**IN THE SUPREME COURT OF FIJI**
**APPELLATE CRIMINAL JURISDICTION**

**Criminal Petition No. CAV 0012 of 2016**
**(Court of Appeal No. AAU 121 of 2014)**

**BETWEEN** : **THE STATE**

***Petitioner***

**AND** : **NEMANI RATUYAWA**

***Respondent***

**CORAM** : **The Hon. Chief Justice, Mr. Anthony Gates, President of the Supreme Court**
**Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme Court**
**Hon. Justice Priyasath Dep, Judge of the Supreme Court**

**COUNSEL** : **Mr. L. J. Burney for the Petitioner**
**Mr. J. Savou for the Respondent**

**Date of Hearing:** **15 August 2016**

**Date of Judgment:** **26 August 2016**

# JUDGMENT OF THE COURT

**Gates, P**

I agree with the orders proposed by Ekanayake J and with the reasoning in Her Ladyship's judgment.

**Chandra Ekanayake, J**

**Introduction**

1. The petitioner (State) by a petition dated 10/3/16 (received by the Registry on the same day) has sought special leave to appeal against the judgment of the Court of Appeal dated 26/2/116 (Calanchini, P, A.F.T.Fernando, JA and Wengappuli, JA) which quashed the sentence imposed on the respondent by the High Court of Fiji at Suva by the Sentencing Order dated 16/6/14.

2. The above petition has been filed by the petitioner in the Registry within the time limit for lodgment prescribed in Rule 6 of the Supreme Court Rules of 1998 namely, 42 days from the date of the impugned judgment of the Court of Appeal. Thus the present application is a timely application.

3. The following grounds of appeal had been urged by the said petition – (as per paragraph 2 thereof):-

   *2.1 That the Court of Appeal erred in law in finding that, in applying the guideline judgment of **Kini Sulua, Michael Ashley Chandra v State**; Criminal Appeal AAU 93/08, the learned sentencing judge contravened the provisions of Article 14(2) (n) of the Constitution of the Republic of Fiji whereas Article 14(2) (n) had no application in this case since the prescribed punishment of imprisonment for life for the offence was not changed between the time the offence was committed and the time of sentencing.*

   *2.2 That the Court of Appeal erred in law in holding that the learned sentencing judge "erred in not following the guidelines for sentencing set out in **Meli Bavesi v The State** [2004] FJHC 93; HAA 0027.2004, which was the sentencing pattern at the time of offending;" when, as a matter of law, the learned sentencing judge was required by Section 4(2)(b) of the Sentencing and Penalties Decree 2009 to have regard to the current practice (at the time of sentencing) and any applicable guideline judgment at the material time.*

   *2.3 That the Court of Appeal in the exercise of its sentencing discretion pursuant to Section 23(3) of the Court of Appeal Act fell into error in failing to have regard to*

*the tariff established in **Kini Sulua** as required by Section 4(2)(b) of the Sentencing and Penalties Decree 2009 and erred in principle by having regard to the guidance set out in **Meli Bavesi**.*

*2.4 It is respectfully submitted that should this Honorable Court be minded to grant the Petitioner special leave to appeal it would be appropriate to review the guidelines in **Kini Sulua** that the tariff in respect of the offence of unlawful possession of cannabis is equally applicable to the offence of unlawful cultivation of cannabis.*

**In the Magistrate's Court**

4. The respondent was charged with another person in the Magistrate's Court at Suva for the following offence:-

**Statement of Offence (a)**

**UNLAWFUL CULTIVATION OF ILLICIT DRUGS**: Contrary to Section 5 of Illicit Drugs Act, 2004.

**Particulars of Offence (b)**

**NEMANI RATUYAWA** and PAULA NAWADRADRA on the 25th day of January 2012, at Nukulekaleka Farm, Naikorokoro village, Kadavu in the Eastern Division without lawful authority, cultivated 221 plants weighing 69.5 kilograms known as Cannabis Sativa, an illicit Drug.

5. The respondent was convicted on his guilty plea and sentenced by the Magistrate as per sentencing order dated 13/4/2012 and a sentence of 1 year 5 months and 17 days was imposed.

**In the High Court**

6. The learned High Court Judge (Temo, J) called for the file and exercised revisionary jurisdiction, pursuant to Section 260 of the Criminal Procedure Decree 2009. His Lordship proceeded to quash the conviction and sentence, and directed the learned Chief Magistrate to transfer the matter to the High Court for trial.

7. By the order of the Chief Magistrate dated 6/2/2013 the matter was transferred to the High Court at Suva.

**In the High Court after the Transfer Order**

8. In the High Court, on 10/6/2014 an amended information was filed by the Director of Public Prosecutions. Same is reproduced below:

> ***NEMANI RATUYAWA*** *and* ***PAULA NAWADRADRA*** *are charged with the following offence:*
>
> *Statement of Offence*
>
> ***UNLAWFUL CULTIVATION OF ILLICIT DRUGS****: Contrary to Section 5 (a) of Illicit Drugs Act 2004.*
>
> *Particulars of Offence*
>
> ***NEMANI RATUYAWA*** *and* ***PAULA NAWADRADRA*** *on the 25th of January 2012, at Nukulekaleka farm, Naikorokoro village, Kadavu in the Eastern Division without lawful authority, cultivated 221 plants of cannabis sativa, an illicit drug, weighing 69.5 kilograms.*

9. Having convicted Mr. Ratuyawa on his guilty plea learned High Court Judge by his order dated 16/6/2014, imposed a sentence of 15 years imprisonment with a non-parole period of 14 years. This sentence was concurrent to any prison sentence the respondent was serving.

**In the Court of Appeal**

10. The respondent had preferred an appeal to the Court of Appeal against the above after obtaining an extension of time to file the same from a single Judge of the Court of Appeal.

11. The Court of Appeal by its impugned judgment of 26/2/16 quashed the sentence imposed by the High Court and a sentence of 8 years with a non-parole period of 6 years was substituted. It was further ordered that the sentence to be effective from 13/4/2012. This date appears to be the date of the sentencing order in the Magistrate's Court. This is the judgment which has been assailed in this Court by the present petition filed by the State.

**Special Leave to Appeal**

12. It is amply clear that the jurisdiction of the Supreme Court with respect to Special Leave to appeal is embodied in Section 7 of the Supreme Court Act No. 14 of 1998.

"Section 7(1) of the Supreme Court Act No. 14 of 1998 provides as follows:-

*In exercise of its jurisdiction under Article 122 of the Constitution [see new Section 98 of Constitution 2013] with respect to Special Leave to Appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case –*

*(a) Refuse to grant special leave to appeal*

*(b) Grant special leave and dismiss the appeal or instead of dismissing make such orders as the circumstances of the case require ; or*

*(c) Grant special leave and allow the appeal make such other orders as the circumstances of the case require".*

Section 7(2) thereof sets out as follows:

In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless -

*(a) A question of general legal importance is involved;*

*(b) A substantial question of principle affecting the administration of criminal justice is involved; or*

*(c) Substantial and grave injustice may otherwise occur.*

Section 7(3)..."

13. A plain reading of the above Section 7(2) which relates to criminal matters would show that the Supreme Court must not grant special leave to appeal in a criminal matter unless the court is satisfied that a question of general legal importance is involved, or a substantial question of principle affecting the administration of criminal justice is involved or substantial or grave injustice may otherwise occur.

14. In this regard it would be pertinent to cite the observations made by this Court in **Dip Chand v State;** CAV_004 of 2010 (9th May 2012) to the following effect:

> *"...Given that the criteria is set out in Section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course...".*

15. Whether special leave should be granted or not is a matter that lies solely with the Court and at this final level this Court being the final Appellate Court, special leave could be granted in cases which fulfill the required criteria enumerated in Section 7(2) of the Supreme Court Act or in a rare case, where there is an irremediable injustice compelling the intervention of the Supreme Court.

**Grounds of Appeal raised in this Court**

16. I shall now advert to the first ground submitted in this special leave to appeal petition namely:-

> *"2.1. That the Court of appeal erred in law in finding that, in applying the guideline judgment Kini Sulua, Michael Ashley Chandra v The State; Crim.Appl AAU 93/08, the learned sentencing Judge contravened the provisions of Article 14(2)(n) of the Constitution of the Republic of Fiji whereas Article 14(2)(n) had no application in this case since the prescribed punishment of imprisonment for life for the offence was not changed between the time the offence was committed and the time of sentencing."*

In this regard it would be pertinent to reproduce the said Section 14(2)(n) of the Constitution. Same reads as follows:

Section 14 (2) (n) of the Constitution states:

"(2) Every person charged with an offence has the right—

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing;"

17. It is noted that the punishment prescribed for this offence by the Illicit Drugs Act was not changed between the time of the commission of the offence and the time of sentencing. As such the respondent is not entitled to the benefit in terms of the above subsection 14(2)(n) of the Constitution. However, a careful examination of the impugned Court of Appeal Judgment reveals that they had given due consideration to the type of offending namely: "offending in cultivation of cannabis." Further I find that it is stated in paragraph 22 of the judgment that the learned Magistrate when sentencing had considered the factors laid down in section 4(2) of the Sentencing and Penalties Decree 2009 and the sentencing practice that had prevailed in April 2012 as set out in **Meli Bavesi v The State**; FJHC 93; Crim.Appl. of 14/4/2004. The aforesaid paragraph 22 of the impugned judgment of the Court of Appeal is reproduced below:

"22. According to the Ruling on Sentence the learned Magistrate states that he had taken into consideration the factors laid down in section 4 (2) of the Sentencing and Penalties Decree 2009 and had relied on the sentencing practice that existed in April 2012 as set out in the judgment of **Meli Bavesi v The State** [2004] FJHC 93; HAA 0027.2004 where the type of offending in cultivation of cannabis cases had been categorized into 3 broad categories, taking into consideration the offenders degree of involvement in the drug supply process as follows:

***Category 1*** *– The growing of a small number of cannabis plants for personal use by an offender or possession of small amount of cannabis coupled with*

*"technical" supply of the drug to others on a non-commercial basis. First offender a short prison term, perhaps served in the community. Sentencing point 1 to 2 years.*

***Category 2** – Small scale cultivation of cannabis plants or possession for a commercial purpose with the object of deriving profit, circumstantial evidence of sale even on small scale commercial basis. The starting point for sentencing should generally be between 2 to 4 years. However, where sales are limited and infrequent and lowest starting point might be justified.*

***Category 3** – Reserved for the most serious classes of offending involving large scale commercial growing or possession of large amounts of drug usually with a considerable degree of sophistication, large numbers of sales, circumstantial or direct evidence of commercial involvement the starting point would generally be 5 to 6 years."*

18. Section 4(2) of the Sentencing and Penalties Decree 2009:

"In sentencing offenders a court must have regard to -

*(a)* the maximum penalty prescribed for the offence;

*(b)* current sentencing practice and the terms of any applicable guideline judgment;

*(c)* the nature and gravity of the particular offence;

*(d)* the offender's culpability and degree of responsibility for the offence;

*(e)* the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

*(f)* whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

*(g)* the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

*h)* any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

*(i)* the offender's previous character;

*(j)* the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

*(k)* any matter stated in this Decree as being grounds for applying a particular sentencing option.

19. The reason given by the Court of Appeal for the conclusion with regard to the error committed by the learned High Court Judge in not following the guidelines in **Meli Bavesi v The State**; was that despite the fact that guidelines in **Meli Bavesi** were the sentencing pattern at the time of offending (25/1/12), the court erroneously proceeded to sentence in terms of the guidelines in **Kini Sulua v The State**. Further it is noted that the judgment in **Kini Sulua's** case had been handed down on 31/5/2012, whereas **Meli Bavesi's** judgment was on 14/4/2004. Thus the above conclusion of the Court of Appeal appears to be correct.

20. Further in paragraph 27 the learned Judges of the Court of Appeal had cited with approval the following statement from **Meli Bavesi's** case:-

> *"....In addition there will of course have to be focus on the quantities of drugs involved.... If the intention is to make money out of supply the inevitable consequence is lengthy terms of imprisonment."*

21. In addition to the above in the same paragraph the following also had been considered:

The number of plants (221), the weight (69.5kg) and the evidence of commercial involvement. The Court of Appeal Justices had been of the view that due to the above reasons this case should have fallen under category 3 in **Meli Bavesi's** case with a starting point of 6 years. Further the impact of this type of offence has on the society was also considered. The guilty plea at the first instance and previous good conduct of the present respondent too had not escaped the consideration of the Justices. Those had been the reasons given by the Court of Appeal for substituting a sentence of 8 years with a non parole period of 6 years.

22. From the above it is evident that the Court of Appeal had given due regard to the provisions in Section 4(2) of Sentencing and Penalties Decree 2009. For the aggravating factors outlined by the Court of Appeal as above and also having duly considered the mitigation factors, fixing the head sentence at 8 years and the non-parole period at 6 years cannot be faulted. Thus I am convinced that the Court of Appeal is not in error by substituting a sentence of 8 years with a non parole period of 6 years.

23. What comes up for consideration next is the ground of appeal stated in paragraph 2.3 of the present petition of the state as reproduced in paragraph 3 above. The thrust of this ground appears to be that the Court of Appeal in its sentencing discretion under Section 23(3) of the Court of Appeal Act fell into error by failing to have regard to the tariff spelt out in **Kini Sulua's** case as required by Section 4(2) (b) of Sentencing and Penalties Decree 2009 and erred thereby following the guidelines set out in **Meli Bavesi**. In this backdrop it would become necessary to consider Section 23(3) of the Court of Appeal Act. Same is therefore reproduced below:

> *"On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."*

24. For the reasons enumerated in paragraph 27 of the impugned judgment of the Court of Appeal it is amply clear that the Court of Appeal had exercised the powers vested in them under the above Section 23(3) and had proceeded to quash the sentence. I am therefore satisfied that no error of law has been occasioned by the Court Of Appeal.

25. Further subsections 4(2) (b) and (d) of Sentencing and Penalties Decree 2009 have been dealt with in the preceding paragraphs of this judgment. For the reasons enumerated therein I conclude that grounds 2.2 and 2.3 cannot succeed.

26. The ground of appeal spelt out in paragraph 2.4 of the petition (reproduced in preceding paragraph 3) will be considered later.

27. From paragraph 2 of the written submissions filed by the petitioner it is clear that special leave to appeal has been sought in order to resolve substantial questions of principles affecting sentencing practice in Fiji and specifically sentencing guidelines in relation to cultivation of cannabis. The petitioner does not seek to argue that the sentence imposed on the respondent by the Court of Appeal is wrong or unduly lenient in all circumstances of the case. This bears ample testimony to the fact that the sentence imposed by Court of Appeal after hearing the appeal, is correct in the backdrop of the circumstances of this case. In other words State is not assailing the Court of Appeal judgment. This ground alone would suffice to dismiss the application for special leave to appeal. Yet the court has proceeded to consider the grounds of appeal submitted by the State.

28. Viewed in the above context I am unable to conclude that the grounds submitted by the petitioner meet the threshold criteria for special leave stipulated in Section 7(2) of the Supreme Court Act No. 14 of 1998. Thus the application for special leave to appeal of the petitioner should fail.

29. The judgment of the Court of Appeal dated 26 February 2016 is therefore affirmed and application for special leave to appeal is refused.

30. As special leave to appeal has been already refused consideration of the ground of appeal bearing number 2.4 in the petitioner's petition to this Court (reproduced in the preceding paragraph 3) needs no consideration.

**Dep, J**

I agree with the reasons and conclusions reached by Chandra Ekanayake J.

**Orders of the Court are:**

1. Special leave to appeal is refused.
2. The judgment of the Court of Appeal dated 26 February 2016 is affirmed.

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**Hon. Chief Justice, Anthony Gates**
**President of the Supreme Court**

SUPREME COURT OF FIJI
FIJI

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**Hon. Justice Chandra Ekanayake**
**Justice of the Supreme Court**

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**Hon. Justice Priyasath Dep**
**Justice of the Supreme Court**

Solicitors:

Office of the Director of Public Prosecutions for the Petitioner
Office of the Director of Legal Aid Commission for the Respondent.