activity*
- *Nature of any likely supply*
- *Level of any profit element*
- *Use of premises accompanied by unlawful access to electricity/other utility supply of others, where not charged separately*
- *Ongoing/large scale operation as evidenced by presence and nature of specialist equipment*
- *Exposure of drug user to the risk of serious harm over and above that expected by the user, for example, through the method of production or subsequent adulteration of the drug*
- *Exposure of those involved in drug production/cultivation to the risk of serious harm, for example through method of production/cultivation*
- *Exposure of third parties to the risk of serious harm, for example, through the location of the drug-related activity*
- *Attempts to conceal or dispose of evidence, where not charged separately*
- *Presence of others, especially children and/or non-users*
- *Presence of weapons, where not charged separately*
- *Use of violence (where not charged as separate offence or taken into account at step one)*
- *Failure to comply with current court orders*
- *Offence committed on licence or post sentence supervision*

- *Offending took place in prison (unless already taken into consideration at step 1)*
- *Established evidence of community impact*
- *Use of sophisticated methods or technologies in order to avoid or impede detection*
- *Use of indoor growing system (hydroponic method) to increase the growth and harvesting period and THC in the plants*
- *Growing for personal use but supplying to others on a non-commercial basis*
- *Period over which the offending has continued.*
- *Estimated value of the crop, if available.*
- *Assumed yield or the weight of dried cannabis*
- *Supply to others on a non-commercial basis in category 4.*
- Factors reducing seriousness or reflecting personal mitigation
- *Involvement due to pressure, intimidation or coercion falling short of duress (as opposed to being a wiling party), except where already taken into account at step one. Acting under duress or undue influence.*
- *Isolated incident*
- *No previous convictions or no relevant or recent convictions*
- *Offender's vulnerability was exploited*
- *Remorse*
- *Good character and/or exemplary conduct*
- *Determination and/or demonstration of steps having been taken to address addiction (whose offending sits at the lower end of the scale in terms of seriousness) or offending behaviour*
- *Serious medical conditions requiring urgent, intensive or long-term treatment*
- *Age and/or lack of maturity*
- *Mental disorder, impairment or diminished responsibility short of insanity or learning disability*
- *Personal circumstances, sole or primary carer for dependent relatives only in relation to category 4.*
- *Assumed yield or the weight of dried cannabis*
- *Sales are infrequent and of limited extent in category 3.*

[72] In commenting on the application of the categories in *Seru*, the Supreme Court in *Ratu* relevantly observed:

> 24. The problem, in my opinion, is more apparent than real. Experience has shown that the overwhelming majority of cases in Fiji involving the cultivation of cannabis plants relate to extremely unsophisticated operations. Ventures involving "a considerable degree of sophistication or organization" or amounting to an "elaborate project designed to last over an extensive period of time" are fortunately extremely rare in Fiji. So if the absence of sophistication was such as to take what would otherwise be a case falling in category 1 because of the number of plants seized out of category 1, there would hardly ever be any cases falling within category 1. That could not have been what the Court of Appeal intended.
>
> 25. In my opinion, the various categories have to be approached with a degree of flexibility, without at the same time undermining one of the reasons why guideline judgments are given – namely to ensure that cases are dealt with consistently and that similar cases are treated, broadly speaking, in the same way. I think that the Court of Appeal must have included the number of plants for each category to make the selection of the appropriate category a really straightforward exercise for sentencing judges. In other words, I proceed on the assumption that the Court of Appeal thought that the number of plants should be the sole criterion for determining the appropriate category, and that they added the descriptions in *Terewi* to explain what the nature and size of the operation was likely to be with that number of plants – perhaps without giving as much thought as was necessary to the rarity of sophisticated enterprises in Fiji involving the cultivation of cannabis plants. To give effect to that, I would refine the approach adopted by the Court of Appeal as follows. If the nature and size of the operation in a particular case does not match the description of the operation in the category indicated by the number of plants, the actual size and nature of the operation should be reflected at the stage at which the judge looks at those factors which either aggravate or mitigate the offence so as to increase or reduce the relevant starting point within the relevant sentencing range. Having said that, if the only way in which the nature and size of the operation in a particular case does not match the description of the operation in the category indicated by the number of plants is because the operation was not as sophisticated as the category suggests, any reduction to the starting point on that account alone should be very modest.

Applying the *Seru* guidelines to these appeals

[73] The State's case was that there were 484 cannabis plants seized at the farm and that yielded the 160.6 kilograms provided for analysis. I note that the first appellant in his caution interview volunteered that they were growing about 400 plants.

[74] The appellants relied on the government analyst's report which referred to 208 plants. The difference, as explained by State counsel, is that forensics only count plants that still have their roots on. Here, it is possibly understandable that

the Police would leave behind relatively heavy root components of the plants, given that they faced a seven-hour trek through rough country, carrying out as much as they reasonably could, to get it back to any accessible road transport. At the time, if convictions followed, the weight of cannabis rather than the number of plants being cultivated would influence the sentence.

[75] Because the *Seru* guidelines focus on numbers of plants for sentencing purposes, it will obviously be important for the Police to provide all seized plants for analysis, complete with their roots wherever possible. That is not a requirement that would have been known to the Police officers in this case.

[76] Two hundred and eight whole plants clearly puts the offending in category one. As in *Ratu*, double the number of plants from the minimum could not warrant a significant uplift.[11] Here, it was not disputed that the plantation had extended to substantially more than that.

[77] Counsel for both appellants submitted valiantly that neither of them should be categorised as having leading roles in terms of the *Seru* definitions. That is not tenable given the description of their roles in their caution interviews. There is no suggestion that they were working under direction from or for others. Both described direct involvement in planting and tending of the plants. Both admitted they sold harvested cannabis to supplement income from farming other, legitimate, crops.

[78] Certainly, there was no sophistication in their operation. They had cleared a patch of bush at an extremely remote location, with that being the major element in their attempts to do so undetected. It is tolerably clear that they were undone by an informer. There was no evidence of any elaborate drying facility, nor was it suggested that they dealt in large quantities with a wholesale dealer (although the evidence on sale was scant and only in their admissions). There was no evidence that they had made substantial profits from previous crops.

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[11] Compare *Ratu* at [31] – in that appeal there were 228 plants seized.

[79] The State did not contend for any of the aggravating factors listed in *Seru*, other than the quantity of cannabis involved. Apart from the number of plants being well above the starting number for category 1, the features of this offending fit more within the characteristics of category 2, rather than category 1, as they are described in [37] of *Seru*.

[80] Adopting the category 1 starting point of 18 years, the total number of plants was substantially above threshold for category one. On the other hand, the lack of sophistication, and the extent to which the features of the cultivation fit more closely in category 2 than category 1, overall justifies a modest reduction.

[81] Both appellants were found guilty only after trial, and therefore cannot claim any reduction for guilty pleas. They had both provided straightforward admissions, including an outline of their mode of operation, and are entitled to credit for no relevant previous convictions.

[82] Taken overall, I would treat all these factors in favour of the appellants as entitling them to a reduction of two years from the starting point. The sentence, before allowance for time served prior to sentencing, would therefore be 16 years' imprisonment. I am mindful that takes the sentence to the bottom of the range provided in *Seru* for leading role participation in Category 1 offending, but that is coincidental and has not determined what I consider to be the appropriate extent of reduction.

[83] There was some difference between counsel as to the length of periods each of them had served in custody on remand. The Judge allowed the first appellant a one-year reduction on the basis of approximately 10 months in custody. The Judge treated the second appellant as having served approximately two years prior to sentencing. Despite a question raised by State counsel, I would not be minded to alter those deductions. Accordingly, the end sentence for the first appellant would be 15 years, and for the second appellant, 14 years imprisonment.

[84] There was a potential inconsistency in the Judge's calculation of the non-parole periods ordered in respect of each appellant. He put it at 15 years for each of them, notwithstanding the year difference in the finite sentences imposed. State counsel was inclined to accept that this was an inconsistency that might justify an adjustment, her suggestion being six months less.

[85] I would be inclined to maintain the differential, affording each of them a period of three and a half years, being a little less than 22 percent off the starting sentence as the non-parole period. In the outcome, therefore, the first appellant's non-parole period would be 11 years and six months, and that of the second appellant would be 10 years and six months.

[86] Returning then to the second criterion in *Zhang*, the outcome is that the *Seru* guidelines would reduce the sentences imposed by the trial Judge and therefore it should apply to give each appellant the benefit of the revised approach to sentencing for the cultivation of cannabis.

Orders:

i) The appeals against conviction are dismissed.

ii) The appeals against sentence are allowed.

iii) The original sentences of 19 years imprisonment for the first appellant and 18 years imprisonment for the second appellant are set aside.

iv) The first appellant is sentenced to a term of 15 years imprisonment with a non-parole period of 11 years and six months imprisonment to take effect from 31 January 2017.

v) The second appellant's is sentenced to a term of 14 years imprisonment with a non-parole period of 10 years and six months imprisonment to take effect from 31 January 2017.

Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Justice Robert Dobson
JUSTICE OF APPEAL