IN THE SUPREME COURT OF FIJI
AT SUVA
CRIMINAL APPELLATE JURISDICTION

CRIMININAL PETITION NO. CAV 011 OF 2023
[On Appeal from Court Of Appeal No. AAU 026 of 2019]

BETWEEN : ARISI KAITANI

Petitioner

AND : THE STATE

Respondent

Coram : The Hon. Mr. Justice Salesi Temo, Acting President of the Supreme Court
The Hon. Mr. Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr. Justice Terence Arnold, Judge of the Supreme Court

Counsel: Mr. M. Fesaitu and Ms. L. Manulevu for the Petitioner
Mr. M. Vosawale and Mr. H. Nofaga for the Respondent

Date of Hearing: 17 October, 2024

Date of Judgment: 29 October, 2024

JUDGMENT

Temo, AP

A. **INTRODUCTION:**

1. On the 25th June 2018, the trial of the petitioner before Mr. Justice V. Perera, with three assessors began. The petitioner was charged with a co-accused, and the information were as follows:

"FIRST COUNT

Statement of Offence

Unlawful Possession of Illicit Drugs: *contrary to section 5 (a) of the Illicit Drugs Control Act 2004.*

Particulars of Offence

Arisi Kaitani and Atikini Matakorovatu *on 15th day of September 2016 at Kadavu in the Eastern Division, unlawfully possessed 1184.4 grams of an illicit drug known as cannabis sativa.*

SECOND COUNT

Statement of Offence

Unlawful Cultivation of Illicit Drugs: *contrary to section 5 (a) of the Illicit Drugs Control Act 2004.*

Particulars of Offence

Arisi Kaitani and Atikini Matakorovatu *on 15th day of September 2016 at Kadavu in the Eastern Division, unlawfully cultivated 7975.7 grams of an illicit drug known as cannabis sativa."*

2. In the presence of his counsel, the petitioner pleaded not guilty to the two counts. In this judgment, I will only talk about the petitioner, not his co-accused. A voir dire to determine the admissibility of the petitioner's police caution interview statements (PE 1) was done from 25th, 26th and 27th June 2018.

3. The trial proper occurred from 27 June to 6 July 2018 (7 days). Nine witnesses gave evidence for the prosecution, while two witnesses gave evidence for defence. The learned judge delivered his summing up on 9 July 2018. Assessor No. 1 found the petitioner guilty as charged on both counts, while Assessor No. 2 and 3 found the petitioner not guilty as charged on both counts.

4. The learned judge delivered his judgment on 10 July 2018. On count No. 1, the learned judge agreed with Assessor No. 2 and 3, and found that the prosecution had not proven count No. 1 beyond a reasonable doubt. He found the petitioner not guilty as charged and acquitted him accordingly. On Count No. 2, the learned judge agreed with Assessor No. 1 and found that the prosecution had proved its case beyond a reasonable doubt and found the petitioner guilty as charged and convicted him accordingly. Despite not accepting the petitioner's alleged confessions in his police caution interview statements, charge statements and verbal admission during his arrest, the learned judge accepted the prosecution's case that the petitioner was, on 15 September 2016, at Kadavu, seen by PW1, PW2, PW3 and PW6 uprooting cannabis sativa plants from the farm, where the police later uprooted 824 cannabis sativa plants. He appeared to infer that the above action indicated that he was aware and was deliberately cultivating cannabis sativa plants on the said farm and was aware that he was doing so unlawfully.

5. On 16 July 2018, the learned judge sentenced the petitioner to 14 years 2 months imprisonment, with a non-parole period of 10 years and 2 months.

B. COURT OF APPEAL PROCEEDINGS

6. On 16 April 2019, the petitioner's counsel filed an untimely notice of appeal and an application for an enlargement of time in the Fiji Court of Appeal. There was an 8 months delay. The petitioner filed his written submission on 15 April 2019, while the State filed their submission on 1 June 2020. A single Justice of Appeal, His Lordship Mr. Justice Prematilaka, heard the matter on 8 June 2020.

7. The petitioner's grounds of appeal were as follows:

> ***"Against conviction***
>
> 1. *THAT the Learned Trial Judge erred in law and facts by not directing himself and the assessors on the principles of Turnbull, given that the Appellant disputed identification, therefore as a result of the non-direction has caused a substantial miscarriage of justices.*
> 2. *THAT the guilty verdict is inconsistent.*

3. *THAT the Learned Trial Judge did not provide cogent reasons in disagreeing with the majority opinion of the assessors that the Appellant is not guilty for the offence of unlawful cultivation of illicit drugs.*

4. *THAT the Learned Trial Judge ought to have given the parties the opportunity to raise any objections (if any), of him hearing the case against the Appellant, given that the trial Judge had heard the facts and sentenced the co-accused who pleaded guilty to both offences, which the Appellant is being charged with.*

Against Sentence

5. *THAT the Learned Trial Judge erred in law and principles by using the same aggravating factor to select a starting point of 7 years, and then giving 11 years to the same aggravating factor, resulting in the excessive enhancement of the sentence."*

8. On 17 June 2020, His Lordship Mr. Justice Prematilaka, in 14 pages, delivered his ruling. He refused enlargement of time for the appeal against conviction, but allowed time for the appeal against sentence.

9. The petitioner was not happy. He choose to go before the Full Court of Appeal and re-argue the appeal grounds he submitted before His Lordship Mr. Justice Prematilaka, as pointed out in paragraph 7 hereof. On 26 June 2023, the petitioner, indicated to the Full Court that he was abandoning ground 1 of his appeal against conviction. On 4 July 2023, the full Court of Appeal (Jitoko VP, Mataitoga JA and Qetaki JA) heard the petitioner and the State.

10. On 27 July 2023, the full Court of Appeal, in 23 pages, delivered their judgment. His Lordship Mr. Justice Qetaki wrote the court's judgment. The petitioner's application for enlargement of time to appeal against conviction was declined. In addition, on the merits, the appeal against conviction was denied. The appeal against sentence was also disallowed. So, the High Court conviction and sentence on Count No. 2 on 10th and 16th July 2018 was confirmed by the full Court of Appeal.

C. SUPREME COURT PROCEEDINGS:

11. The petitioner now seeks leave to appeal against the Court of Appeal's decision of 27 July 2023. In the papers he submitted to the Court on 9 August 2023, 1 August 2024 and 11 October 2024, the petitioner appears to be appealing his conviction and sentence. On conviction, he relies on grounds 2, 3 and 4 of the grounds he submitted before the single judge and the full Court of Appeal on 8 June 2020 and 4 July 2023. However, he has now changed the numbers. Ground 2 becomes Ground 1, Ground 3 becomes Ground 2 and Ground 4 becomes Ground 3. On sentence, the petitioner appears to advance the ground that the sentence was harsh and excessive.

12. The Supreme Court had repeatedly said in the past that the Court of Appeal, in criminal matters, is really in fact the final Court of Appeal. It is where the petitioner's complaints about the trial process in the High Court are ventilated, carefully analyzed and where faults and/or mistakes discovered, remedies are found and applied to advance the interest of justice. It had also been said that *"an appeal to the Supreme Court from a final judgment of the Court of Appeal may not be brought to the Supreme Court, unless it grants leave to appeal."* (section 98 (4) of the 2013 Constitution).

13. And leave to appeal, in criminal matters, will not be granted unless your case involved:

    (a) a question of general legal importance; or

    (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 (2) of the Supreme Court Act 1998).

14. On conviction appeal grounds 1, 2 and 3, appeal grounds 2, 3 and 4 in the Court of Appeal (paragraph 7), the petitioner appears to be rehashing the same grounds and submissions he submitted in the Court of Appeal. When reading his submissions to the Supreme Court, they were the same matters that were submitted in the Court of Appeal, before the single Judge and the Full Court. The matters submitted does not meet the threshold established

by section 7 (2) of the Supreme Court Act 1998. They are not matters of general legal importance, nor do they involve matters of substantial question of principle affecting the administration of criminal justice. Given the above, the petitioner's application for leave to appeal his conviction is refused.

D. SENTENCE APPEAL GROUND

15. The petitioner appears to complain that the High Court sentence of 14 years 2 months imprisonment, with a non-parole period of 10 years 2 months from 16 July 2018, was harsh and excessive. He appeared to say that if the same is not reduced on appeal to the Supreme Court, *"substantial and grave injustice may otherwise occur."*

16. Like the present case, in Fiji, most cannabis sativa type offences, were prosecution for *"unlawful possession of illicit drugs"* or *"unlawful cultivation of illicit drugs"*, contrary to section 5 (a) of the Illicit Drugs Control Act 2004. Section 5 (a) of the Illicit Drugs Control Act 2004 reads as follows:

> *"…5 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 $1million or imprisonment for life or both…."*

17. *"Illicit Drugs"* is defined in section 2 of the Illicit Drugs Control Act 2004 and it means *"any drugs listed in Schedule 1"*. In Part 1, Schedule 1, *"cannabis and cannabis resin"* are *"illicit drugs".* In Part 8, Schedule 1, *"cannabis fruit; cannabis plant (whether fresh, dried or otherwise) that is, any part of any plant of the genus cannabis except a part from which all the resin had been extracted: cannabis seed; cannabis oil"* are all classified as *"illicit drugs".*

18. When the Illicit Drugs Control Bill 2004 was debated in Parliament on 5 May 2004, the then Attorney General had this to say *"…In Fiji, Mr. Speaker, Sir, the main type of drug*

that is be-devilling our society, villages and youths is marijuana. The media reports, almost day-in and day-out, tell us of the extent of use of marijuana in Fiji. Our people are planting, selling and using it, and it is against these people and their activities that the provisions of this Bill are about. If we are not careful, we may be fighting a losing battle. However, Mr. Speaker, Sir, this Government is doing all it can within its powers and resources to fight the drug problem in Fiji, in particular those who are planting and selling it, that is marijuana…"

19. The then Attorney General continued, *"…Clause 5 of the Bill, Sir, is the main provision that will control drug use and abuse in Fiji, as it deals particularly with cultivation, supply, possession and use, et cetera. As mentioned earlier, there is an increasing trend to cultivate marijuana near our villages in rural areas, where our youths have come to prefer this, rather than relying on traditional cash crops such as dalo and yaqona, because of the speed with which they can market, as well as the commercial returns to them on these commodities. This can only thrive, Sir, if there is supply market and profit is good, in comparison with other cash crops in our villages such as dalo and yaqona. Our chiefs and responsible citizens are very much concerned with this trend. More importantly, its effect on our closely-knit societal structures, settings and relationships…"* (Hansard Report, Parliament, pages 2558, 2560, 5 May 2004).

20. The Illicit Drugs Control Act 2004 was running for eight years when the first Court of Appeal guideline judgment was issued in **Kini Sulua**, **Michael Ashleigh Chandra** v **State**, Fiji Law Report, Volume 2, 2012, pages 111 -147 (31 May 2012). I wrote the majority judgment, and His Lordship Mr. Justice Fernando agreed with me. His Lordship Mr. Justice Marshall was the dissenting minority. Fifty cases were analyzed to determine the sentencing trend in the High Court.

21. The following tariff was decided by the majority:

"…In summary, the four categories are as follows:

(i) ***Category 1****: possession of 1 to 100 grams of cannabis sativa – a non-custodial sentence to be given, for example, fines, community service,*

counselling, discharge with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.

(ii) ***Category 2:*** *possession of 100 to 1,000 gram of cannabis sativa. Tariff should be a sentence between 1 to 3 years imprisonment, with those possessing below 500 grams, being sentenced to less than 2 years imprisonment.*

(iii) ***Category 3:*** *possessing 1,000 to 4,000 grams of cannabis sativa. Tariff should be a sentence between 3 to 7 years, with those possessing less than 2,500 grams, be sentenced to less than 4 years imprisonment, and those possessing more than 2,500 grams, be sentenced to more than 4 years.*

(iv) ***Category 4:*** *possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence 7 to 14 years' imprisonment…"* (**Sulua** v **State**, supra pg.143)

22. Section 6 (2) of the Sentencing and Penalties Act 2009 reads as follows:

"…A guideline judgment given by the Court of Appeal or the Supreme Court shall be taken into account and applied by the High Court and the Magistrate Court when considering cases to which the guideline judgment applies…"

23. In **Kini Sulua** v **State** (supra), the majority said the following in paragraph 117 and 118 (page 144):

*"… [**117**] Section 5(a) of the Illicit Drugs Control Act 2004 treated the verbs "acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug" equally. All the verbs are treated equally. In other words, all the offending verbs or offending actions are treated equally. "Supplies, possesses, manufactures and cultivates" are treated equally, and none of the offending actions are given any higher or lower standing, as far as s 5 (a) of the Illicit Drugs Control Act 2004 was concerned. It follows that the penalties applicable to possession, must also apply to the offending verbs of "acquire, supplies, produces, manufactures, cultivates, uses or administers". That is the will of Parliament, as expressed in the words of s 5(a) of the Illicit Drugs Control Act 2004. Consequently, the four categories mentioned above, apply to each of the verbs mentioned in s 5(a) of the 2004 Act mentioned above. The weight of the particular illicit drug will determine which category the case falls under, and the applicable penalty that will apply. It is also suggested that, the application of the four categories*

mentioned in paragraph 115 hereof to s 5(a) of the Illicit Drugs Control Act 2004, be extended to the offending verbs or offending actions in s 5(b) of the

Illicit Drugs Control Act 2004. This will introduce some measure of consistency in how sentences are passed for offendings against s 5(a) and 5(b) of the Illicit Drugs Control Act 2004. This will enhance the objective and purpose of the 2004 Act, as highlighted in paragraph 111 hereof.

*[**118**] Categories numbers 1 to 4 merely sets the tariff for the sentence, given the weight of the illicit drugs involved. The actual sentence will depend on the aggravating and mitigating factors, in the particular circumstances of the case, and it may well fall below or above the set tariff…"*

24. I have read and analyzed 84 cases since the decision in **Kini Sulua** v **State** (supra) to determine the sentencing trends in the High Court since 31 May 2012. Please, refer to Appendix 1 at the end of my judgment. In the 84 cases, 67 cases applied the sentencing tariff in **Kini Sulua** v **State** (supra), while 17 cases choose not follow **Kini Sulua** v **State** (supra). This case was one of those that choose not to follow **Kini Sulua** v **State** (supra). There was a view that the tariff in **Kini Sulua** (supra) only applied to *"possession type offences",* not *"cultivation type offences".* There were thus uncertainty and inconsistencies in the sentencing of *"cannabis sativa cultivation type offending"* since 31 May 2012.

25. In **Jone Seru** v **The State**, Criminal Appeal No. AAU 115 of 2017 (25 May 2023), His Lordship Mr. Justice Prematilaka well traced and described the reasons for the differing school of thoughts in the High Court of how to approach sentencing on cultivation of cannabis sativa type offence (please, refer paragraph 1 to 22 of **Jone Seru** v **The State** (supra), pages 1 to 9). I will not dwell on the difference in the above differing school of thoughts, but suffice to say that **Jone Seru** v **The State** (supra) came up with another guideline judgment on the *"cultivation of cannabis sativa plants"* in Fiji. The guideline table were written as follows:

*"**SENTENCING TABLE** (cultivation of cannabis sativa).*

Culpability / Harm	*LEADING ROLE*	*SIGNIFICANT ROLE*	*LESSER ROLE*
Category 1	***Starting point*** *18 years' custody*	***Starting point*** *14 years' custody*	***Starting point*** *9 years' custody*
	Category range *16 – 20 years' custody*	***Category range*** *12 – 16 years' custody*	***Category range*** *7 years' – 12 years' custody*
Category 2	***Starting point*** *14 years' custody*	***Starting point*** *9 years' custody*	***Starting point*** *5 years' custody*
	Category range *12 years– 16 years' custody*	***Category range*** *7 years'– 12 years' custody*	***Category range*** *3 years– 7 years' custody*
Category 3	***Starting point*** *9 years' custody*	***Starting point*** *5 years' custody*	***Starting point*** *18 months' custody*
	Category range *7 years'– 12 years' custody*	***Category range*** *3 years'– 7 years' custody*	***Category range*** *1 year – 3 years' custody*
Category 4	***Starting point*** *5 years' custody*	***Starting point*** *18 months' custody*	***Starting point***
	Category range *3 years' – 7 years' custody*	***Category range*** *1 year – 3 years' custody*	***Category range*** *Non-custodial – suspended sentence*

26. **Jone Seru** v **The State** (supra), in paragraph 37 said:

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

- ***Category 1*** *– Large scale cultivation capable of producing industrial quantities for commercial use with a considerable degree of sophistication and organization. Large commercial quantities. Elaborate projects designed to last over an extensive period of time. High degree of sophistication and organization. 100 or more plants.*

- ***Category 2*** *– Medium scale cultivation capable of producing significant quantities for commercial use i.e. with the object of deriving profits. Commercial quantities. Over 50 but less than 100 plants.*

- ***Category 3*** *– Small scale cultivation for profits capable of producing quantities for commercial use. 10 to 50 plants (with an assumed yield of 55g per plant).*

- ***Category 4*** *– Cultivation of small number of plants for personal use without sale to another party occurring or being intended. Less than 10 plants (with an assumed yield of 55g per plant)…"*

27. In determining culpability, **Jone Seru** v **The State** (supra) said, in paragraph 36, the following;

*"…**CULPABILITY**. Culpability is demonstrated by the offender's role as given below. In assessing culpability, the sentencer should weigh up all the factors of the case to determine role (**leading role, significant role** or **lesser role**). Where there are characteristics present which fall under different role categories, or where the level of the offender's role is affected by the scale of the operation, the court should balance these characteristics to reach a fair assessment of the offender's culpability. Thus, it must be borne in mind that these roles may overlap or a single offender may have more than one role in any given situation. The demarcation of roles may blur at times. The sentencers should use their best judgment and discretion in such situations.*

Leading role:

- *Owner, organizer, initiator or principal party in the venture. Involved in setting-up of the operation, for example obtaining the lands, premises, workers and equipment with which to carry out the cultivation. May have one or more such ventures.*
- *Directing or organizing production/cultivation on a commercial scale, etc.…*

Significant role:

- *Play a greater or dominant part. Running the operation.*
- *Operational or management function within a chain. May make arrangements for the plants to be brought in, and the crop to be distributed. They may help to run more than one operation and be involved in making payments, such as rental payments, albeit again on instructions from those running the operation, etc.…*

Lesser role:

- *Secondary party. Sometimes as "gardeners" tending the plants and carrying out what might be described as the ordinary tasks involved in growing and harvesting the cannabis. Simply be doing their tasks on the instructions of above in the hierarchy. May get paid for the work or subsistence.*
- *Performs a limited function under direction, etc.…"*

28. In paragraph 39, **Jone Seru** v **The State** (supra) mentioned the relevant aggravating and mitigating factors. I will not mentioned the same here because of space.

29. In sentencing offenders, **Jone Seru** v **The State** (supra) in paragraph 35 said as follows:

> "…*Firstly, the court should determine the offender's culpability (role) and then the harm caused (output or potential output). Then, the court should use the starting point given in the Sentencing Table below to reach a sentence corresponding to the role and category identified. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm could merit upward adjustment from the starting point. After further adjustment for aggravating or mitigating features a sentence within the range in the* ***Sentencing Table*** *below should be arrived at. Thereafter, reduction for guilty pleas, time in remand, totality principle etc. would complete the sentencing process…"*

30. The end result was that we have two different Court of Appeal guidelines on the sentencing of offenders on possession/cultivation cannabis offence in Fiji, that is, **Kini Sulua** v **The State** (supra) as against **Jone Seru** v **The State** (supra).

31. Section 6 (1) of the Sentencing and Penalties Act 2009 reads as follows:

> *"…6 (1) On hearing and considering an appeal against sentence the Court of Appeal and the Supreme Court may, on its own initiative or on an application made by a party to the appeal, consider whether to give a guideline judgment or to review a guideline judgment that has already been given..."*

32. Fiji is a country of about 928,784. The United Kingdom has a population of 69 million people. Australia has a population of 26.7 million. New Zealand has a population of 5.2 million (source: www.worldometers.info) Fiji views the menace of drugs very seriously,

given the smallness of its population. As recognized by **Inoke Ratu** v **The State**, CAV 00254 of 2022, Supreme Court, (25 April 2024), paragraph 21, page 100, the maximum sentence for cultivating cannabis plants in England is 14 years imprisonment, in New Zealand it is 7 years imprisonment and in Fiji, it is life imprisonment. The discovery of 4 tons of methamphetamine in Nadi earlier this year, has not soften Fiji's attitude to illicit drugs generally. Some Cabinet Ministers in Fiji are on record by calling for the death penalty for illicit drug traffickers. Looking at the penalties ascribed by section 5 (a) and (b) of the Illicit Drugs Control Act 2004, Fiji has a zero tolerance on illicit drugs.

33. In my view, with respect, the sentencing guideline suggested by **Jone Seru** v **The State** (supra) appears inappropriate for Fiji. In determining culpability, it imports its formula from the UK Sentencing Guideline. In determining culpability, it looks at the role of the offender, that is, whether or not he has a leading role, significant role or lesser role. As His Lordship Mr. Justice Keith had said in **Inoke Ratu** v **State** (supra)

> *"…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…"*

34. In Fiji, with its favourable weather and rich soil, a few subsistence farmers can easily turn inaccessible farm land into a thriving cannabis sativa farm as shown in the cases mentioned in Appendix 1, especially those in Categories 2, 3, 4 and 5. Furthermore, using the above formula in deciding culpability, has the effect of watering down the deterrent effect of the punishment ascribed by s.5 (a) and (b) of the Illicit Drugs Control Act 2004. Section 5 (a) and (b) of the Illicit Drugs Control Act 2004, when compared to England and New Zealand's equivalent legislation on cannabis sativa cultivation, appears to have a zero tolerance effect for such offending. In a small community like Fiji, when compared to England, Australia and New Zealand, cannot be expected to combat and survive an

uncontrollable expansion of an illicit drug trade. An uncontrollable expansion of an illicit drug trade in Fiji will certainly lead it into economic and social ruin.

35. Furthermore, in determining *"Harm",* **Jone Seru** v **State** (supra) looks at the "output or potential output determined by the number of plant/scale of operation (category 0*1, 02, 03 or 04), as described in paragraph 25 and 26 hereof. In my view, with respect, using *"the number of plants"* to determine the *"harm output"* is largely subjective and not precise. Small plants when compared to fully mature plants cannot be said to have the same *"harm output"*. In my view, with respect, the weight of the cannabis sativa plant is more precise in determining the *"harm output"* of the cannabis sativa plants, rather than the number of plants. The arguments in the decided cases of whether or not the cannabis sativa plants are green or dried, is really neither here nor there, because under Schedule 1, Part 8 of the Illicit Drugs Control Act 2004, a cannabis plant includes its fresh version, its dried version or otherwise. Furthermore, in this case, the learned trial judge His Lordship V. S. Perera, used **Meli Bavesi** v **State** [2004] FJHC 93; HAA 0027/2004 as the authority for using the *"harm output"* of the cannabis sativa plants. **Meli Bavesi** (supra) was a decision under the repealed Dangerous Drug Act (Chapter 114), which the Illicit Drugs Control Act 2004 repealed. In addition, **Meli Bavesi** (supra) had been repealed by the majority in **Kini Sulua** v **The State** (supra) see paragraphs 93 to 102, pages 137 to 139.

36. With the objectives of section 4 (1) of the Sentencing and Penalties Act 2009 in mind, and with the majority of the courts using the **Kini Sulua** v **The State** (supra) sentencing guidelines in the cases identified in Appendix 1, and given the zero tolerance of illicit drug offendings in Fiji as shown by the penalties ascribed in section 5 (a) and (b) of the Illicit Drugs Control Act 2004, it is my respectful view that the guidelines in **Kini Sulua** v **The State** (supra) be reviewed and upgraded to apply not only to possession and cultivation of cannabis sativa offences, but also all the offending verbs in section 5 (a) and (b) of the Illicit Drugs Control Act 2004. It is also suggested that weight of the illicit drugs be used to measure *"harm"* and *"culpability"* as described in **Jone Seru** v **The State** (supra). In the context of Fiji, weight of the drugs had been historically used by the

state and prosecution service to measure *"harm"* and *"culpability"* issue. The number of plants planted had not been historically used to measure *"harm"* and *"culpability"*.

37. In the context of Fiji, to plant cassava, dalo, yaqona or marijuana (cannabis sativa), a lot of energy and time had to be devoted to it. Uncontrollable weeds are the enemy of all the above cultivated plants. To grow cassava, dalo, yaqona and/or cannabis sativa (marijuana), continuous weeding out or keeping the weeds under control, is a must from when the plants are small to when they are fully mature. With the good soil and climate in Fiji, if the weeds are not kept under control, it will kill the cultivated plants. Weeding must be done continuously until the plants mature. As the plants grow, their weight also increase. The weight of the cannabis sativa plants, whether growing or mature, is circumstantial evidence of the amount of time and care that had been done to it, to make it grow, and this is evidence, by inferences that, the offending verbs in section 5 (a) or (b) of the Illicit Drugs Control Act 2004 had been committed (i.e. cultivation and/or possession etc.). The weight of the plant will indirectly be evidence of the role each cultivator in the plant played in determining culpability.

38. The weights of the cannabis plants shown in category 3, 4 and 5 in Appendix 1, is evidence of the time and energy each cultivator/possessor/etc. played in having the cannabis plants, etc. The weight of the cannabis plant is therefore direct and indirect evidence of the role that the alleged cultivator/possessor/etc. played in the alleged offending in section 5 (a) and (b) of the Illicit Drugs Control Act 2004. The weight of the cannabis plant will also decide the *"harm, output or potential output"* in the categories identified in Appendix 1. Category 5 is 150 kilograms and over. Category 4 is 10 kilograms to 150 kilograms. Category 3 is 5 kilograms to 10 kilograms. Category 2 is 1 kilogram to 5 kilograms. Category 1 is 0 grams to 1,000 grams (1 kilogram).

39. Having looked at the 84 cases referred to in Appendix 1, and the development of illicit drug offending since 31 May 2012, it is suggested that the **Kini Sulua** v **The State** (supra) sentencing guideline be reviewed and replaced in the following way:

(i) **Category 1: (0 gram to 1,000 grams (1 kilogram)**

In the 84 cases examined, 17 cases came from this category. They were prosecution for possession and/or cultivation etc. of cannabis sativa. The sentences ranged from $100 fine to 6 years imprisonment. In the **Kini Sulua** v **State** (supra) guideline, non-custodial sentence were given for this category. It is suggested that the same punishment be reserved for this category.

(ii) **Category 2: (1 kilogram to 5 kilograms)**

In the 84 cases examined, 17 cases came from this category. Again, they were prosecution for possession and/or cultivation etc. of cannabis sativa. The sentences ranged from 1 year 5 months to 7 years imprisonment. In the **Kini Sulua** v **State** (supra) guideline, the tariff was a sentence of 1 to 3 years imprisonment. It is suggested that the same be reviewed to 1 to 4 years imprisonment.

(iii) **Category 3: (5 kilograms to 10 kilograms)**

In the 84 cases examined, 17 cases came from this category. Again, they were prosecution for possession, cultivation etc. of cannabis sativa. In the **Sulua** v **State** (supra) guideline, the tariff was a sentence between 3 to 7 years imprisonment. The sentences ranged from 2 years 8 months to 16 years imprisonment. It is suggested the same be reviewed from 4 years to 8 years imprisonment.

(iv) **Category 4: (10 kilograms to 150 kilograms)**

In the 84 cases examined, 29 cases came from this category. Again they were prosecution for possession, cultivation etc. of cannabis sativa. The sentences ranged from 3 years to 15 years imprisonment. In the **Sulua** v **State** (supra) guideline, the sentence was between 7 to 14 years imprisonment. It is suggested that the same be reviewed and sentences between 8 to 16 years imprisonment be imposed.

(v) **Category 5: (150 kilogram and above)**

In the 84 cases examined, 4 cases came from this category. Again, they were prosecution for cultivation of cannabis sativa plants. This category was not in the **Sulua** v **State** (supra) category. It is a new category. It is suggested that the tariff should be life imprisonment, with the trial judge at liberty to fix a minimum term

to be served before the accused can apply for a pardon from His Excellency the President.

40. In summary, the five categories are as follows:

(i) **Category 1: (0 gram to 1,000 grams (1 kilogram)**

possession/cultivation/offending verbs of cannabis sativa. Like **Sulua** v **State** (supra), a non-custodial sentence is to be given in this category. With the recent discovery of 4 tons of methamphetamine in Nadi earlier this year, there is no need for the State to waste its resources on this category. The cases can be disposed by fines, community services, counselling, discharge with a strong warning etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.

(ii) **Category 2: (1 kilogram to 5 kilograms)**

possession/cultivation/offending verbs of cannabis sativa. Tariff should be a sentence between 1 to 4 years imprisonment, with liberty to the trial Magistrate/Judge to sentence at what level of the tariff, depending on the mitigating and aggravating factors.

(iii)**Category 3: (5 kilograms to 10 kilograms)**

possession/cultivation/offending verbs of cannabis sativa. Tariff should be a sentence between 4 to 8 years imprisonment, with liberty to the trial Magistrate/Judge to sentence at what level of the tariff, depending on the mitigating and aggravating factors.

(iv)**Category 4: (10 kilograms to 150 kilograms)**

possession/cultivation/offending verbs of cannabis sativa. Tariff should be a sentence between 8 years to 16 years imprisonment, with liberty to the trial Magistrate/Judge to sentence at what level of the tariff, depending on the mitigating and aggravating factors.

(v) **Category 5: (150 kilogram and above)**

possession/cultivation/offending verbs of cannabis sativa. Tariff should be life imprisonment, with liberty to the trial judge to fix a minimum term, depending on the aggravating and mitigating factors, from which to apply for a pardon from His Excellency the President.

E. THE RETROSPECTIVITY OF THE GUIDELINE IN KAITANI

41. I agree with what His Lordship Mr. Justice Brian Keith said in **Inoke Ratu** v **The State** (supra) at paragraph 27, page 12. His Lordship said,

> *"...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..."*

42. This judgment will be issued on 29 October 2024. So after 29 October 2024, the guideline applies to the petitioner's case. The petitioner's sentence was imposed on 16 July 2018. He appealed the sentence to the Full Court of Appeal. The Court of Appeal dismissed his appeal against sentence. He now seeks leave to appeal his sentence to this court. He was sentenced for cultivating 7.9 kilograms of cannabis sativa on 15 September 2016 at Kadavu in the Eastern Division. According to the new guideline, it is a Category 3 offence. The tariff is a sentence between 4 to 8 years imprisonment. The trial judge started with 7 years' imprisonment. The trial judge found no aggravating factors. He deducted 2 years for the mitigating factors. Deducting 2 years from the 7 years would leave 5 years as the balance. Your new sentence is 5 years imprisonment with a non-parole period of 4 years imprisonment, with effect from 16 July 2018. It appears you have served your sentence and you are released forthwith.

43. The following is my Appendix 1:

"***RECORD OF CANNABIS SATIVA CASES AFTER SULUA v STATE***

(AAU 0093 OF 2008), DECIDED ON 31 MAY 2012:

Category 1: [0 gram to 1,000 grams (1 Kilogram)]

Dibi v State, HAA 96/2017 (32grams), Vatuwaliwali v State, HAA45/2019 (111gm), State v Yabakidrau, HAC 29/2019 (752gm), State v Koroi, HAC 110/2018 (1.7gm), Baravilala v State, HAA 011/2018 (4gm), Toga v State, HAA 52/2020 (962gm), Smith v State, HAA 003/2015 (41gm), Davoivoi v State, HAA 009/2015 (487gm), State v Sivonatoto, HAR 008/2012 (480gm), State v Kurunawai, HAM 009/2012 (408gm), Kaicolo v State, HAA 33/2023 (15.6gm), State v Sevakatini, HAC 24/2024 (283gms), Tuinakauvadra v State, HAA 12/2023 (701gms), Navuase v State, HAA 11/2023 (15.4gms), Kumar v State, HAA 24/2022 (9.3gms), Anand v State, HAA 14/2022 (846gms), Mirialolo v State, HAA 22/2018 (1kg)

Category 2: [1 kilogram to 5 kilograms]

Lovobalavu v State, HAA 009/2021 (1kg), Duikoro v State, HAA 22/2019 (1.3kg), Tuidama v State, HAA 29/2016 (2.6 kg), State v Waqavanua, HAC 412/2018 (4kg), Radrodro v State, HAA 20/2018 (1.3kg), State v Bati, HAC 04/2018 (4kg), Narube v State, HAA 08/2018 (1.5kg), State v Dukubure, HAC 076/2017 (4.4kg), State v Tabusoi, HAC 093/2017 (4.9kg), State v Vaganalau, HAR 14/2012 (5kg), State v Qalita, HAR 11/2012 (3.1kg), State v Veimosoi, HAR 016/2012 (1.5kg), State v Leva, HAM 013/2012 (2.5kg), State v Drose, HAM 012/2012 (4kg), Vukitoga v State, HAA 04/2019 (4.3kg), Yavala v State, HAA 11/2017 (4kg), Dralomani v State, HAA 2/2016 (1.3kg)

Category 3: [5 kilograms to 10 kilograms]

State v Ramzaa, HAC 151/2019 (5.5kg), State v Calevu, HAC 211/2018 (6.2kg), State v Nasila, HAC 184/2019 (9kg), State v Kaitani, HAC 355/2016 (7kg), State v Nabenu, HAA 10/2018 (10kg), State v Tobua, HAC 140/2018 (8kg), State v Koroitamana, HAC 69/2017 (7.6kg), State v Matakorovatu, HAC 355/2016 (7.9kg), State v Tabusoi, HAC 156/2017 (8.6kg), State v Dreduadua, HAC 08/2015 (10kg), State v Vimlesh, HAC 31/2012 (6.4kg), State v Tuituba, HAC 23/2015 (7.6kg), State v Bogaga, HAC 157/2013 (5.5kg), State v Prasad, HAC 015/2015 (5kg), State v Naco, HAC 357/2016 (6.9kg), State v Tawake, HAC 128/2017 (8kg), State v Tikotikoca, HAC 16/2023 (6kg)

Category 4: [10 kilograms to 150 kilograms]

Naqiolevu v State, HAA 035/20 (16kg), State v Wasawasa, HAC 069/2021 (10.7kg), State v Kawa, HAC 037/2018 (15kg), State v Delai, HAC 392/2019 (25kg), State v Siva, HAC 324/2018 (15kg), State v Koro, HAC 48/2019 (40kg), State v Ravia, HAC 255/2017 (34kg), State v Ratokabula, HAC 360/2016 (21.9kg), State v Salevuwai, HAC 02/2018 (12kg), State v Vuicakau, HAC 01/2018 (17kg), State v Qaranivalu, HAC 287/2015 (11kg), State v Koli, HAC 333/2016 (18.3kg), State v Tawake, HAC 061/2016 (84.6kg), State v Bai, HAC 50/2015 (20.3kg), State v Kuboutawa, HAC 17/2015

(10.9kg), State v Ratu, HAC 083/2015 (26kg), State v Tavailagi, HAC 041/2015 (43kg), State v Vitukawalu, HAC 288/2015 (11kg), State v Voravora, HAC 052/2015 (33.7kg), State v Vuloaloa, HAC 03/2015 (41kg), State v Vonokula, HAC 84/2015 (119kg), State v Rabuka, HAC 017/2015 (10.9kg), State v Ratuyawa, HAC 051/2013 (69kg), State v Nabulu, HAC 310/2015 (59.5kg), State v Bola, HAC 106/2016 (134.2kg), State v Lal, HAC 161/2023 (36kg), State v Louis, HAC 44/2024 (58kg), State v Bulivou, HAC 16/2019 (61kg), State v Kali, HAC 391/2019 (14kg)

Category 5: [150 kilograms and over]

State v Kurinacoba, HAC 024/2019 (198kg), State v Kaloulia, HAC 064/2015 (160kg), State v Yabakidrau, HAC 29/2019 (369kg), State v Masikerei, HAC 39/2018 (1,046.8kg)"

Calanchini, J

44. I have had the advantage of reading in draft form the judgment of Temo ACJ and agree with his proposed orders and his reasons.

Arnold, J

Introduction

45. I have read the judgment of His Lordship the Acting President in draft. While there is much in the judgment that I agree with, I do not agree that sentencing in cannabis cultivation cases should be by reference to the weight of the cannabis plants involved; nor do I agree with the proposition that sentencing in all forms of cannabis offending falling within the language of section 5(a) of the Illicit Drugs Control Act 2004 should be subject to the proposed weight-based guideline.

46. While I accept that the weight of the cannabis involved could be an appropriate basis for sentencing for some forms of cannabis offending, sentencing in cultivation cases should be based on the nature of the relevant cultivation operation and the extent of the offender's involvement in it. In the Fijian context, these factors are generally best assessed by reference to the number of plants being cultivated. I accept that the maturity of the plants, which will be reflected in their weight, may be a relevant factor in sentencing in

cultivation cases. Where cannabis plants have reached maturity as a result of the care with which they have been farmed, that could be treated as an aggravating feature, or, where appropriate, as an indicator of the sophistication of the operation.

47. But the key features for sentencing purposes in cultivation cases should be the nature and extent of the cultivation operation, which determine the harm involved, and the extent of the offender's involvement, which determine culpability − the number of plants involved is critical to the assessment of both.

48. In this judgment I will attempt to explain the difficulties I see in sentencing on the basis of plant weight in cultivation cases and why sentencing on a basis which utilises the number of plants being cultivated is preferable. In essence, the difficulties with a plant weight-based approach are that:

(a) it does not promote the purposes of sentencing in the context of cannabis cultivation, even taking into account the particular circumstances of Fiji; and

(b) it produces results which are inconsistent as between comparable offenders and often will not accurately reflect offenders' individual culpability, thereby resulting in unjustified inequality of treatment, contrary to the constitutional right to equality of treatment under the law.[1]

49. In addition, I do not agree with the view that sentencing all forms of cannabis offending referred to in section 5(a) of the Illicit Drugs Control Act 2004 – whether acquiring, cultivating, supplying, producing, possessing, using, or administering cannabis – should be by reference to the weight of the cannabis involved. In my view, that approach does not accord with the legislative intent as reflected in the language of the Act and produces anomalous and unfair results as between different classes of offender.

50. I will develop these points below. Before I do so, however, I should make three preliminary points that are relevant to the discussion which follows.

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[1] *Constitution of the Republic of Fiji*, section 26.

Three preliminary points

51. The first point is that the most valuable part of a cannabis plant from a user's perspective is the bud (or flower) produced by female plants. Smaller leaves can also be used, but are of significantly less commercial value than buds. Male plants are needed to fertilise the female plants, but professional cultivators in other jurisdictions remove any male plants as soon as they are identified as pollination of the female plants reduces the desirability of the buds (or alternatively, producers may use "feminised" seeds which produce mainly female plants). I do not know what the position is in Fiji, but I assume that those such as the petitioner who cultivate cannabis focus on female plants.

52. Second, there is a significant difference in weight between a fresh cannabis plant taken from the soil and one that has been dried out. Estimates of the difference vary, but as a general proposition, it seems likely that a dried cannabis plant will be about one quarter of the weight of the plant when fresh (this may be affected by whether the roots are attached). In other words, a high percentage of a fresh plant is water. Again, I do not know what the weight difference between a fresh mature cannabis plant and the same plant dried will typically be in Fiji, but I will use the 1:4 ratio for the purposes of discussion. Even if the ratio in Fiji differs, it will not affect the validity of the points made.

53. Third, as the previous paragraph implies, one of the difficulties in preparing a guideline judgment in relation to cannabis cultivation in Fiji is that the Court does not have before it all the necessary data about cannabis operations here, as will become apparent in the course of this judgment. More comprehensive information is needed to enable the sentencing response to cannabis offending to be properly tailored in light of the purposes of sentencing.

Purposes of sentencing for cannabis cultivation offending

54. Section 4(1) of the Sentencing and Penalties Act 2009 sets out the purposes of sentencing. Those purposes are punishment, protection of the community, specific and general deterrence, rehabilitation of offenders and denunciation. As the Acting President has

graphically explained, drug offending, particularly cannabis offending, is a significant problem in Fiji.

55. I agree with the Acting President that the focus in terms of law enforcement and sentencing should not be on low level offenders (eg, individual cannabis users) but on more significant offenders, especially those who cultivate cannabis for commercial purposes. This is particularly important in Fiji because, as I understand it, the illegal cannabis market here is supplied by locally grown cannabis rather than imported product. The sentencing of commercial cannabis cultivators should focus primarily on deterring them and others from undertaking cannabis cultivation on a commercial scale. Sentences aimed at deterring actual and potential offenders will serve the purposes of punishment and denunciation, and, if effective, will also protect the community.

56. The cultivators who threaten the greatest harm are those who conduct large-scale, well organised, sophisticated cultivation operations producing high-quality product for the illegal market. As the Acting President has pointed out, this Court in *Ratu v State* noted that experience in Fiji to date has been that cannabis cultivation operations here are not the type of large-scale sophisticated operations that occur in other countries.[2] Typically, those overseas operations involve indoor growing rooms, artificial lighting and heating, drying rooms, high-producing female plants and so on. In Fiji climatic conditions mean indoor production is not required and many of those involved in cannabis growing are ordinary farmers, whose growing operations are not particularly sophisticated or highly organised. As I have said, importation of cannabis for the local market does not appear to be a significant problem – the cannabis used in Fiji seems to be grown in Fiji.

57. The present case is typical of cannabis cultivation offending. The number of plants was large (824) but they were in varying stages of development (from 12 cms to 129 cms in height) and were grown at a farm alongside other crops. Apart from the number of plants involved, there was nothing to indicate a well-organised or sophisticated operation. Accordingly, I agree with the Acting President that it is not appropriate simply to take a sentencing approach developed overseas and apply it unchanged in Fiji. Obviously, the

[2] *Ratu v State* [2024] FJSC 10, at para [24].

particular characteristics of offending in Fiji must be reflected in the sentencing approach adopted.

58. That said, overseas experience can provide useful lessons. The experience of comparable jurisdictions, such as England, Australia, Canada and New Zealand with similar traditions and values, may show a general consensus about how sentencing in particular areas is best approached or offer insights into what approaches seem to work and what do not.

59. In attempting to meet the purposes of sentencing in relation to the cultivation of cannabis, courts need to consider two factors in particular − the culpability of the offender and the harm, actual or potential, flowing from their actions. When considering the offender's culpability it is useful to ask how the offender viewed their cultivation activities − were they cultivating so as to access cannabis for themselves and their immediate associates? or were they cultivating to supply the market generally? Assessing the harm, actual or potential, flowing from the offender's activities requires analysis of the particular activities in question – what was the nature and extent of the cultivation? what degree of organisation was involved? how sophisticated were the growing and other techniques utilised? what connections did the cultivator have with those who processed and sold cannabis? This must be done against the background of the importance to the illegal cannabis market of local cannabis cultivations.

60. The Acting President states that culpability and harm in relation to all cannabis offending including cultivation are best measured by the weight of the illicit drugs involved. In my view, at least in the context of cannabis cultivation, the answers to questions of culpability and harm can best be found in the number of plants involved in the cultivation rather than in the weight of the plants, as I shall attempt to show.

The two approaches – plant weight and plant number

61. As the Acting President has noted, trial judges have taken different approaches in relation to sentencing for cannabis cultivation offending, arising from the decisions of the Court of Appeal in *Sulua v State*[3] and *Seru v State*.[4] The background to this is important.

[3] *Sulua v State* [2012] FJCA 33.
[4] *Seru v State* [2023] FJCA 67.

62. In *Sulua v State*, the appellant was convicted of possession of nine packs of dried cannabis leaves, weighing 5.2 kilograms. The majority of the Court set out four categories of offending based on weight and set out tariffs for each category. While the case involved possession of dried cannabis leaves, the categories were said to apply as well to all types of cannabis offending covered by the words "acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers" used in section 5(a) of the Illicit Drugs Control Act.

63. As the Court of Appeal in *Seru v State* noted, Magistrates and High Court Judges did not always adopt the *Sulua* approach when sentencing in cultivation cases. This was because they considered that there were difficulties in applying a weight-based approach when sentencing for cultivation offences.

64. An example given by the Court was *Tuidama v State*.[5] That was an appeal to the High Court against a sentence imposed by a Magistrate in a cannabis cultivation case. The High Court Judge noted that the cannabis in *Sulua* was in the form of dried leaves; the cannabis in the case before him was in the form of 13 "green" (or fresh) cannabis plants. Accordingly, the tested weight (2.68 kilograms) included stems and the water content of the plants; it may also have included the weight of the roots. The Court concluded that the *Sulua* guideline could not be used given the difference between "dry" and "green" cannabis plant weights and suggested that if weight was to be the critical factor for sentencing purposes, some further regulation might be required to ensure that the same things were being weighed, ie to ensure "like for like" comparisons.

65. Similarly, the sentencing Judge in the present case did not consider it right to follow the *Sulua* guideline given that he was dealing with a cultivation case.[6] The Judge pointed out because the *Sulua* guideline is based simply on weight, in some cases it would not adequately reflect the seriousness of the offending and in other cases would overstate the seriousness. The Judge included a table listing the number of plants and the weights involved in eight cultivation cases. There was no correlation between numbers and weights; rather, there was wide variation – 824 plants weighing 7.98 kilograms in the

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5 *Tuidama v State* [2018] FJHC 539.
6 *State v Kaitani - Sentence* [2018] FJHC 605.

present case; other cases involving: 484 plants weighing 160.6 kilograms; 228 plants weighing 26.4 kilograms; 127 plants weighing 8.60 kilograms; 94 plants weighing 41 kilograms; 74 plants weighing 4.34 kilograms; 34 plants weighing 10 kilograms and 13 plants weighing 2.60 kilograms.

66. The Court of Appeal also said in *Seru* that the courts which did not adopt the *Sulua* approach generally took a "numbers of plants" approach. The Court decided that it should adopt a similar approach in its guideline judgment.

67. It is important to emphasise, however, that the Court of Appeal's guideline in *Seru* involves more than simply a "number of plants" approach. This is because it looks at culpability in terms of the offender's role in the offending – ie, whether it was a leading, significant or lesser role – and assesses harm by looking at the nature of the cultivation – ie, was it a large, medium or small scale commercial operation (each involving a decreasing level of sophistication and organisation), or a small operation for individual use. But in the Court's guideline, the numbers of plants involved provide useful indicators of the category into which particular cultivation operations fall. The sentencing "grid" developed in *Seru* combined features from the New Zealand case, *R v Terewi*,[7] the UK Sentencing Guidelines for drug offences, as well as elements developed by the Court, in particular the numbers of plants for each category.

68. Subsequent to *Seru*, both this Court (in *Ratu v State*) and the Court of Appeal (in cases such as *Kaloulia v State*[8] and in the present case)[9] have applied the *Seru* guidelines in cannabis cultivation cases. The question is whether this Court should endorse the plant weight approach over the plant number approach. I believe that it should not.

69. As I indicated at paragraph [48] above, I see two significant deficiencies in sentencing cannabis cultivation offending on the basis of plant weight:

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7 *R v Terewi* [1999] NZLR 62 (CA).
8 *Kaloulia v State* [2024] FJCA 107.
9 *Kaitani v State* [2023] FJCA 134.

(a) it does not promote the purposes of sentencing in the context of cannabis cultivation, even taking into account the particular circumstances of Fiji; and

(b) it produces results which are inconsistent as between comparable cannabis cultivation offenders and often will not accurately reflect their individual culpability, therefore resulting in unjustified inequality of treatment, contrary to the Constitution.

In addition, I consider that sentencing all forms of cannabis offending – acquiring, supplying, possessing, producing, manufacturing, cultivating, using, or administering – by reference to the weight of the cannabis involved is inconsistent with the statutory language and produces anomalous and unfair results as between different classes of offender.

Plant weight approach in sentencing for cannabis cultivation

70. In the present case, the police seized 824 plants on 15 September 2016. The plants were analysed by the Police Forensic Chemistry Laboratory 5 days later, on 20 September 2016. The plants were referred to in the analyst's report as "dried plants". In other words, they had lost a substantial amount of their water content, although they may not have been completely dried out at that stage. The total weight of the 824 plants was almost 8 kilograms (7975.7 grams). The analyst stated in her report that to be classified as "plants" the samples had to have "all the parts of the plant intact especially its roots". In her oral evidence she indicated that the height measurement included the roots; however, it appears that the roots were cut off the plants before they were weighed.[10]

71. The analyst weighed the plants in bundles. Their weight varied greatly. For example, one bundle of 50 plants weighed 3.25 kilos (ie, almost 41% of the total weight of the 824 plants); another bundle of 50 plants weighed 273.1 grams; two bundles of 100 plants each weighed 100.4 grams and 102.2 grams respectively; a bundle of 111 plants weighed 31.7 grams and so on.

[10] When describing the testing process, the witness said: "After the height is noted, roads are cutoff to take the weight". I have assumed that the word "roads" in the transcript is a typographical error and should be "roots".

72. Together with the plant height differentials (see paragraph [57] above), these weights indicate that the cannabis plantation was at a relatively early stage of development and that the plants differed considerably in size. The likely reason for this is that the petitioner and his co-offender received a tip-off that the police were coming to raid the farm and set about pulling the cannabis plants up before they arrived. They were still in the process of pulling out the plants when the police and their army escort reached the farm. Had the police conducted the raid a month or two later, the plants would have been significantly bigger and their weight substantially greater, moving the petitioner into a higher weight-based sentencing band.

73. This illustrates two points:

(a) The first is that the plant weights in a cultivation case will depend on the point of time in the growing cycle that the offender's plantation is discovered. If the crop is well advanced, the weight of the plants will be greater than would be the case where the crop is newly planted. In this sense, sentencing on the basis of plant weight involves a significant element of chance, with cultivators being in higher or lower bands depending on when in the growing cycle their plantations are discovered.

(b) This leads on the second point, namely that the plant weight-based approach does not accurately reflect individual culpability. Assume, for example, that two farmers, A and B, live in different areas and each decide to plant 600 young cannabis plants on their farms intending to sell the product to middlemen for sale to users. A's plantation is discovered by police a month or so after it is planted; B's is discovered four or five months after it is planted. On a plant weight-based approach (and ignoring any individual aggravating or mitigating circumstances), A would receive a significantly lighter sentence than B. Yet, from the perspective of personal culpability, each is in essentially the same position – both have planted 600 cannabis plants, both intended to sell the mature plants to middlemen to supply the illegal cannabis market, and both have worked on their farms to tend their plants so as to achieve their commercial objective, albeit that one has

worked longer.[11] Not only are A and B in essentially the same position in relation to their individual culpability, they are in the same position in relation to the other relevant purposes of sentencing − deterrence, denunciation and protection of the public.

74. Moreover, given that the weight of a fresh cannabis plant will be significantly higher than the weight of a dried plant, I do not agree with the Acting President's observation that arguments about whether cannabis plants are green or dry "are neither here nor there".[12] As I have noted, such arguments are one illustration of why sentencing judges found plant weight-based sentencing difficult in cannabis cultivation cases.

75. As the Acting President says, the Illicit Drugs Control Act treats both fresh and dried cannabis plants as being the same, in the sense that they both fit within the definition of "cannabis plant" in Schedule 1, part 8 of the Act. But for a sentencing regime based on weight, it is important that like is compared with like if consistency in sentencing is to be achieved. Consistency in sentencing is an important value, reflected in the constitutional right to equality of treatment under the law.

76. Given that a dried cannabis plant will weigh significantly less than the same plant when fresh, a weight-based approach is likely to produce marked discrepancies in sentences. For example, assuming a weight differential between fresh and dried plants of 1 to 4, cultivation of 25 fresh plants might fall within the same weight-based sentencing band as cultivation of 100 similarly sized dried plants, yet the scale of the two cultivation operations is likely to be very different. Or, to give another example, a cultivator with 100 fresh plants may be in a higher weight bracket than a cultivator with 100 similarly sized dried plants simply as a result of the weight differential between fresh and dried plants. Given that this weight differential will result simply from the presence or absence of water in the plants, it is difficult to see how it indicates different culpability as between the two offenders or a difference in the harm threatened by their activities. To treat two cases as dissimilar for sentencing purposes when there is in fact no relevant difference

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11 This could be treated as an aggravating feature on the plant-based approach.

12 At para [35] above.

between them distorts sentencing principles and is corrosive of public confidence in the criminal justice system.

Plant number approach in sentencing for cannabis cultivation

77. By contrast to the plant weight approach, the plant number approach does measure individual culpability on an equal footing, but allows for variations to reflect individual circumstances, for example, the greater time that farmer B in the example above will have spent in tending his cannabis plants. Looked at in terms of offender culpability, the fact that A and B each planted 600 plants tells us something about how each viewed his operation. Clearly, the cannabis to be produced from the plants was not for personal use – both farmers were undertaking commercial enterprises. Typically, they would not be sophisticated operations, although their scale can be regarded as significant. Turning to the issue of the harm (actual or potential) posed by the offender's activities, the harm posed by the farmers' cultivation activities was the same − both intended to provide the raw material for the production of useable cannabis for illegal sale. One was closer to reaching his objective than the other, but that could be dealt with as an aggravating feature of his offending.

78. The Acting President criticises the plant-based approach as "largely subjective and not precise" and says that "small plants when compared to fully mature plants cannot be said to have the same '*harm output*' (see paragraph [35] above).

79. As to the first point, the number of plants is both objective and precise – simply a matter of counting the plants in the particular cultivation, testing them to ensure they are cannabis plants and (possibly) making an assessment of their maturity.

80. As to the second point, young plants may not produce any, or as much, useable product as mature plants, but that is simply a matter of timing – it depends on where the plants are in their growth cycle at the time the authorities discover and destroy the cultivation. In order to assess harm (which will often be potential rather than actual harm because the cultivation will have been discovered and closed down) and to achieve the other purposes of sentencing, it is necessary to focus on the nature and extent of the operation and the threat it poses. In the example above, farmer A's cannabis cultivation was raided when

the plants were young, farmer B's when the plants were more mature. But both posed an equal threat and could have caused similar harm if they had succeeded in their plans. Culpability is similar, even though one got closer to the ultimate objective than the other.

Same weight-based sentencing regime for all cannabis offending

81. The Acting President states that cultivation and possession should be subject to the same weight-based sentencing regime, along with acquiring, supplying, producing, using, or administering cannabis: see paragraph [36] above. There are at least two problems with this.

82. The first is that the weight-based approach clearly cannot apply to some types of cannabis offending, administering cannabis in particular. "Administering" involves assisting a person to take something, generally something remedial like medicine. In the context of cannabis, what is administered is most likely to be cannabis oil, which can be highly potent. It might also include making food (eg, cakes or slices) with cannabis in them to be eaten by others. But either way, it makes no sense to apply weight-based sentencing in that context.

83. The second and more fundamental problem is that the cannabis product in possession cases, particularly those involving possession for supply, will generally be very different from the uprooted cannabis plants in cultivation cases, yet each is to be assessed in terms of the weight categories set out in the Acting President's judgment. In possession cases, the product possessed is likely to be the buds and/or useable leaves of cannabis plants (as in *Sulua*) rather than the entire plants. Equating that useable product with entire plants for sentencing purposes is likely to significantly distort sentencing outcomes − three kilograms of good quality cannabis product is very different from three kilograms of cannabis plants, whether wet or dried.[13]

[13] The sentencing Judge in the present case noted that under the UK Sentencing Guidelines as they were at the time of sentencing (July 2018), the assumed yield of a cannabis plant was 40 grams. In the most recent version of those Guidelines, the assumed yield of a cannabis plant has been increased to 55 grams, to reflect the use of more sophisticated production methods and the cultivation of higher yield plants. The assumed yield of the plants is a useful way of assessing the nature and scope of cultivation activities. It is not an

84. The majority in *Sulua* and the Acting President in this case consider that the courts are required to adopt this "one size fits all" approach because of the language of the Illicit Drugs Control Act. I do not agree. In my view, the Legislature has done in the Illicit Drugs Control Act what it generally does in criminal enactments, namely, it sets the maximum sentences in terms of fines and/or imprisonment and leaves it to the courts to determine, within those broad constraints and the principles set out in the Sentencing and Penalties Act, the matters relevant to fixing sentences as between different types of offending and different types of offender. That this is a legitimate function of the courts is clear from the fact that the courts are given the power in the Act to issue guideline judgments.

85. The Illicit Drugs Control Act is extraordinarily broad in its terms, covering numerous different drugs. I have already referred to the wide-ranging listing of the activities covered in section 5(a) and to the breadth of the definition of "cannabis plant". Equally broad is the definition of "cultivate":

> **cultivate** means planting, sowing, scattering the seed, growing, nurturing, tending or harvesting and also includes the separating of opium, coca leaves, cannabis and its extracts from the plants from which they are obtained; and **cultivation** has a corresponding meaning.

Given the breadth of the Act's coverage, the need for appropriate guideline judgments is clearly pressing.

86. As I see it, it is critical in a society such as Fiji which is committed to the rule of law, that sentencing be principled, rational, transparent and understandable to offenders and to the general public. If there are principled and rational arguments that sentencing in cultivation cases needs to be approached differently from sentencing in possession cases to help achieve the purposes of sentencing, differentiation is justified − indeed, necessary.

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arbitrary figure but one based on scientific analysis and experience. Unfortunately, there does not seem to be any information available on the likely yield of cannabis plants in Fiji, so I take this aspect no further.

87. I agree with the Acting President that the Illicit Drugs Control Act demonstrates that the Legislature regards drug offending as a matter of significant concern. But that does not mean that occasional users of cannabis have to be treated with the severity that would be applied to commercial suppliers, as the Acting President acknowledges. It is up to the courts to perform their usual function in relation to sentencing of developing appropriate guidelines which address the positions of the different classes of offender and the different types of offending. That may well result in differences of approach as between, say, possession and cultivation offending. That does not undermine legislative intention but rather shows that the courts are performing their expected role.

Conclusion on plant weight and plant number approaches in cannabis cultivation sentencing

88. I agree with the Acting President that there needs to be clarity for the future concerning the approach to be adopted to sentencing in cannabis cultivation cases. I also agree that the principal focus should be on those involved in commercial cannabis operations. But in my view, applying the same weight-based approach to all forms of cannabis offending as in the Acting President's proposed guideline will lead to results which do not serve the purposes of sentencing and are fundamentally unjust as between offenders. Treating all forms of cannabis, whether processed for users (such as buds and leaves) or unprocessed (such as whole plants, both fresh and dried) as falling within the same weight categories for sentencing purposes lacks any rational justification.

89. I consider that the general approach developed in *Seru* better reflects the purposes of sentencing in the context of cannabis cultivation offending than the weight-based approach developed in *Sulua* in a possession context. I accept that the *Seru* guidelines are more complex than they need to be and require some further modification to make them reflect more accurately the situation in Fiji. To improve the guidelines in that way, the Court would need more and better information about illicit cannabis activities in Fiji, which should come from those who have the necessary knowledge, experience and expertise.

90. Subject to the caveat that I do not consider that the Court has before it all the information necessary to formulate a guideline judgment for cannabis cultivation offending, I would

modify the *Seru* approach as follows. To assess harm I would have four categories for the sentencing of cannabis cultivation, along the following lines:

(a) cultivation for personal use without sale to any other party, generally involving no more than 5 or 6 plants: sentences other than imprisonment to be considered, but imprisonment up to 2 years available;

(b) small commercial cultivation operations, generally involving up to 50 plants: between 3 – 10 years imprisonment;

(c) medium sized commercial cultivation operations, generally involving 50 to 120 plants: 5 – 14 years imprisonment;

(d) large-scale commercial cultivation operations, involving over 120 plants: 7 – 20 years imprisonment.

91. This tentative guideline does not provide for the maximum penalty of life imprisonment, which is available under the Illicit Drugs Control Act for drug offending. While there are instances of drug offending that should, in my view, attract life imprisonment (eg persistent large scale manufacture of methamphetamine), I find it difficult to imagine a cannabis cultivator in Fiji whose activities would be such as to attract the sanction of life imprisonment. However, should there be such a case, that sentence could be imposed, given that guidelines are simply guides.

92. In terms of the culpability of the offender, I would not adopt the offender roles identified by the Court in *Seru* to create a sentencing grid. To my mind, such a grid creates added complexity but does not provide great assistance in the Fijian context. Rather, sentencing judges should look at the part played by the offender in the offending and address that in the context of the aggravating and mitigating factors relevant to the offender.

The present case

93. After deducting time served, the trial Judge sentenced the petitioner to imprisonment for 14 years, two months, with a non-parole period of 10 years, two months. On appeal, this sentence was upheld, although the Court of Appeal recalculated the sentence in

accordance with the *Seru* guidelines. Applying the guideline proposed in his judgment, the Acting President would quash this sentence and replace it with a sentence of five years imprisonment with no non-parole period. Instinctively, that sentence seems unduly lenient given the extent of the petitioner's cultivation and the harm it threatened.

94. On my tentative guideline[14], the petitioner would fall within the large-scale commercial operation category of 7 – 20 years. The authorities indicate that there are different ways of calculating where within the tariff range the offending at issue falls. Either the sentencing judge can start at the bottom of the range and then identify all the aggravating and mitigating factors related to the offence to reach a final view about where within the tariff range the particular offending sits. (Starting at the bottom of the range avoids any risk of double counting.) Or, having identified all the aggravating and mitigating factors relevant to the offence, a sentencing judge can identify the appropriate starting point within the range in light of those factors (sometimes referred to as the adjusted starting point).

95. Either way, I see this offending as sitting towards the upper end of the range, principally because of the size of the cultivation and its threatened harm. This cultivation involved 824 plants, which is many more plants than in most cultivation cases, albeit not as many as in the worst cases where two or, in one case, three thousand plants were cultivated.

96. My adjusted starting point would therefore be 17 years imprisonment. The petitioner had a significant role in the cultivation, but like the trial Judge, I would make a deduction of two years for personal mitigating factors. This leaves a sentence of 15 years. I would fix a non-parole period of 11 years. I would then deduct from both figures the time the petitioner spent on remand, which was one year, 10 months. This produces an end sentence of 13 years, two months, with a non-parole period of 9 years, two months.

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[14] Since I am in the minority and simply illustrating how I would approach Sentencing, I will not address the issue of retrospectivity.

97 **Orders:** **(*Arnold J dissenting)***

(i) Application for leave to appeal against conviction is refused.

(ii) Application for leave to appeal against sentence is granted.

(iii) Appeal against sentence allowed.

(v) Order of the Court of Appeal on 27 July 2023 on sentence is set aside.

(vi) The High Court sentence of 16 July 2018 is set aside, and in substitution thereof, a head sentence of 5 years imprisonment, with 4 years non-parole period, is imposed therefrom.

The Hon Mr. Justice Salesi Temo

ACTING PRESIDENT OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon Mr. Justice William Calanchini

JUDGE OF THE SUPREME COURT

The Hon Mr. Justice Terence Arnold

JUDGE OF THE SUPREME COURT