**IN THE SUPREME COURT OF FIJI**
**AT SUVA**

**CRIMINAL PETITION CAV 20 OF 2015**
**(Court of Appeal AAU 57 OF 2010)**

**BETWEEN** : **WAISALE NATURU**

***Petitioner***

**AND** : **THE STATE**

***Respondent***

**Coram** : **The Honourable Mr Justice Marsoof,**
**Judge of the Supreme Court**
**The Honourable Mr Justice Dep,**
**Judge of the Supreme Court**
**The Honourable Mr Justice Calanchini,**
**Judge of the Supreme Court**

**Counsel** : **Petitioner in person**
**Mr M Korovou for the Respondent**

**Date of Hearing** : **12 and 14 October 2015**

**Date of Judgment** : **22 October 2015**

# JUDGMENT

**Marsoof J**

[1] I have read in draft the judgment of Calanchini J and agree that there is no basis to grant the petitioner an enlargement of time to lodge an application for leave to appeal to this Court.

**Dep J**

[2] I agree with the reasoning and conclusions of Calanchini J.

**Calanchini J**

[3] This is an application for an enlargement of time to lodge an application for leave to appeal to this Court the decision of the Court of Appeal dismissing the Petitioner's appeal pursuant to section 35(2) of the Court of Appeal Act Cap 12 (the Act).

[4] The Petitioner and one other were charged with the offence of cultivating Indian Hemp contrary to section 8(a) of the Dangerous Drugs Act Cap 114 as amended by the Dangerous Drugs Act (Amendment) Decree 1990 and the Dangerous Drugs Act (Amendment) No.1 Decree 1991. It was alleged that the Petitioner and his co-accused on 7 July 2004 at Volivoli in Korolevu were found cultivating 2335 plants of Indian Hemp.

[5] Following a trial in the High Court the assessors returned unanimous opinions of guilty in respect of both the Petitioner and the co-accused. The learned trial Judge agreed with the guilty opinions and in a particularly brief judgment formally convicted both the Petitioner and his co-accused.

[6] On 9 July 2010 the Petitioner was sentenced to a term of imprisonment of 10 years with a "*minimum*" term of 7 years. His co-accused was sentenced to 8½ years imprisonment with a minimum term of 5½ years.

[7] By letter dated 20 July 2010 the Petitioner gave timely notice of his application for leave to appeal against conviction and sentence. It would appear that by way of

documents dated 4 April 2011 the Petitioner applied to amend his grounds of appeal against conviction and to withdraw his application for leave to appeal against sentence (pages 23 – 27 of the Record).

[8] Be that as it may and for reasons which cannot be determined from the material that is now before this Court, the application for leave to appeal against conviction and sentence as set out in the initial notice dated 20 July 2010 came on for hearing before a justice of appeal on 1 February 2013. On that day the Petitioner appeared in person and the Respondent was represented by Counsel. The application for leave to appeal was considered on the following grounds:

> *"1. That the learned trial Judge erred in law and fact when his Lordship wrongly and or incorrectly directed the assessors of his summing up that ..... "They gave answers voluntarily to the questions asked and you must assess any other evidence and give then the weight you think fit....."*
>
> *2. That their right to a fair trial was greatly prejudiced from the prolonged delay of this matter being pending from 2004 and being convicted in 2010.*
>
> *3. That the learned trial Judge erred in law and in fact when his Lordship wrongly convicted the appellant in the absence of sworn evidence and on-appearance of the Government Analyst and evidence of cannabis being tendered.*
>
> *4. That the learned trial judge erred in law when his Lordship did not direct the assessors what weight they should give to the appellants confessions in the light of Police threats, intimidations and assaults before during and after the interview of the appellant.*
>
> *5. That the sentence is both harsh and excessive in all the circumstances of the case."*

[9] To the extent that any of these grounds of appeal against conviction involved a mixed question of law and fact or of fact alone the Petitioner was required to obtain leave of the Court of Appeal pursuant to section 21(1) (b) of the Act. However leave was not required in the event that any of the grounds involved a question of law alone under section 21(1) (a) of the Act. Leave is required in respect of any appeal against sentence under section 21(1) (c) of the Act. Pursuant to section 35(1) of the Act the

power of the Court of Appeal to grant leave to appeal may be exercised by a justice of appeal.

[10] In a Ruling delivered on 17 June 2013 the learned Justice of Appeal refused leave to appeal against conviction and sentence and although there is some confusion in the terminology it is apparent that he also proceeded to dismiss the appeals under section 35(2) of the Act.

[11] The first ground of appeal challenged the directions given to the assessors concerning answers given by the Petitioner to questions in the caution interview. The learned Justice of appeal pointed out that the Petitioner had not challenged the admissibility of his caution interview and as a result the Petitioner could not now complain about the evidence. In any event the learned Justice of Appeal considered that the directions given by the trial Judge were quite proper and that there was no basis for claiming that there had been an error. As a result both grounds 1 and 4 were not arguable.

[12] Ground 2 relates to the issue of pre-charge delay. Apart from the fact that pre-charge delay is only rarely a basis for stay, the learned Justice of Appeal concluded that the material suggested that the Petitioner's conduct contributed to that delay. The ground was not arguable.

[13] Ground 3 raised an issue concerning the certificate of the Government analyst. The Justice of Appeal noted that the certificate had been admitted into evidence without objection by the Petitioner. There had been no request for leave to cross-examine the analyst. The ground was not arguable.

[14] In relation to the sentence appeal the learned Justice of Appeal considered that there had been no error in the imposition of the sentence

[15] It is not clear upon what basis that learned Justice of Appeal dismissed the appeals under section 35(2). It is clear that the learned Judge concluded that none of the grounds raised an arguable point. It must be inferred that he has also concluded, as a result, that the appeals were frivolous.

[16] It is necessary to pause at this point and consider section 35(2) of the Act which states:

> *"If on the filing of a notice of appeal or of an application for leave to appeal, a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal."*

[17] The effect of the section is that a justice of appeal, whether in the course of hearing an application for leave to appeal or at any other time, may dismiss the appeal under section 35(2) as being (1) vexatious, or (2) frivolous or (3) or bound to fail because there is no right of appeal.

[18] It is well settled that an appeal lies to this Court against a decision of dismissal under section 35(2) of the Act as a final decision of the Court of Appeal (See: **Raura –v- The State** CAV 10 of 2005; **Tubuli –v- The State** CAV 9 of 2006; **Naisua –v- The State** CAV 10 of 2013 and **Tiritiri –v- The State** CAV 9 of 2014).

[19] The decision of the Justice of Appeal is a decision made in the exercise of the Court of Appeal's jurisdiction to dismiss an appeal under section 23 of the Act. It is on that basis that this Court's jurisdiction is enlivened pursuant to section 98(3) (b) of the Constitution which provides that:

> *"3. The Supreme Court:*
> *(a) _ _ _*
> *(b) has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determines appeals from all final judgments of the Court of Appeal; and*
> *(c) _ _ _."*

[20] It must be borne in mind that the final judgment of the Court of Appeal in these proceedings is the Ruling of the Justice of Appeal dismissing the Petitioner's appeal under section 35(2) of the Act. In doing so the learned Judge has denied the petitioner the statutory option to renew his application for leave to appeal before the Full Court of Appeal under section 35(3) of the Act.

[21] The Petitioner lodged in the Supreme Court Registry a petition for leave to appeal to the Supreme Court out of time. The date of the petition is 12 June 2015. Although the petition is signed there is no affidavit, as is required by the Rules, filed in support of the Petition, let alone explaining the delay. The document dated 12 June 2015 does not set out any grounds upon which the Petitioner relies for challenging the decision of the Justice of Appeal. The document does offer an explanation for the delay.

[22] A further document dated 5 October 2015 sets out grounds and submissions on the issue of the fixing of the non-parole term by the sentencing judge in the High Court. From this material it would appear that the Petitioner is no longer seeking to challenge the decision of the Justice of Appeal dismissing his appeal against conviction. Furthermore the issue of fixing a non-parole term was not a ground of appeal raised in the Court of Appeal. The only ground of appeal against sentence raised in the Court of Appeal related to the head sentence being harsh and excessive.

[23] The immediate issue for the Petitioner would ordinarily be the length of the delay in lodging his petition for leave in this Court. Under Rule 6 of the Supreme Court Rules the Petitioner was required to lodge his petition within 42 days from the date of the Ruling. The petition should have been lodged no later than 29 July 2013. It is over 22 months out of time.

[24] The principles upon which this Court will determine whether to exercise its discretion to enlarge the time for filing a petition are well settled and were recently affirmed in the decision of **Kumar and Sinu –v- The State** (CAV 1 of 2009; 21 August 2013).

[25] In my judgment it is not necessary to consider those principles because the Petitioner, as noted earlier, is no longer seeking to challenge the dismissal of his appeal against conviction. The basis upon which he challenged the sentence imposed by the High Court related to the length of the head sentence. It is after some 22 months later that the Petitioner raises an issue in relation to the fixing of what the learned High Court Judge referred to as the minimum term. This issue was not before the Justice of Appeal at the hearing of the leave application. It cannot possibly be said that the Justice of Appeal has erred in relation to that ground when it was not raised as a ground of appeal.

[26] It must be recalled that the Supreme Court is not a court of criminal appeal. The statutory framework (the Supreme Court Act 1998) indicates that an appeal to the Supreme Court is an appeal in the strict sense which is only available upon leave having been first granted. The appeal is not by way of re-hearing on the papers. As a result this Court is required to consider whether the judgment being appealed from (i.e. the Ruling of the Justice of Appeal) was correct when it was given.

[27] The issues that were before the Court of Appeal as at the date of the judgment under appeal are considered by this Court, not any material that may subsequently come before the Court. If it is determined that the Ruling was correct when it was given, then that is the end of the matter. Ordinarily this Court should not at this late stage consider new grounds of appeal relating to conviction and/or sentence that may have subsequently been filed since the Ruling delivered by the Justice of Appeal. In the event that the proceedings are remitted to the Court of Appeal, the Petitioner may amend his grounds of appeal.

[28] The point is that this is not an appeal against the sentencing decision of the High Court. This Court does not have any jurisdiction under section 98(3) of the Constitution to determine an appeal from the High Court. Furthermore, this is not an appeal against the refusal to grant leave to appeal against sentence. If the Justice of Appeal had stopped at that point, the Petitioner could have opted to have his leave application renewed before the Full Court of Appeal. This Court's jurisdiction is limited to determining whether, once leave to appeal has been granted, whether the Justice of Appeal has erred. However the Petitioner is not now challenging the dismissal of his appeals against conviction nor his appeal against sentence on the ground stated in his notice of appeal.

[29] From time to time the Court has demonstrated a willingness to consider an application for leave to appeal in circumstances where the ground relied upon was not raised in the Court of Appeal.

[30] The issue of the non-parole term is the only issue raised by the Petitioner in his material filed on 5 October 2015. He has at all times appeared unrepresented and it can be fairly stated that he was not equipped to articulate this ground.

[31] The offences were committed in 2004. The Petitioner was initially charged in 2007, but was subsequently discharged by the Lautoka High Court in 2007 as a result of having been charged under the wrong legislation. The Petitioner was charged for a second time on 19 November 2009. The trial commenced on 6 July 2010 and sentencing took place on 9 July 2010.

[32] Pursuant to section 61(1) of the Sentencing and Penalties Decree 2009 (the Sentencing Decree) the learned High Court Judge was required to apply the Decree and fix a non-parole term under section 18 of the Sentencing Decree. Although the High Court Judge has referred to a *"minimum term"* there is no apparent reason why it cannot be assumed that he meant a *"non-parole term."*

[33] As far as the Court of Appeal was concerned the options available to an appellate court when the sentence was imposed prior to the coming into effect of the Sentencing Decree do not apply since the sentence was imposed after the Decree came into effect. As a result any appeal against sentence was to be determined by the Court of Appeal in accordance with the Sentencing Decree.

[34] The ground raised in the Petitioner's appeal against sentence in the Court of Appeal related to the head sentence. The Petitioner claimed that the sentence was harsh and excessive in all the circumstances of the case. There were 2335 plants analysed as Indian Hemp and weighing 455 kilograms.

[35] Even in the absence of a constitutional mandate, it has always been a rule at common law that the punishment to be imposed should be one that was applicable at the time the offence was committed. The offences were committed in 2004. Consequently the observations of Shameem J in **Tunidau –v- The State** HAA 45 of 2003; 24 October 2003 are useful in determining whether the ground of appeal should be regarded as not having any chance of succeeding. Referring to the English Court of Appeal decision in **R –v- Aramah** 76 Cr. App. R 180 Shameem J considered that:

*"Supply of cannabis (including cultivation) of massive amounts (for example on a farm) will lead to sentences of about 10 years imprisonment for those playing 'more than a subordinate role'."*

[36] Although the trial Judge referred to the judgment of the High Court in Tunidau he then went on to consider a 2009 decision concerning cultivation of cannabis. It would appear however that the final sentence of 10 years imprisonment for the cultivation of a massive amount (455 kilograms) by a person whose role could not be described as sub-ordinate was an appropriate sentence at the time the offence was committed. I see no error in the decision of the Justice of Appeal to dismiss the appeal under section 35(2) on the basis that it was frivolous.

[37] Even if all the obstacles facing the Petitioner had been overcome, and there were many, in the end there was no basis upon which this court could have granted an enlargement of time. In all the circumstance it is just to refuse his application and therefore I would refuse the application for an enlargement of time.

**Orders:**

*Application for an enlargement of time is refused.*

SUPREME COURT OF FIJI
FIJI

**Hon. Mr Justice Marsoof**
**JUDGE OF THE SUPREME COURT**

**Hon. Mr Justice Dep**
**JUDGE OF THE SUPREME COURT**

**Hon. Mr Justice Calanchini**
**JUDGE OF THE SUPREME COURT**