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

CRIMINAL APPEAL NO. AAU 054 OF 2024
[Lautoka High Court: HAC 161 of 2023]

BETWEEN : **RAVIN LAL**

Appellant

AND : **THE STATE**

Respondent

Coram : Qetaki, RJA

Counsel : Mr. Y. Kumar for the Appellant
Mr. Seruvatu for the Respondent

Date of Hearing : 8 August, 2025
Date of Ruling : 26 August, 2025

RULING

(A). Background

[1] The Appellant, Ravin Lal was charged with one Count of Unlawful cultivation of illicit drugs, contrary to section 5(a) of the Illicit Drugs Control Act 2004, and one Count of Unlawful possession of illicit drugs, contrary to section 5(a) of the Illicit Drugs Control Act 2004 at the Nadi Magistrate's Court.

[2] On 3 June 2022 in the Magistrates Court, the Appellant pleaded guilty to the charges and admitted to the summary of facts which was read out and explained to the Appellant in his preferred language in the presence of his counsel at the time.

[3] On 25 September 2023, the learned Magistrate found the Appellant guilty and convicted him as charged. However, after the filing of sentence submissions and

mitigation by the defence counsel, the learned Magistrate adjourned proceedings upon recognizing potential jurisdictional limitations in imposing an appropriate sentence.

[4] The Appellant was transferred to the High Court for sentencing pursuant to section 190(1) of the Criminal Procedure Act 2009. On 7 December 2023 when the matter was called in the High Court, the Appellant through his counsel at the time filed two Miscellaneous Applications to vacate the Appellant's plea.

[5] On 16 May 2024, HAM 297 of 2023, an application to withdraw the guilty plea of the applicant was dismissed by the High Court due to lack of jurisdiction. On 8 July 2024, HAM 147 of 2024, an application for stay of sentence, bail pending sentence and transfer of HAC 161 of 2023 to the Magistrate's Court, Nadi was dismissed by the High Court as frivolous.

[6] On 17 July 2024 the Court sentenced the accused to an aggregate sentence of 12 years and 3 months imprisonment with a non-parole period of 9 years.

[7] The Appellant filed a timely appeal against conviction and sentence.

(B). Summary of Facts

[8] On 28 December, 2021 at about 3pm at Masimasi, Sabeto, Nadi D/Cpl Filipe Ratini received information that the accused was cultivating illicit drugs at Savalau Settlement, Nadi at his farm. This officer then informed the Fiji Detector Dog Unit based at Nadi Airport. At Nadi Airport D/Cpl. Filipe Ratini met Petero Saini, PC Neumi Nanuku and briefed them on the place and person of interest.

[9] The team drove to Savalau to the accused's compound and identified themselves to the accused and the reason for their presence. The accused identified himself as Ravin Lal. D/Cpl. Filipe Ratini showed the accused a copy of search warrant, the accused admitted that he was planting some green plants believed to be marijuana. The accused then led the team to his farm.

[10] In the presence of the accused, the team uprooted 119 plants believed to be marijuana measuring 0.8cm to 2.8 meter. Thereafter PC Saini went with the accused and K-9 Conan to search his house. During the search, PC Saini found 9 dried plant material believed to be marijuana wrapped in a red sari.

[11] D/LCpl Filipe Ratini approached the accused and arrested him after giving him his constitutional rights and the reason for his arrest. The green plants and the dried plant materials were taken to the Sabeto Police Station and handed over to the investigating officer and then taken to the Forensic Chemistry Laboratory for analysis. The result of the analysis came out positive for Cannabis Sativa having a total weight of 36,388 grams.

[12] The accused was arrested, interviewed under caution where he admitted cultivation from Q. and A. 31 to 47. The accused was later charged and produced in court.

(C). Grounds of Appeal

[13] The Appellant had raised 16 grounds of appeal filed on 16 August 2024, as follows:

> *1. That the learned trial Judge erred in law and in fact in not exercising his discretion judicial when he dismissed the applicant's application to withdraw his guilty plea before sentence and the failure to do so caused a substantial miscarriage of justice thus denying his rights to fair trial.*
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> *2. That the learned Trial Judge erred in law and in fact when he refused the appellant to withdraw his guilty plea before his sentence by not taking into consideration that a change of plea from guilty to not guilty may be entertained at any time before sentence is passed and when it appeared to the court that the accused pleaded guilty to the charge on the basis of a material mistake of facts and upon obtaining wrong advise from his Solicitors.*
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> *3. That the learned trial Judge erred in law and in fact when refusing the appellant to withdraw his guilty plea application, when he failed to consider that the paramount question of plea application, is whether plea is unequivocal and made with the full understanding of the offence alleged and its ingredients and in considering the history of the case itself. The applicant's affidavit was set aside was not allowed to be fully and adequately considered by the learned trial Judge.*
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> *4. That the learned trial Judge erred in law and in fact in not taking into consideration adequately/or in detail in particular the affidavit of the appellant filed in support of his application to withdraw his plea when refusing the appellant to withdraw his guilty plea before sentence, the interest of justice demanded that the accused should be allowed to change his plea to not guilty.*

5. That the learned trial Judge erred in law in not considering that the Magistrate is not allowing the appellant his rights to an election of the charges of the charges of the possession and cultivation of illicit drugs.

6. That the learned Judge erred in law by not allowing the appellant to change his plea when the prosecution agreed to the application to withdraw the plea and remit the case to Magistrate Court?

7. That the learned Judge erred in law that appellant has a right to be heard which is constitutionally protected as per section 15 of the constitution access to court and tribunal.

8. That the learned Judge erred in law when he did not consider that the court has an express concession by the State which consented to the express application to withdraw the plea of guilty as entered before the Magistrate Court.

9. That the learned trial Judge failed to consider that there were variations with the caution interview statement and what was stated in the summary of facts and yet failed to allow the appellant to change his plea before sentence.

10. That the learned trial Judge erred in law by stating that High Court does not have jurisdiction in this case to change plea and under those circumstances failed to remit the file back to the Magistrates Court for consideration of the said fact.

11. That the learned Judge erred in law that High Court has inherent jurisdiction to stay processing following common law traditions.

12. That the sentence is manifestly harsh and excessive.

13. That the learned trial Magistrate erred in law and in fact in passing sentence of imprisonment which was disproportionally severe punishment.

14. That the learned trial Magistrate erred in law and in fact in passing sentence of imprisonment without considering the medical history, surgery and medical certificate of the Appellant.

15. That the learned trial Magistrate erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.

16. Whether the appellant reserves his right to add further other grounds of appeal on receiving record proceedings.

(D). High Court Ruling (Delivered on 08 July 2024 per Sunil Sharma J)

Background

[14] The learned Judge noted that this is the second notice of motion field by the Applicant, and is supported by the Affidavit sworn on 30th May 2024 seeking four orders. Two of the orders sought, are:

> *"a.* ***That*** *Lautoka High Court HAC 161 of 2023 being State v Ravin Lal be stayed pending the outcome of the application of the Applicant before the Nadi Magistrates Court in Criminal Case No.1250 of 2021 for withdrawal/setting aside of the plea of guilty entered on 24 June 2022 before the Magistrates Court at Nadi.*
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> ……
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> ……
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> *d.* ***Alternatively,*** *the entire action being Lautoka High Court Action HAC 161 of 2023 being State v Ravin Lal be transferred to the Nadi Magistrates Court for the determination of the application of the applicant before the Nadi Magistrates Court in Criminal Case 1250 of 2021 for withdrawal/setting aside of the plea of guilty entered on 24 June 2022 before the Magistrates Court at Nadi."*

Submissions

[15] The Applicant's counsel argued that since the Court does not have the jurisdiction to set aside the guilty plea of the applicant, a stay of the sentence in the substantive file being HAC 161 of 2023 be granted pending the outcome of their application in the Magistrates Court for the withdrawal/setting aside of the guilty plea. It was submitted that whilst the above application is being attended to, the applicant is to be released on bail or alternatively the entire substantive file in the High Court be transferred to the Magistrates Court.

[16] The Affidavit filed in support of this application, deposes substantially similar facts that had been deposed in HAM 297 of 2023, for which a Ruling had been made. That is, he had pleaded guilty upon the wrong advice of his former counsel in the Magistrate's Court, who failed and/or neglected to give him proper and competent

advice from the disclosures served by the prosecution. That there is a valid defence which goes to the core of the charges. The applicant would have never pleaded guilty had he been properly and correctly advised.

Determination

[17] The law governing the transfer of cases to the High Court for sentencing under section 190 of the Criminal Procedure Act 2009 was discussed in the earlier ruling in HAM 297 of 2023 delivered on 16th May, 2024.

[18] That ruling also addressed the purpose of section 190 and reliance was placed on the Supreme Court decision in **Vishwa Nandan v The State** Criminal Petition No. CAV 0007 of 2019 (31 October, 2019).

[19] The learned trial Judge was concerned that the counsel for the applicant had taken "a somewhat unusual interpretation" of the ruling delivered earlier. It would appear that counsel had misconstrued that ruling on the application of section 190(4) of the Criminal Procedure Act 2009. The ruling delivered in HAM 297 of 2023 explains the reasons why the High Court did not have the powers to set aside the guilty plea of the applicant from paragraphs 12 to 15 as follows:

> *"12. The purpose of section 190 above is to sentence an offender in the High Court after the offender has been convicted in the Magistrate's Court where the learned magistrate is of the view that a greater punishment is to be imposed. When a file is transferred to the High Court for sentencing the power given to the High Court is limited one which is to "enquire into the circumstances of the case and deal with the person in any manner in which the person could be dealt with if the person had been convicted by the High Court.*
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> *13. In view of the above, this Court has the power to sentence the applicant with the appropriate punishment but not to review the lawfulness or correctness of the conviction. The applicant has recourse under section 190(4) of the Criminal Procedure Act to appeal against the correctness or otherwise of the conviction to the Court of Appeal.*
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> *14. The Supreme Court in Vishwa Nandan v The State, Criminal Petition No. CAV 0007 of 2019 (31 October,2019) at paragraph 28 made an important*

observation in respect of the powers of the High Court under section 190(3) of the Criminal Procedure Act at paragraph 28 as follows:

> *"……. The language of section190 (3) takes colour from its purpose. That purpose is to invest the High Court with the power in certain circumstances to sentence a defendant convicted in the Magistrates' Court. Although broad language is used, it is necessary to link the circumstances to be enquired into with the particular function which the High Court has to perform. Since that function is to determine the appropriate sentence, the circumstances to be enquired into are those which enable the High Court to do that. And as of Nawana JA's concern that it is unseemly for judges to pass sentence in a case in which the conviction might have been vitiated by some unlawful process, the answer is that the Act provides the route for that defect to be remedied, namely by an appeal under section 190(4).*

15. This court has to look at the intent and purpose of section 190 of the Criminal Procedure Act, amongst other matters the applicant is asking this court to go behind the copy record and consider matters supposedly between a solicitor and client and/or appellate court issues. The issues raised by the Applicant are clearly beyond the scope envisaged by section 190(3) of the Criminal Procedure Act.

[20] The Magistrate's Court has performed its functions under section 190 of the Criminal Procedure Act. On the applicant's argument that this court can transfer this file back to the Magistrate's Court under section 190(5) of the Criminal Procedure Act, 2009. The section vests a discretionary power on the High Court upon hearing submissions from the prosecutor to remit the person transferred for sentence to be dealt with by the Magistrate's Court. There was no such submission made by the state counsel in that regard and this is not a case that will come under that provision of the law.

[21] The learned Judge also held as misconceived the submission by counsel for the applicant that **Viswa Nandan's** case was not applicable considering the facts of this case, and affirmed that the case is concerned with section 190 which governs the transfer of persons to the High Court for sentence. It clarified the principles of law applicable. That Section 190 has direct application to sentence, the substantive matter which is pending. He stated, the law with regard to transfer of cases to the High Court for sentence is now well and truly settled. Once an offender is found guilty and

convicted by the Magistrate's Court a transfer to the High Court for sentence empowers the High Court to do exactly that for completion.

(E). The Law

[22] In terms of section 21 (1) (b) and (c) of the Court of Appeal Act, the Appellant could only appeal against his conviction or sentence with leave of court. For a timely appeal, the test for leave to appeal against conviction or sentence is *"reasonable prospect of success"*- see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2016) and the line of similar cases including **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **Sadrugu v State** [2019] FJCA 87; AAU0057 of 2015 (06 June 2019).

[23] When the sentence is challenged, the Court is guided by the requirements set out in **Kim Nam Bae v The State**, unreported Criminal Appeal AAU 15 of 1998 (26 February 1999), as follows:

> *"It is well established law that before the Court could disturb the sentence, the appellant must demonstrate that the Court below fell into error when exercising its jurisdiction. 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 considerations, 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) 55 CLR 499)."*

(F). Appellant's Case

Grounds 1-4 and Grounds 6-11

[24] The Ruling dated 8 July, 2024 is frivolous. The learned Judge had not considered that the applicant pleaded guilty to the charges based on the advice of his Solicitors as outlined in his affidavit. If the High Court cannot hear that application the case should have been remitted back to the Magistrate Court for that application to be heard. The application should be remitted to the Magistrate's Court under section 190(5) of the Criminal Procedure Act 2009.

[25] The following cases support the remittance of file back to the Magistrate's Court: **State v Inosi Durituituba** Crim.Case No. HAC 1 of 2024, and **Vishwa Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019). See also **State v Seru** [2003] FJHC 180; HAC0021D.2002S (26 March 2003) **State v Narayan** [2022] FJHC 129; HAC250.2021 (22 March 2022).

Ground 5 (Right for Election)

[26] The applicable laws are section 4(1) (b) and section 35(2) of the Criminal Procedure Act 2009. On application see **Upendra Dutt v State** Criminal Appeal No.027 of 2021, **Tasova v Office of DPP** [2022] FJSC 43; CAV12.2019 (26 September 2022).

[27] The accused in this matter was not given his right to election pursuant to section 4(1)(b) of the Criminal Procedure Act 2009. The State (prosecution) did not make an application to transfer the case to the High Court - the learned Magistrate did so. It is a question of law.

Grounds 12 - 16 (Sentence)

[28] The issues are whether the sentence is manifestly harsh and excessive? Whether the sentence was disproportionately severe? Whether the sentence was passed without considering the medical history, surgery and medical certificate of the Appellant? Also, whether the learned trial Judge erred in law in not taking into consideration adequately the provisions of the Sentencing and Penalties Decree 2009?

[29] On paragraph 28 of Sentencing delivered on 17th July 2024, the learned trial Judge decided as follows:

a) 12 years as starting point

b) 3 years added for aggravating factors

c) 1 year 6 months were deducted for mitigation and good character.

[30] On paragraph 29 deduction of 3 months for period already served in custody. The final aggregate sentence is 12 years and 3 months.

[31] The Appellant refers to **Ravia v The State** [2024] FJSC 54; CAV0023.2023 (29 October 2024), a case involving 87 plants of cannabis sativa weighing 34.2 kilograms contrary to section 5(a) of the Illicit Drugs Control Act 2004.

[32] The accused was sentenced to 12 years imprisonment with a non-parole period of 10 years on 30 April 2019. The Appellant quoted from paragraphs 8, 9 and 16 - as a consequence the learned trial Judge in that case reduced the sentence to 8 years with a non-parole period of 7 years. It is submitted that in this matter, the sentence is severe at 12 years and 3 months imprisonment, with 9 years non-parole period. Here there were 119 plants with 36.02kg in weight of cannabis aside. The 12 years starting point is excessive and inappropriate - the starting point should be around 10 years imprisonment.

[33] The Appellant submits that the learned Judge erred in taking up the starting point and then adding 3 years imprisonment as aggravating factors stipulating the role of the offender, rather than due to the offence itself. If all the aggravating features of the case relate to the offence rather than the offender, there will be no basis for enhancing the starting point over and above its appropriate place in the sentencing range: **Navuda v The State** [2023] FJSC 45; CAV13 of 2022 (26 October 2023), **Naikelekelevesi v State** [2008] FJCA 11.

[34] The learned sentencing Judge failed to consider the medical certificate and the medical history of the Appellant. The learned sentencing Judge disregarded the supplementary mitigation filed on 16th July, 2024 which informs that the Appellant had suffered from stroke and is a diabetic patient. He only deducted 1 year and 6 months for mitigation and good character. He did not consider the Appellants early guilty plea and health conditions.

(G). Respondent's Case

Against Conviction

[35] The Respondent's submissions focus on whether the High Court's refusal to vacate the plea resulted in a miscarriage of justice. This is addressed collectively. The Respondent submits that the Appellant's guilty plea was unequivocal and properly entered.

[36] The Respondent relies on the pronouncements of this Court in **Ali v State** [2020] FJCA 11; AAU31.2015 (27 February 2020), on the issue of *"equivocal or unequivocal plea"*. This Court stated:

> *"[13] I shall now examine the law relevant to the appellant's complaints. Lord Lane CJ in Regina v Drew [1985] 1 WLR 914, (19850 81 Cr App R 190 having considered when a judge should allow a defendant to withdraw a plea of guilty, said "In our judgment only rarely would it be appropriate for the trial judge to exercise his undoubted discretion in favour of an accused person wishing to change an unequivocal plea of guilty to one of not guilty. Particularly this is so in cases where as here the accused has throughout been advised by experienced counsel, and where, after full consultation with his counsel, he has already changed his plea to one of guilty at an earlier stage in the proceedings."*
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> *[14] A change of plea from guilty to not guilty may be entertained at any time before sentence is passed (vide R v McNally [1954] 1 WLR 933; 38 Cr.App 90. When an accused has been committed to the High Court for sentence and it appears to the Court that the accused pleaded guilty on the basis of a material mistake of fact, the Court may remit the matter to the Magistrates Court with a direction to proceed on a not guilty plea (vide R v Isleworth ,Crown Court and Uxbridge Magistrates Court, ex p Buda (2000) 1 Cr.App R(s) 538).*
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> *[15] The paramount question on any change of plea application, is whether the plea was unequivocal, and made with a full understanding of the offence alleged and its ingredients. In considering this question, the history of the case itself is highly relevant (vide State v Seru [2003] FJHC 189; HAC0021D.2002S (26 March 2003).*
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> *[16] In Heffernan v The State [2003] FJHC 163;HAA 0051J.2003S (12 December 2003) Justice Nashat Shameem said 8" The law on the subject to change of plea was clearly set out in S(an infant) V Recorder of Manchester and Others (1971)AC 481 by the House of Lords. I applied those principles in **State v Timoci Kauyaca Bainivalu** HAC0006 of 2002. A plea can be changed at any time before sentence. However, in considering change of plea, the court should only allow the change if there was prejudice as a result of lack of legal representation. The discretion should be exercised sparingly and judicially."*

[37] In **Tuisavusavu v State** [2009] FJCA 50; AAU0064.2004 (3 April 2009) this Court held:

> *"The authorities relating to equivocal pleas make it quite clear that the onus falls on the appellant to establish facts upon which the validity of a guilty plea is challenged (See **Bogiwalu v State** [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (**Liberti** (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.*
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> *[10] Whether a guilty plea is effective and binding is a question to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st appellant's plea was not in any way equivocal. As the 1st appellant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence. As was stated by the High Court of Australia in Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132;*
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> > *"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family of friends; or in the hope of obtaining a more lenient sentence than he would have if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea, he could not in law have been guilty of the offence."*

[38] The summary of facts was properly explained to the Appellant in the preferred language in the Magistrates Court. He had legal representation. The Appellant's counsel at that time had filed mitigation submissions. These factors demonstrate that

the Appellant had full understanding and voluntary admission of guilt-conduct wholly inconsistent with any claim of an ambiguous or mistaken plea.

[39] The Respondent submits that the Appellant's attempt to withdraw his guilty plea arose when the Magistrate indicated the matter would be transferred to the High Court for sentencing, where a more severe sentence was likely. This reveals that the application to vacate the plea was motivated by sentencing concerns rather than any genuine defect in the plea process.

[40] The Respondent submits that the Ruling dated 16 May 2024 dismissing the Appellant's application to vacate the guilty plea was correct.

[41] The summary of facts comprehensively addresses all essential elements required to establish the offences of unlawful cultivation and possession of marijuana under the relevant statutory provision. The narrative chronologically details the discovery, seizure, evidentiary chain and admissions in a manner that leaves no ambiguity about the commission of both offences.

[42] With regard to the principle in **R v Isleworth Crown Court ex p Buda,** the summary of facts was read out and admitted by the Appellant prior to pleading. It reveals no material mistake of fact that could render the Appellant's guilty plea equivocal.

[43] The Respondent submits that grounds 1 to 4 and 6 to 11 are not reasonably arguable and no substantial miscarriage of justice arises.

Against Sentence

[44] The Respondent submits that it is not arguable that the sentence discretion miscarried in consideration of **Kim Nam Bae v The State** (supra).

[45] The learned Judge properly applied the sentencing principles established in **Jone Seru v State** [2025] FJCA 115, correctly utilizing this binding precedent to determine an appropriate sentence for cultivation offences.

[46] In rebuttal of the Appellant's ground that the sentence is harsh and excessive, it is submitted that it is well established by the Supreme Court in **Koroicakau v State** [2006] FJSC 5;CAV0006U.2005S (4 May 2006) and in **Sharma v State** [2015] FJCA

178; AAU.2011 (3 December 2011 (3 December 2015) in dealing with sentence appeal, that is, when a sentence is reviewed on appeal, it is the ultimate sentence rather than each step in the reasoning process that must be considered and whether in all the circumstances of the case the sentence is one that could reasonably be imposed.

[47] That the sentence imposed was entirely consistent with the established tariff for cannabis cultivation offences as set out in **Jone Seru v State** (supra).

[48] The Appellant's argument that the learned trial Judge failed to consider the medical certificate and medical history is, the Appellant submits, misconceived. At paragraph 11 of the Sentence, particularly (g) and (l), the learned trial judge does consider the Appellant's medical condition.

[49] It is simply not arguable that the sentencing discretion miscarried. The Appellant's appeal against conviction and sentence ought to be refused.

(H). Analysis

[50] This in an appeal against conviction and sentence, and is in substance an appeal against the ruling delivered on 8 July 2024 (See **Part (D)** above) and the earlier ruling in HAM 297 of 2023 delivered on 16 May 2024 by the learned Justice Sunil Sharma at the Lautoka High Court. The Appellant's case is set out in **Part (F)** above, and the Case for the Respondents is set out in **Part (G)** above.

[51] The transfer was ordered pursuant to section 190 (1) of the Criminal Procedure Act 2009 for the purpose of sentencing as the Magistrate recognized potential jurisdictional limitation after the filing of sentencing submissions and mitigation by the defence counsel

Grounds 1 - 4 and Grounds 6 - 11

[52] In Grounds 1 - 4, the Appellant contends that the learned Judge was mistaken in law and in fact in not exercising his judicial discretion when he (i) dismissed the applicant's application to withdraw his guilty plea, causing a substantial miscarriage of justice; (ii) refusing the applicants application to withdraw his guilty plea before

his sentence; (iii) failed to consider that the paramount question of plea is unequivocal; (iv) when he did not consider the applicant's Affidavit in support.

[53] All of the above grounds relate to the learned Judge's not exercising his discretion in favour of the Appellant, to allow the Appellant liberty to withdraw his guilty plea. The law and principles applicable to the withdrawal of a guilty plea prior to sentencing in the High Court is well settled. In **Ali v State** (supra), on the issue of "*equivocal or unequivocal plea",* the Court considered the principles in **Regina v Drew** [1985] where Lord Lane, having considered when a judge should allow a defendant to withdraw a plea of guilty said:

> "*In our judgment only rarely would it be appropriate for a trial Judge to exercise his discretion in favour of an accused person wishing to change an unequivocal plea of guilty to one of not guilty. Particularly this is so in cases where as here the accused has throughout been advised by experienced counsel, and where, after full consultation with his counsel, he has already changed his plea to one of guilty at an earlier stage of the proceedings."*

[54] When an accused has been committed to the High Court for sentence and it appears to the Court that the accused pleaded guilty on the basis of a material mistake of fact, the Court may remit the matter to the Magistrates Court with a direction to proceed on a not guilty plea **R v McNally** [1954] 1 WLR 933 Cr. App 90. The paramount question on any change of plea application, is whether the plea was unequivocal, and made with a full understanding of the offence alleged and its ingredients. In considering this question, the history of the case itself is highly relevant: **State v Seru** (supra). A plea can be changed at any time before sentence.

[55] In considering change of plea, the Court should only allow the change if there was prejudice as a result of lack of representation. The discretion should be exercised sparingly and judicially. **State v Timoci Kauyaca Bainivalu** (supra). The authorities relating to equivocal pleas make it quite clear that the onus falls on the appellant to establish facts upon which the validity of a guilty plea is challenged: **Tuisavusavu v State** (supra), and paragraphs [37] to [43] above. In this case the facts, circumstances and the history support the decision / ruling of the learned High Court

Judge. The above grounds are not arguable. They have no merit. There is no substantial miscarriage of justice.

[56] In Grounds 6 - 11, the Appellant argues that the learned Judge was mistaken in law and in fact in , (a) not allowing the applicant to change his plea when the prosecution agreed to the application to withdraw the plea and remit the case to the Magistrate's Court; (b) refusing to hear the applicant who had a right to be heard pursuant to section 15 of the constitution; (c) when he did not consider that the court has an express concession by the State which consented to the application to withdraw the plea of guilty; (d) that there were variations with the caution interview statement and what was stated in the summary of facts and yet failed to allow the appellant to change his plea before sentence; (e) that he does not have jurisdiction to change of plea and failed to remit the file back to the Magistrate's Court for consideration of the said fact, and (f) the sentence is manifestly harsh and excessive.

[57] The issue relating to the High Court's jurisdiction in relation to the change of plea has already been determined after consideration of two opposing arguments. A closer examination of section 190 of the Criminal Procedure Act 2009 will assist in clarifying the jurisdictional issue, and also the scope of section 190 (1) to (5) of the said Act.

Analysis of section 190 Criminal Procedure Act 2009

[58] The allegations against the learned Judge calls for a careful analysis of the relevant provisions of section 190 of the Criminal Procedure Act 2009, and the legal authorities/cases on the principles and guidelines on the application of those provisions of the Act.

[59] Section 190 (1) empowers a Magistrate by exercise of discretion, by order, to transfer a person to the High Court for sentencing, in a situation where a person over 18 years of age is convicted of an offence, and the Magistrate is of the opinion (whether by reason of the nature of the offence, the circumstances surrounding its commission or the previous history of the accused person) that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the Magistrate has power to impose. This is the discretion which the learned Magistrate exercised in this case.

[60] Section 190(2) requires that, when the Magistrate has exercised the discretion pursuant to section 190(1), a copy of the order of transfer and the charge in respect of which the person was convicted shall be sent to the Chief Registrar of the High Court. The learned Magistrate had forwarded the case file to the Lautoka High Court and warned the accused to appear before the High Court on the next date. It is evident from the record that the accused had already been convicted, and the accused was transferred to the High Court as "the likely sentence of the accused may be beyond the sentencing jurisdiction of the Magistrate's Court."-paragraph 26 of Sentence in Magistrate's Court. A similar sentiment is expressed in paragraph 28 thereof.

[61] Section 190(3) determines the scope of the jurisdiction of the High Court in dealing with a person sent for sentence under section 190(1). It requires that the High Court enquire into the circumstances of the case and may deal with the person in any manner in which the person could be dealt with if the person had been convicted by the High Court. The purpose of this provision was commented upon by Keith JA in **Nadan v State** [2019] FJSC 29; CAV 0007.2019 (31 October 2019), as follows:

> *"[26] ……. The purpose of the provision was to enable a convicted defendant to be sentenced by a court with sufficient powers to pass the appropriate punishment. There is no need for the court to have the power to review the lawfulness or correctness of the conviction in order to determine the proper sentence. It is not as if the defendant cannot appeal to a higher court against his conviction……In the circumstances the nature of the enquiry to be carried out by the High Court made under section 190(3) of the CPA is to ascertain the facts which may be relevant to the determination of the proper sentence. The position might have been different if there had been no other route by which the defendant could question his conviction or the lawfulness of the procedure by which it was reached. But since such a route does exist, the argument that somehow section 190 creates some form of mechanism for the procedure to be reviewed – in addition to an appeal under section 190(4) falls away*. (Emphasis added).

[62] Section 190(4) confers a right of a person who is transferred to the High Court for sentencing under section 190(1). It declares that, a person transferred to the High Court, as above, has the same right of appeal to the Court of Appeal as if the person

had been convicted and sentenced by the High Court. The right of appeal and access to a higher Court is not affected adversely.

[63] Section 190(5) confers a discretion on the High Court to remit the person transferred to the High Court under section 190(1) to be dealt with by the Magistrate's Court. It states that, the High Court, after hearing submissions by the prosecutor, may remit the person transferred for sentence in custody or on bail to the Magistrate's Court which originally transferred the person to the High Court and the person shall then be dealt with by the Magistrate's Court, and the person has the same right of appeal as if no transfer to the High Court had occurred.

[64] The High Court may exercise the discretion under this provision, after hearing submissions from the prosecution. There were no such submissions in this case which distinguishes it from **State v Inosi Durituituba** (supra) where Justice R.D.R.T. Ranasinghe held that remitting the Accused to the Magistrate's Court would allow the Magistrate, if needed, to consider the complaint made by the Accused with respect to his plea and make appropriate orders. He then remitted the person to the Magistrate's Court. Counsel for the prosecution did file a "constructive written submission" in **Inosi Durituituba** case. The Appellant and the file cannot be remitted under section 190(5) as a result. Grounds 6-11 are not arguable. There is no substantial miscarriage of justice.

Ground 5

[65] The question of the right of the Appellant to election pursuant to section 4(1)(b) and section 35(2) of the Criminal Procedure Act 2009, in my considered view cannot be entertained: **Vishwa Nandan v The State** (supra) , at paragraph 28, as adopted in HAM 297 of 2023 see paragraph [19] above. Paragraph 15 of HAM 297 of 2023 is reproduced below, as follows:

> *"15 The Court has to look at the intent of section 190 of the Criminal Procedure Act, amongst other matters the applicant is asking this court to go behind the copy record and consider matters supposedly between a Solicitor and client and/or appellate court issues. The issues raised by the Applicant are clearly beyond the scope envisaged by section 190(3) of the Criminal Procedure Act."*

[66] This ground is not arguable.

Sentence Grounds 12 to 15

[67] I have considered the submissions of the Appellant on sentence (paragraphs [28] to [34] above) as well as the Respondent's submissions on the same (paragraphs [44] to [49] above). In reviewing the sentencing, I am inclined to allow leave so that the Full Court could look into the starting point and in light of the aggravating factors, and the need for the learned Judge to have enhanced the sentence above its appropriate place in the sentencing range: **Navuda v State** (supra), **Naikelekelevesi v State** (supra). Also, whether there needs to be an adjustment in sentence if considered in light of **Ravia v The State** (supra). In dealing with sentence appeal, that is, when a sentence is reviewed on appeal, it is the ultimate sentence rather than each step in the reasoning process that must be considered and whether in all the circumstances of the case the sentence is one that could reasonably be imposed. The above grounds are arguable.

Order of Court

1. *The Appellant's application for leave to Appeal against conviction is dismissed.*
2. *The Appellant's application for leave to appeal against sentence is allowed.*

Solicitors
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