IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0024 of 2022
Court of Appeal No. AAU 142 of 2016

BETWEEN: **INOKE RATU**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Justice Brian Keith**
Judge of the Supreme Court

The Hon. Justice William Calanchini
Judge of the Supreme Court

The Hon. Justice Terence Arnold
Judge of the Supreme Court

Counsel: **The petitioner in person**
Mr M. Vosawale for the Respondent
Ms L. Manulevu of the Legal Aid Commission appearing as a friend of the Court

Dates of Hearing: **9 and 19 April 2024**

Date of Judgment: **25 April 2024**

JUDGMENT

***Keith J*:**

Introduction

1. The petitioner, Inoke Ratu, was charged with unlawfully cultivating illicit drugs. The drugs consisted of 228 cannabis plants. In accordance with the usual practice in Fiji, I shall refer to him by his first name, Inoke. His case was transferred to the High Court where he pleaded not guilty. Following a trial, two of the three assessors expressed the opinion that Inoke was not guilty. However, one of them thought that he was guilty, and so did the judge. He was sentenced to 13 years' imprisonment with a non-parole period of 12 years. He appealed to the Court of Appeal against both his conviction and sentence. His appeal against conviction was dismissed, but his appeal against sentence was allowed. His sentence was reduced to 12 years' imprisonment with a non-parole period of 11 years. He now applies to the Supreme Court for leave to appeal against both his conviction and sentence.

2. I have had an opportunity to read a draft of the judgment of Arnold J. For the reasons which he gives, I agree that Inoke's application for leave to appeal against his conviction should be refused. This judgment deals only with his application for leave to appeal against his sentence.

3. There have been conflicting views about the correctness of the application of the guidelines in the consolidated appeals of *Kini Sulua and Michael Ashley Chandra v The State* [2012] FJCA 33 ("the *Sulua* guidelines") to the offence of cultivating cannabis plants. Indeed, the Court of Appeal in the present case noted that this division of judicial opinion should be resolved in a guideline judgment. We agreed with that. Accordingly, when the case was first listed before us on 9 April 2024, we asked Mr Vosawale who was appearing for the State whether any thought had been given to using this case as the vehicle for a guideline judgment on the topic. He told us that it had. Indeed, it had been raised at a mention hearing only last month before the President of the Supreme Court. It was thought then that there might not be sufficient time in the current session of the Supreme Court for a guideline judgment on the topic, and if this case was to be a vehicle for such a guideline judgment, it would have to be heard at a later session of the Supreme Court. The President was

understandably reluctant for the case to be taken out of the list for the current session of the Supreme Court.

4. We were troubled by this case. Our sense was that, following mature consideration of the issues which the case raised, this may be a case in which the sentence would have to be reduced – and perhaps reduced to a length which could have resulted in Inoke's release from prison immediately. In case that was what we were eventually to decide, we were very anxious to dispose of the appeal as soon as possible. We did not want Inoke to have to remain in custody any longer than his offence merited. In any event, we were confident – in the light of the other cases we had to consider in the current session of the Supreme Court (two of which had already been taken out of the list) – that there would be sufficient time for us to produce a judgment by the end of the current session which adequately reflected the importance of the issues which Inoke's case raises.

5. We were also confident that there would be sufficient time for written submissions to be prepared which addressed the correctness of the application of the ***Sulua*** guidelines to the offence of cultivating cannabis plants. Section 6 of the Sentencing and Penalties Act 2009 ("the 2009 Act") permits us on our own initiative to consider giving a guideline judgment, and we decided to consider doing that. Section 8 of the 2009 Act required us to notify the Director of Public Prosecutions and the Director of the Legal Aid Commission of our intention to consider making a guideline judgment. We gave them 7 days to provide us with written submissions on the topic. Moreover, to enable us to make such a judgment if we decided to do so, we required their written submissions to address the correctness of the application of the ***Sulua*** guidelines to the offence of cultivating cannabis plants. It was in these circumstances that on 9 April 2024 we heard the application for leave to appeal against conviction, but adjourned the application for leave to appeal against sentence to 19 April 2024.

6. It was on 17 April 2024 that we found something out which completely undermined what we had had in mind. We discovered that there had indeed been a guideline judgment on the very issue which the Court of Appeal in the present case had called for. That judgment was the Court of Appeal's judgment in *Jone Seru v The State* [2023] FJCA 67 dated 25 May 2023. We had not been told about that judgment. It had not been referred to in any of the

written submissions which had been filed previously. Had we been told about that case, we would not, of course, have considered giving a guideline judgment on the topic ourselves. In these circumstances, we informed Mr Vosawale and the Legal Aid Commission on 17 April 2024 that we would no longer be considering giving a guideline judgment, and that the submissions should focus on the new guidance given in *Seru*.

The relevant statutory provision

7. The offence which Inoke was convicted of was expressed to be contrary to section 5(a) of the Illicit Drugs Control Act 2004 ("the Act"). Section 5 is headed "Unlawful possession, manufacture, cultivation and supply", and in its entirety it reads:

> "Any person who, without lawful authority–
>
> (a) acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or
> (b) engages in any dealings with any other person for the transfer, transport, supply, use, manufacture, offer, sale, import or export of an illicit drug,
>
> commits an offence and is liable on conviction to a fine not exceeding $1 million or imprisonment for life or both."

The term "illicit drug" is defined in section 2 of the Act as meaning any drug listed in Schedule 1 to the Act. That Schedule includes cannabis and cannabis resin in Part 1 of the Schedule, but it also includes in Part 8 a number of other drugs associated with cannabis. They are cannabis fruit, cannabis seed, cannabis oil, and of particular relevance to Inoke's case, cannabis plant (whether fresh, dried or otherwise). The term "cannabis plant" is itself defined in Part 8 as "any part of any plant of the genus *cannabis* except a part from which all the resin has been extracted".

8. The illicit drug which was referred to in the charge which Inoke faced was "approximately 228 plants of cannabis sativa … weighing approximately 26.4 kilograms". Cannabis sativa is the most common form of cannabis plant. The word sativa means "cultivated", and indeed the charge alleged that the activity in which Inoke was engaged was *cultivating* cannabis sativa plants.

The sentencing guidelines in Sulua

9. The Court of Appeal in ***Sulua*** was asked to give guidance to judges about the sentencing of offenders who were convicted of cultivating cannabis sativa plants. The Court was divided about what the proper approach should be. The judgment of the majority was given by Temo JA (as he then was), with Priyantha Fernando J agreeing with him. The majority considered a large number of cases under the Act in which the courts had had to sentence offenders for *possession* of cannabis. Their purpose in doing so was to see whether any sentencing trends could be identified. Many of the cases were for possession of cannabis plants or the leaves of cannabis plants, but others related to other forms of cannabis. This analysis identified four categories of cases, each category reflecting the weight of the cannabis in each case:

    Category 1: 0-100 gms

    Category 2: 100-1000 gms

    Category 3: 1000-4000 gms

    Category 4: 4000 gms and more

10. The majority decided to adopt as the appropriate sentencing ranges the trends which were revealed by the cases they examined. The result was that the majority identified the following sentencing ranges for the offence of *possessing* cannabis sativa:

    Category 1: A non-custodial sentence should be the norm. Examples of such sentences were "fines, community service, counselling, discharge with a string warning etc". Only in the worst cases should a suspended sentence of imprisonment or a short sharp prison sentence of immediate effect be considered. The majority did not identify the factors which would exceptionally have rendered the case suitable for the imposition of a term of imprisonment, whether suspended or otherwise.

    Category 2: Sentences of imprisonment were called for in such cases. The sentencing range for cases where the weight was between 100-500 gms was one to two years' imprisonment, and the sentencing range for cases where the weight was between 500-1000 gms was two to three years' imprisonment.

Category 3: The sentencing range for cases where the weight was between 1000-2500 gms was three to four years' imprisonment, and the sentencing range for cases where the weight was between 2500-4000 gms was four to seven years' imprisonment.

Category 4: The sentencing range for cases in this category was between seven and 14 years' imprisonment.

11. As I have said, these were the sentencing ranges for offenders convicted of *possessing* cannabis plants. Only one of the two offenders, Kini Sulua, had been convicted of such an offence. Michael Chandra had been convicted of an offence under section 5(b) of the Act, namely *engaging in dealing with another for the sale of* cannabis plants. The question therefore arose whether the sentencing ranges which the majority thought appropriate for the offence of *possessing* cannabis plants should apply to the different offence of *engaging in dealing with another for the sale of* cannabis plants. And that itself raised the question whether the sentencing ranges which the majority had in mind should apply to the many other activities which constituted offences relating to cannabis plants, ie all the other activities criminalized by section 5 of the Act in respect of cannabis plants including *cultivating* cannabis plants.

12. The majority concluded that the new sentencing ranges for possessing cannabis plants should apply to all those activities. They did so on the basis that the legislature had not differentiated between the different activities criminalized by section 5 when it came to the maximum sentence. Whatever offence falling within section 5 the offender had committed, the maximum sentence was the same: a fine of $1 million or imprisonment for life or both. The majority reasoned that if the legislature treated all the offences as being of equal culpability, then the sentencing ranges for the offence of *possessing* cannabis plants should apply to other offences criminalized by section 5 – including for present purposes the offence of *cultivating* cannabis plants.

The reasoning of the sentencing judge

13. The sentencing judge treated the case as a category 4 case for the purposes of the *Sulua* guidelines. He took 12 years' imprisonment as his starting point. He described the amount of illicit drugs in this case as huge. He regarded that as an aggravating factor of such

significance that it warranted increasing the starting point to 16 years' imprisonment. He then deducted 20 months to reflect the time during which Inoke had been in custody on remand awaiting trial and sentence. That brought the term down to 14 years and 4 months' imprisonment. He regarded the fact Inoke was a first offender as a mitigating factor, and he reduced the term by a further 16 months. That resulted in a sentence of 13 years' imprisonment. He fixed the non-parole period at 12 years. The Court of Appeal took the view that there had been an element of double-counting in the judge's approach, and they reduced Inoke's head sentence to 12 years' imprisonment with a non-parole period of 11 years.

The judgment in Seru

14. A number of commentators have questioned the ***Sulua*** guidelines. Most people think that possessing illicit drugs for your own use is less serious than supplying them for profit. And yet on the majority's reasoning they are of equal culpability, with any difference in sentence being attributable to the amount of the drugs involved and any aggravating or mitigating factors. But the particular problem of applying the sentencing tariffs in ***Sulua*** for the offence of *possessing* cannabis plants to the offence of *cultivating* cannabis plants was said to relate to how you calculate their weight. That was of critical importance because the particular category in which a case fell was entirely dependent on the weight of the plants. That was one of the issues which the Court of Appeal in ***Seru*** (in an exceptionally comprehensive and lucid judgment by Prematilaka RJA, with which the other members of the Court agreed) had to address.

15. Some of the cases concerning cannabis plants are cases which relate to the leaves of the cannabis plant – the dried form of the plant. Other cases concerning cannabis plants are cases which relate to plants still in the ground or fresh from the ground. In ***Seru***, the State produced evidence to show that cannabis plants weigh much less when they have dried out and are in the form of leaves than when they are still in the ground or fresh from the ground. The evidence was said to show that the dried form of the plant weighs between 20% and 40% of the same plant fresh from the ground. Having said that, the substance in cannabis which produces the effect which users seek is tetrahydrocannabinol (THC for short). However, the research placed before the Court of Appeal in ***Seru*** showed that the amount of

THC remains more or less constant in both the dried form of the plant and where plants are still in the ground or fresh from the ground.

16. Previous cases had identified another problem when it came to determining weight. Much of the cannabis plant consist of fabric which is not narcotic – for example, their stems and roots. Its narcotic element is more in its leaves. Many jurisdictions whose sentencing regime attaches importance to the weight of illicit drugs which have been seized distinguish between their weight on seizure and the weight of their narcotic content. That may be very different, and the approach of many of those jurisdictions is to take the weight of their narcotic content as the determining factor. The difficulty of applying that approach to cannabis plants has made some jurisdictions abandon weight as the criterion altogether, and focus on the number of plants instead. Of course, the more mature a plant is, the greater the yield, and where the number of plants is the criterion rather than their weight, the plant's assumed yield will have to be modified in the case of less mature plants.

17. In ***Seru***, the State was anxious to keep weight as the criterion for sentence. Its suggestion was to base the weight of freshly seized plants on the weight they were likely to have once they had dried out. The Court of Appeal was reluctant to adopt that approach because in its view the literature on the degree by which freshly seized plants lost their weight as they dried out was far from clear. Indeed, an appropriate formula would have to take into account the humidity and environmental conditions prevalent in Fiji. Given this uncertainty, and having considered the approach in other common law jurisdictions (in particular the UK and New Zealand), the Court of Appeal in ***Seru*** decided to move away from treating weight as the determining factor, and instead to use a combination of other factors, those being the nature of the operation (which drew on the number of plants among other things) and the offender's role in it. The Court of Appeal adopted the methodology of the two grid matrix which the Supreme Court had used in ***The State v Eparama Tawake*** [2022] FJSC 22 when giving sentencing guidelines for "street muggings". The matrix followed the approach adopted by the Sentencing Council in England, and would involve classifying cases of cultivating cannabis plants by reference to two important factors: the degree of the offender's culpability and the level of harm likely to be caused.

18. The degree of the offender's culpability would depend on how the role which the offender played should be characterized. Did he play a leading role or a significant role or a lesser role? The Court of Appeal identified the various factors which the sentencing judge should take into account to determine which of these three roles the offender played. The level of harm likely to be caused would depend on the nature of the operation. There were four categories, and the Court of Appeal identified the various factors which would indicate into which category the operation in a particular case came.

19. Once the sentencing judge has identified the degree of the offender's culpability and the level of harm likely to be caused, the grid to which the Court of Appeal referred enables the sentencing judge to identify the relevant starting point. The sentencing judge is then required to increase or reduce the starting point by reference to whatever aggravating and mitigating factors may be present. The Court of Appeal then listed those factors which might aggravate or mitigate the offence, making it clear that the list was not an exhaustive one. The range within which the starting point could be reduced to reflect aggravating and mitigating factors was also identified in the grid. Although the Court of Appeal did not say so in so many words, the term of imprisonment (if imprisonment is called for) has then to be reduced for a plea of guilty, and then further reduced to reflect the time the offender has been in custody on remand awaiting trial and sentence.

20. It has to be said that the starting points and the sentencing ranges which the Court of Appeal in *Seru* set out in the grid are very considerably higher than their equivalents in England and New Zealand. To take the most serious case as an example, that of an offender playing a leading role in a large-scale operation capable of producing industrial quantities of cannabis for commercial use, the starting point in England is 8 years' imprisonment with a sentencing range of 7 to 10 years' imprisonment: see the guideline issued by the Sentencing Council on "Production of Cannabis Plant" effective from 1 April 2021. Similarly in New Zealand. The starting point for the large-scale commercial cultivation of cannabis plants, usually with a considerable degree of sophistication and organization, will generally be four years' imprisonment or more: see *R v Terewi* [1999] NZCA 92 at para 4. That compares with the starting point of 18 years' imprisonment and the sentencing range of 16 to 20 years'

imprisonment set out in *Seru* for an offender playing a leading role in a large-scale operation capable of producing industrial quantities of cannabis for commercial use.

21. The Court of Appeal did not explain why it set the starting points and sentencing ranges so much higher than in England and New Zealand, but I assume that it had in mind the difference in the maximum sentence. The maximum sentence for cultivating cannabis plants in England is 14 years' imprisonment: see section 6(2) of the Misuse of Drugs Act 1971. The maximum sentence for the similar offence in New Zealand is 7 years' imprisonment: see section 9(2) of the Misuse of Drugs Act 1975. On the other hand, as we have seen, the maximum sentence in Fiji for cultivating cannabis plants is imprisonment for life. Having said that, this is the maximum sentence for *all* the offences created by *both* parts of section 5 of the Act, even when the offences themselves are very different in terms of their gravity. By differentiating between different types of offences relating to illicit drugs, it might be said that the approach in England and New Zealand is a more nuanced one than that adopted in Fiji, and is less likely to result in sentences which may be too long in particular cases.

The four categories of harm in Seru

22. The four categories of harm set out in *Seru* are as follows:

> "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 plants or more.
>
> 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 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)."

23. Leaving aside the number of plants identified by each category, these descriptions of the nature and size of the operation to which each category relates were lifted, pretty much word for word, from *Terewi* (though the references to yield were taken from the English

guideline). _*Terewi*_ did not refer to the number of plants at all, and that raises a question about how judges in Fiji should apply these four categories. To take an example, suppose the offender has been cultivating 150 plants. The number of plants would suggest that his case falls into category 1. But suppose also that his operation is a small one – lacking what category 1 describes as "a considerable degree of sophistication and organization" or an "elaborate project designed to last over an extensive period of time". These factors would suggest a category other than category 1.

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.

26. It would not be right, of course, for us to revisit the starting points and sentencing ranges set out in *Seru* on this appeal – or indeed whether the number of plants should have been regarded as the sole criterion for determining the category of harm into which a particular case falls, or indeed whether there is too little difference between the number of plants in each category. By the time we became aware of the Court of Appeal's judgment in *Seru*, it was far too late for us to invite submissions on the topic. If the guidelines in *Seru* are to be revisited, it will have to be on another occasion.

The retrospectivity of the guidelines in Seru

27. At the time Inoke was sentenced, the *Sulua* guidelines were the relevant guideline. Can the *Seru* guidelines be made to apply to his case retrospectively? We were not addressed on that issue at all, and it would therefore be wrong to express a definitive view about whether guidelines issued by the courts can apply to cases where the offender was sentenced at a time when a previous guideline applied. The Supreme Court has itself said that this is an issue which will have to be determined definitively in due course. However, for the time being, I think that we should follow the approach in *Seru* itself which drew on the practice in New Zealand as formulated by the New Zealand Court of Appeal in *Zhang v R* [2019] NZCA 507, in which a new guideline judgment for sentencing in methamphetamine-related offending was issued:

> "[187] This judgment is to be issued on 21 October 2019. It applies to all sentencing that takes place after that date regardless of when the offending took place. The more difficult issue is whether it should also apply to those who have already been sentenced and if so in what circumstances.
>
> [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."

The first condition is satisfied in this case. I turn to whether the second condition has been. That depends on what the sentencing judge's sentence would have been if the *Seru* guidelines had been in place then.

The application of the Seru guidelines to Inoke's case

28. On the footing that the Court of Appeal thought that the number of plants was the sole criterion for determining the level of harm which the offence could be expected to cause, the number of plants which Inoke was cultivating placed his case firmly within category 1. However, having seen the photographs taken of his farm, at which he was growing dalo, cassava, yaqona and other vegetables in addition to the cannabis plants, the operation does not look particularly sophisticated. It bore little resemblance to the more advanced operations in countries with a different climate from Fiji – whether in greenhouses or otherwise with modern hydroponic methods using water-based nutrient solutions rather than soil. Moreover, the plants were analysed by the Fiji Police Forensic Chemistry Laboratory. The certificate of that analysis shows that the plants differed greatly in height, and maybe in weight as well. The upshot is that we cannot tell what proportion of the plants were mature, and what proportion were young, and therefore we cannot tell what their yield would have been. The potential yield of the crops is a relevant factor when assessing the harm they are likely to cause. In the absence of any evidence about that, we must proceed on the basis which is the most favourable to Inoke. This was still a category 1 case because of the number of plants involved, but the apparent lack of sophistication in the operation, and the absence of any evidence about the likely yield, will be reflected, albeit to a modest extent, when the mitigating factors come to be considered.

29. I turn to Inoke's culpability, ie the nature of his role in the operation. *Seru* sets out a number of factors which indicate whether the role played by an offender should be regarded as a leading, significant or lesser one. Inoke was not the owner of the land on which the plants were being cultivated, but he acknowledged when interviewed by the police that he had planted them and cultivated them. As it is, the State accepts that the role Inoke played in the operation should be classified as a lesser one. Mr Vosawale told us that that was because

the State regarded Inoke as simply tending the plants. His role was therefore akin to that of a "gardener", one of the indicia in *Seru* for treating an offender's role as a lesser one. He was looking after crops on the instructions of people who were above him in the hierarchy of the operation. In these circumstances, I go along with the State's classification of Inoke's role in this operation.

30. Using the matrix in *Seru*, the degree of Inoke's culpability and the level of the harm which the operation he was working in was likely to cause results in a starting point of 9 years' imprisonment. It is significantly less than the 12 years' imprisonment which the trial judge took. That is, of course, not a criticism of the trial judge. He was going on the *Sulua* guidelines, not the *Seru* guidelines.

31. I turn to such aggravating and mitigating factors as there were in the case. The only aggravating factor which Mr Vosawale advanced was that the number of plants exceeded the threshold for a category 1 case by a significant margin. I agree with Mr Vosawale that the number by which the threshold of 100 plants is exceeded in a particular case is a relevant factor. It would be absurd to say that a huge number of plants would not be capable of amounting to an aggravating factor. But I do not regard the actual number of plants in this case (228) as being sufficiently large to justify treating it as a *significant* aggravating factor – certainly not justifying the enhancement of four years which the trial judge thought was appropriate. In any event, it would, in my opinion, be offset by the unsophisticated nature of the operation. In addition, Inoke was a married man aged 24 with a child at the time of the offence, and significantly he had no previous convictions. Like the trial judge, I would treat the absence of previous convictions as a further mitigating factor – which is also what *Seru* suggested.

32. In *Vishwa Nadan v The State* [2019] FJSC 29 at para 39, I referred to "the pitfalls inherent in … assigning a particular additional term for any aggravating features and a particular lesser term for any mitigating features. In many jurisdictions, the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors." I propose to follow that approach. I would reduce the

starting point of 9 years' imprisonment to 8 years' imprisonment to reflect these aggravating and mitigating factors.

The non-parole period

33. The judge fixed the non-parole period at one year less than the head sentence. So did the Court of Appeal. The fixing of a non-parole is an innovative feature of Fiji's criminal justice system. Its purpose is well-established. It is intended to be the minimum period which an offender has to serve so that the offender will not be released earlier than the court thinks appropriate by the grant of parole or the practice of remitting one-third of the sentence for "good behaviour" in prison. However, since a Parole Board has never been established in Fiji, the only route by which an offender can be released earlier than the expiration of his head sentence, but for a non-parole period being fixed in his case, is by the operation of the practice relating to remission of sentence: see *Ilaisa Bogidrau v The State* [2016] FJSC 5 at para 4.

34. One of the issues on this appeal is whether there was an insufficient gap between the non-parole period and the head sentence. The fixing of a non-parole period has been a source of much litigation and legislative intervention in recent years. Many different issues needed to be resolved. In the recent case of *Akuila Navuda v The State* [2023] FJSC 45, I said at para 47:

> "The resolution of these issues resulted in some of the court's original pronouncements about the non-parole period being lost sight of. One was important for this case. It was that the non-parole period should not be too close to the head sentence. As Calanchini P (as he then was) said in *Tora v The State* [2015] FJCA 20 at para 2:
>
> > 'The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent.'
>
> Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for

> prisoners to behave themselves in prison, and the advantages of incentivizing good behaviour in prison by the granting of remission will be lost."

35. These observations apply with equal force to Inoke's case. Mr Vosawale agreed. He accepted that the difference between the non-parole period and the head sentence was too short. It should have been longer. If the head sentence had been what the Court of Appeal reduced it to – 12 years' imprisonment – the non-parole period should have been fixed at, say, 10 years. However, now that the head sentence should be 8 years' imprisonment, I think that the non-parole period should be 6 years and 6 months, subject, of course, to the need to reflect the length of time Inoke was in custody on remand awaiting trial. A non-parole period of 6 years and 6 months is itself 14 months longer that Inoke would have had to serve if he had been entitled to one-third remission.

Time spent in custody on remand

36. Inoke spent 1 year 7 months and 14 days in custody on remand awaiting trial and sentence. The trial judge rounded that up to 1 year and 8 months. He deducted that period from what would otherwise have been the head sentence, before reducing it by a further 1 year and four months because Inoke had no previous convictions. Calculating the head sentence in that order makes it look as if the time spent in custody on remand is a factor *which mitigates the offence*. That would now be regarded as an error, though it would not have been thought of as an error in 2016 when Inoke was sentenced. That is because in *Apolosi Domona v The State* [2017] FJSC 15, the Supreme Court endorsed what had been said by the Court of Appeal in *Naivalurua Koroitavalena v The State* [2014] FJCA 185 at para 24:

> "The period spent in remand before trial should be dealt with separately from the mitigating factors when imposing a sentence and cannot be subsumed in the mitigating factors."

That makes sense. Being in custody awaiting trial does not male an offender's offence any the less serious. It simply means that the time he has spent in custody should count towards his sentence. The difficulty is in identifying a methodology which properly reflects that.

37. The governing statutory provision is section 24 of the 2009 Act, which provides:

> "If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter

> or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

The methodology by which courts should reflect time spent in custody in the sentence to be imposed was laid down by the Supreme Court in *Apakuki Sowane v The State* [2016] FJSC 8. The Court held that the time spent in custody should be deducted from what would otherwise have been the appropriate head sentence *and* what would otherwise have been the appropriate non-parole period. That was precisely the approach which appealed to Arnold J in his dissenting judgment in *Peni Tuilaselase v The State* [2023] FJSC 36 at para 10, even though *Sowane* had not been cited to the Court.

38. This was, in effect, what the trial judge did in the present case. The aggravating factors which he identified took the sentence up to 16 years. Inoke's lack of previous convictions took the sentence down to 14 years and 8 months. Had Inoke been on bail throughout, that would have been the head sentence with a non-parole period of 13 years and 8 months. But the time Inoke had spent in custody brought the head sentence down to 13 years and the non-parole period to 12 years. By that route both the head sentence and the non-parole period had been reduced by the length of time Inoke had been in custody. The methodology laid down in *Sowane* was therefore applied to Inoke's case.

39. What remains, then, is for the methodology in Sowane to be applied to the new head sentence and non-parole period which this judgment proposes. The head sentence will have to be reduced from the proposed 8 years' imprisonment to 6 years and 4 months' imprisonment, and the non-parole period will have to be reduced to 4 years and 10 months. I appreciate that these are very significant reductions from the periods identified by the experienced judge at first instance, but the difference is primarily attributable to the change in the governing guidelines in the meantime from the *Sulua* guidelines which applied when the judge had to sentence Inoke (and when the Court of Appeal considered his appeal) to the *Seru* guidelines which have now to be applied retrospectively to Inoke's case. Since Inoke has now been in custody for almost eight years, this judgment would result in his immediate release.

Conclusion

40. For these reasons, I would refuse Inoke leave to appeal against his conviction, but I would give him leave to appeal against sentence on the basis that a substantial and grave injustice

would have occurred if leave had not been given. In accordance with the Supreme Court's usual practice, I would treat the hearing of the application for leave to appeal against sentence as the hearing of the appeal, I would allow the appeal, I would set aside the order of the Court of Appeal, and I would reduce Inoke's sentence for cultivating cannabis plants to 6 years and 4 months imprisonment with a non-parole period of 4 years and 10 months.

***Calanchini J*:**

41. I have had the advantage of reading in draft form the judgments of Keith and Arnold JJ, and I agree with their reasoning and conclusions. I agree with the proposed orders.

***Arnold J*:**

Introduction

42. The Petitioner, Inoke Ratu, seeks leave to appeal against a decision of the Court of Appeal affirming his conviction on one count of unlawful cultivation of illicit drugs contrary to s 5(a) of the Illicit Drugs Control Act 2004 and reducing his sentence from 13 years' imprisonment with a non-parole period of 12 years to 12 years' imprisonment with a non-parole period of 11 years (he submits that this sentence reduction is insufficient).

43. Under s 7(2) of the Supreme Court Act 1998, the Court must not grant leave in a criminal matter 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 occur.

44. In this judgment, I address Inoke's petition for leave in relation to his criminal conviction. In respect of his sentence appeal, I have read the judgment of Keith J in draft and agree with it and with the orders he proposes.

Background

45. The charge against Inoke was that, between 1 December 2014 and 7 January 2015 at Kadavu in the Eastern District, he cultivated 26.4 kilograms of cannabis sativa plants without lawful authority.

46. At the time, Inoke was living in Naini settlement in Tavuki in Kadavu. His partner came from Tavuki. They had a young child.

47. Inoke appears to have been a subsistence farmer planting a variety of crops. The police received information that he was cultivating cannabis. Accordingly, in the early morning of 7 January 2015, two police officers in plain clothes were sent to search for the location of the alleged cultivation. At least one had a cane knife. Around 10 am, the officers discovered a cannabis cultivation at Nabununikoula. They were instructed to stay at the location to see whether anyone came to tend the crop.

48. The two officers said that they saw Inoke arrive at the location around 4 pm. They said he looked about and then began to weed the cannabis cultivation with a cane knife. After he had been doing this for around 30 minutes, the police officers confronted him and placed him under arrest for cultivating cannabis. The officers said that Inoke told them they were trespassing; one gave evidence that Inoke admitted that the cultivation was his. The police also arrested a cousin of Inoke's who was in the area, but ultimately he was not charged.

49. The police said they uprooted 228 marijuana plants at the cultivation, some of which were about a metre high and others smaller.[1] At 8.18pm, Inoke was interviewed under caution at the Kadavu Police Station, but the interview focussed on preliminary matters and ended at 8.58pm. The Station diary indicates that Inoke was visited twice by his wife after his arrest, the second time to bring him fresh clothing, and that relatives brought food for him and his cousin. The following day, he was taken to Suva by boat, arriving late in the evening. His interview resumed around midday on 9 January 2015 at the Nasinu Police Station and ended at 2.15pm, and there was a further brief interview on 10 January 2015. Inoke asked to see a doctor on 9 January and an officer took him to the Makoi Heath Centre that afternoon.

[1] Subsequent forensic analysis gave a height range for the plants of between 11 cm and 2.96 m.

50. According to the police, in his interview on 9 January, Inoke admitted that he had looked after the cannabis cultivation. He said he had been asked by his uncle to look after the farm and that he was doing so because he needed money for his upcoming wedding. In his short interview on 10 January, Inoke repeated that the cannabis plants were his. He also said he had been taken to the Makoi Health Centre the previous afternoon, where he had seen a doctor and been given medication.

51. At the voir dire, four police officers gave evidence, to the effect that Inoke had been given his rights, had not been assaulted or otherwise pressured but was cooperative and had acknowledged his guilt. Although defence counsel cross-examined the officers, the defence called no evidence. At the conclusion of the voir dire, the trial Judge found that that Inoke gave his caution statements voluntarily.

52. At trial, Inoke gave evidence in his defence. He said that on 7 January 2015, he had gone to a local picnic spot with his wife and members of her family. He said that while relieving himself by the river, he was accosted by two men, one of whom had a cane knife. They tackled him to the ground, handcuffed him and hit him with the blunt side of the cane knife. They told him to follow their orders. They walked for about 30 minutes to a farm. Inoke recognised that marijuana plants were growing there. He said that some additional men turned up and they assaulted him and forced him to confess that the marijuana farm was his. He went on to describe further violence inflicted on him by police during his subsequent interviews, including a sustained assault with a stick (a table leg). He asked to be taken to hospital. Under cross-examination, he said he had raised the matter of the police assault when he came before the High Court on 27 February 2015. However, the Court records do not reflect that.

53. At the conclusion of the trial, two assessors gave opinions of “Not Guilty”, while one gave an opinion of “Guilty”. The Judge accepted that the “not guilty” opinions were not perverse, but did not agree with them. Rather, he agreed with the assessor who considered Inoke was guilty of the offence charged.

54. Inoke filed an application for leave to appeal against both conviction and sentence. A single Judge of the Court of Appeal refused him leave to appeal against conviction but granted him leave to appeal against sentence.[2] Inoke then filed a renewal application in the Court of Appeal in respect of his conviction appeal. In the event, he argued his conviction appeal personally, while the Legal Aid Commission argued his sentence appeal.

55. In a judgment dated 29 September 2022, the Court of Appeal dismissed the appeal against conviction but allowed the appeal against sentence.[3] As I have said, in this judgment I address only Inoke's application for leave to appeal to this Court against conviction.

Basis for proposed appeal against conviction

56. During the course of these proceedings, Inoke has filed numerous submissions in support of his application for leave to appeal against conviction, raising a variety of grounds. Quite apart from the submissions contained in the case bundles, the Court received submissions from Inoke on 12, 25 and 27 March 2024 (2 different sets on the latter date). These various submissions addressed different aspects of his conviction appeal.

57. While I appreciate Inoke's concern to ensure that that his position is put before the Court in as comprehensive a way as possible, multiple submissions of this sort are unhelpful. What is required is a single written submission addressing the issues which the petitioner asks this Court to consider. Furthermore, the issues must be ones appropriate for consideration by this Court. Given that this Court is a final appellate court, something more than a re-run of all the arguments previously considered and dealt with by the Court of Appeal is required. The criteria in s 7(2) of the Supreme Court Act must be met.

58. The State's submissions before this Court addressed the two grounds raised in one of the 27 March submissions. I will briefly address these. I will also address the further ground raised in the other submission received on 27 March 2024. The three grounds concern (i) the

---

[2] *Ratu v State* [2020] FJCA 60.
[3] *Ratu v State* [2022] FJCA 103.

prosecution's failure to disclose certain material, (ii) the trial Judge's conclusion following the voir dire, and (iii) the Judge's rejection of the majority view of the Assessors.

(i) Alleged failure to disclose

59. Inoke submitted that the prosecution failed in its duty to disclose the Nasinu Police Station diary and the reasons they took him to the Makoi Medical Centre for treatment. These were relevant, he said, to his allegation that he had been assaulted by the police. A similar argument was made before the Court of Appeal.

60. The police did disclose the relevant cell book and the meal book, but said they were unable to locate the station diary. However, the essential point is that the evidence indicates that Inoke asked police to take him to see a doctor and the police did take him to the Makoi Medical Centre on the afternoon of 9 January. Inoke said that he was seen by a doctor and a nurse and received some medication at the centre. He said in his evidence that this was related to the assaults he had received. But when police asked him during his caution interview on 10 January whether he had seen a doctor, he confirmed that he had, but there is no record in the interview notes that he then asked to be taken to CWM Hospital.

61. More significantly, there is no record of him having raised the alleged assaults before a judicial officer at the time of his arrest. As the trial Judge noted, Inoke appeared before a Magistrate on 12 January, 26 January and 9 February 2015 and before the trial Judge on 27 February 2015. If he had suffered serious assaults of the type he alleges, it is to be expected that (i) he would have suffered significant bruising and other injuries, which would be visible for some time; and (ii) he would have raised the matter at an early opportunity.

62. Inoke did write to the High Court in early December 2015 alleging that his caution statement was not voluntary, that he was assaulted by the police and seeking access to police notebooks, station diaries and the like. Subsequently, he gave a full account of what he claimed had happened to him in his evidence at trial (mid-August 2024). There is at least one significant inconsistency between the account given in Inoke's December 2015 letter and his evidence at trial. In the letter, he said that police had rubbed chillies all over his body; he did not mention this in his evidence.

63. In my view, had the type of beating that Inoke described been inflicted on him by police, it is implausible that he would not have raised it with a judicial officer at an early stage, whether or not he had received medical attention.

64. Consequently, I see no merit in this point.

(ii) The trial Judge misdirected himself as to the voluntariness and truthfulness of the confession

65. Inoke complains that part of his caution interview (the 7 January portion) was not signed by the witnessing officer. This was explored in the voir dire, where the interviewing officer explained that the witnessing officer was present (as is recorded in the interview notes), but he forgot to ask him to sign the notes when the interview ended. Both the interviewing officer and Inoke did sign the notes, however.

66. Moreover, Inoke did not give evidence at the voir dire. Although Inoke's counsel cross-examined the police witnesses, they maintained their version of events. As propositions put by counsel in cross-examination are not "evidence", the police account before the Judge was effectively uncontested. In those circumstances the Judge's conclusion that Inoke's statement was given voluntarily was to be expected.

67. I see no merit in this point of appeal.

(iii) Whether the trial Judge erred in rejecting the "Not Guilty" opinions of the two Assessors

68. Inoke submits that two of the three Assessors rejected his caution interview and found his evidence at trial more credible than the police witnesses. He complains that because the trial Judge rejected the "Not Guilty" opinions of the two Assessors in favour of the "Guilty" opinion of the remaining Assessor immediately after they were given, he could not have made an independent assessment of the evidence before convicting him.

69. Before the abolition of Assessor system, a trial Judge was, of course, entitled to reject the opinion of the Assessors, even their unanimous opinion, because it was the Judge who was the ultimate decision-maker, not the Assessors. But where a judge did disagree with the majority view of the Assessors, he or she was required under s 237 of the Criminal Procedure Decree of 2009 to give reasons for differing with the majority opinion. Those reasons had to be in writing and given in open court.

70. The reasons given by the trial Judge in his judgment after the voir dire were as follows:

> 8. Six witnesses gave evidence for the prosecution. They were:
>
> [names listed]
>
> 9. One witness gave evidence for the defence, that is the accused himself.
>
> 10. I had carefully considered all the evidence and had carefully compared them. I had carefully assessed the demeanour of all the witnesses. The prosecution's case was that the accused verbally confessed to PW2 and PW3 that the marijuana farm at Nabununikoula was his. This was when PW2 confronted him at the crime scene, and later arrested him on 7 January 2015. PW2 said he gave the accused his legal rights during the arrest.
>
> 11. Furthermore, when he was caution interviewed by PW4 on 7, 9 and 10 January 2015, the accused fully confessed to the crime. I accept PW2, PW3 and PW4's evidence that when the accused confessed to the police, he did so voluntarily and out of his own free will.
>
> 12. On my assessment of the credibility of the witnesses, I find all the prosecution's witnesses to be credible. They were forthright and not evasive. I accept that the accused verbally confessed to PW2 and PW3 that the marijuana farm was his on 7 January 2015. I also accept that he confessed to the crime when caution interviewed by PW4 on 7, 9 and 10 January 2015. I accept that his confessions were true.
>
> 13. As to the accused's allegations of alleged police brutality, I totally reject the same. He did not ask the Magistrate on his first appearance on 12 January 2015 for a medical examination at CWM Hospital. Neither did he ask the Magistrate for the same on 26 January 2015 and 9 February 2015. He did not ask the High Court on 27 February for the same. To me that showed he had no injuries to complain about. Furthermore, he was very evasive when cross-examined. To me, he was not a credible witness, and thus I reject his denial of the crime.

71. The Judge's assessment of the credibility of the witnesses lay at the heart of his rejection of the majority opinion of the assessors. The Judge was entitled to reach a different view about credibility and has explained what led him to do that. The Judge said all that needed to be said to explain and justify his view. There is no merit in this point of appeal.

72. In the result, I do not consider that the points Inoke raises fall within the s 7(2) criteria and would dismiss his petition for leave to appeal against conviction.

Order:

(1) Application for leave to appeal against conviction refused.
(2) Application for leave to appeal against sentence granted.
(3) Appeal allowed.
(4) Order of the Court of Appeal dated 29 September 2022 set aside.
(5) The petitioner's head sentence is hereby reduced to 6 years and 4 months' imprisonment with a non-parole period of 4 years and 10 months.

The Hon. Justice Brian Keith
Judge of the Supreme Court

The Hon. Justice William Calanchini
Judge of the Supreme Court

The Hon. Justice Terence Arnold
Judge of the Supreme Court