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

CRIMINAL APPEAL NO. AAU 121 OF 2014
[High Court Case No. HAC 051 of 2013 S]

BETWEEN	:	**NEMANI RATUYAWA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Calanchini, P** **A.F.T Fernando, JA** **Wengappuli, JA**
Counsel	:	**Mr. J. Savou for the Appellant** **Mr. L. J. Burney and Ms. B. Kantharia for the Respondent**
Date of Hearing	:	**8 February 2016**
Date of Judgment	:	**26 February 2016**

JUDGMENT

Calanchini P

I have read the draft judgment of A. Fernando JA and agree that the appeal against conviction should be dismissed. I also agree that the sentence imposed should be reduced in the manner proposed in his judgment.

Anthony F. T. Fernando JA

1. The Appellant has appealed against his conviction for unlawful cultivation of illicit drugs, namely 221 plants of cannabis sativa, weighing 69.5 kilograms, contrary to section 5(a) of the Illicit Drugs Control Act 2004; by the learned High Court Judge at Suva on the 13th of

June 2014 and the sentence of 15 years imprisonment imposed on him with 14 years as non-parole period. The Appellant had been convicted on his own plea of guilt.

2. The Appellant had filed his Notice of Appeal after being granted an extension of time to file the notice of appeal on an order made by the single Judge of this Court.

3. The Appellant had been earlier convicted in the Magistrates Court at Suva in respect of the same offence following his guilty plea and had been sentenced on the 13th of April 2012 to a term of imprisonment of 1 year, 5 months and 17 days.

4. The trial before the learned High Court was in consequence of an order made by the learned High Court Judge on the 19th of October 2012 in exercising the revisional powers of the High Court pursuant to section 260 of the Criminal Procedure Decree 2009, wherein the learned High Court Judge had quashed the conviction and sentence of the Magistrate's Court and remitted the matter to the Chief Magistrate at Suva with the direction to transfer the matter to the High Court for trial.

5. The Chief Magistrate had, by his Order dated 6th of February 2013 transferred the case to the High Court at Suva.

6. I have no doubt that the High Court in view of the provisions of **Section 260(1) of the Criminal Procedure Decree 2009**, has the jurisdiction to "call for and examine the record of any criminal proceedings before any Magistrate's Court for the purpose of satisfying itself as to-

   a) *The correctness, legality or propriety of any finding, sentence or order recorded or passed; and*

   b) *The regularity of any proceedings of any Magistrate Court..."; and in view of the provisions of section 256(2)(a),(b),(d) and (e) of the Criminal*

Procedure Decree 2009 to "…..reverse……...the decision of the Magistrate Court", and to order that the case be transferred before the High Court for trial. (emphasis added by me).

7. The quashing of the conviction and sentence and the transfer of the case before the High Court had been based on the Court of Appeal judgment in **Kini Sulua and Michael Ashley Chandra v The State,** Criminal Appeal No. AAU 0093 of 2008 and AAU 0074 of 2008, which was delivered on the 31st of May 2012. It had been the view of the learned High Court Judge that when the Appellant had been convicted and sentenced by the Magistrates Court, "the learned Chief Magistrate did so, without the guidance of **Kini Sulua and Michael Ashley Chandra v The State**. Strictly speaking it was not the fault of the Learned Chief Magistrate, as the above judgment was yet to be delivered on 31st May, 2012. In any event, subject to any decision of the Supreme Court of Fiji, the majority decision in **Kini Sulua and Michael Ashley Chandra v The State** (supra) must be followed, at least in the Magistrate Courts."(emphasis added by me). The **Kini Sulua** case had laid down the guidelines to be followed in sentencing in cases of possession of cannabis sativa and had devised four categories dependant on the weight of the illicit drugs.

8. The learned High Court Judge had then gone on to state that although the above four categories "referred to 'possession' offences only, by virtue of paragraph 116 of my judgment in **Kini Sulua and Michael Ashley Chandra v The State** (supra), the categories applied to 'cultivation' offences also. What is important is the weight of the illicit drugs involved, as determined by the government analyst's certificate." This case according to the learned High Court Judge fell into the fourth category in view of the weight of the illicit drugs being over 4kg, which called for the highest sentence, namely one between 7 to 14 years imprisonment. The learned High Court Judge had therefore determined: "By virtue of the authority of the majority decision in **Kini Sulua**, the Magistrate Court had no jurisdiction to try category 4 cases – see paragraph 119, pages 58 and 59 of the above decision. The Magistrate Court should have transferred the three cases to the High Court for trial."(emphasis placed by me). Thus the issue according to the learned High Court Judge was one of jurisdiction and one which had arisen as a result of a

superior appellate court decision that had not been delivered at the time the Appellant was convicted and sentenced.

9. At the very outset I am in a difficulty to understand how the Magistrate's Court in the instant case should have, as stated by the learned High Court Judge, 'followed' the decision in **Kini Sulua**, which had not been delivered at the time the Appellant was convicted and sentenced in the Magistrates Court at Suva on the 13th of April 2012. The decision in **Kini Sulua** had been delivered on the 31st May 2012.

10. In applying the **Kini Sulua** case the learned High Court Judge had contravened the provisions of **Article 14(2)(n) of the Constitution** which provides: "*every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.*"

11. The Appellant's single ground of appeal against the conviction is to the effect:

> *"The learned High Court Judge erred in law by quashing the conviction of the Magistrate Court and retaining jurisdiction of the matter on the basis that the Magistrates Court had no jurisdiction to try the matter by virtue of the majority Court of appeal decision in Kini Sulua despite the existence of statutory provisions namely sections 4 and 5 of the Criminal Procedure Decree 2009 which deals with jurisdiction of criminal trial matters."*

12. The Appellant had also appealed against his sentence on the following grounds:

> *"The learned High Court Judge caused the sentence to be harsh and excessive in light of the following:*
>
> *i. When he made erroneous observations whilst accounting for aggravating features of the offending by stating that marijuana consumption was notorious with family miseries without any evidence to support such a conclusion;*

ii. *By failing to discount the term of imprisonment already served that is April to October 2012 from his final sentence;*

iii. *Fixing a non-parole too close to the head sentence."*

13. It is the submission of the Appellant that the ground of appeal against conviction purports to establish two issues in need of determination by this Court, namely:

i. *"Whether the Court of Appeal decision in* ***Kini Sulua*** *(supra) has retrospective effect thereby depriving the Magistrates Court of jurisdiction in respect of category 4 drug offences; and*

ii. *Whether section 5(2) of the Criminal Procedure Decree 2009 allows a Magistrates Court to retain jurisdiction to hear and determine all offences under section 5 of the Illicit Drugs Control Act 2004."*

14. The single Judge of this Court in his decision granting an extension of time to file a notice of appeal had identified the same issues warranting a determination of this Court. I am also in agreement with the single Judge of this Court that the decision of the High Court is appealable to this Court under Section 22(1) read with 22(2) of the Court of Appeal Act as the grounds raise against conviction is essentially "a question of law" and thus in accordance with Section 22(1) of the Court of Appeal Act and the challenge to the sentence being, that it "was passed in consequence of an error of law"; is in accordance with Section 22(1A)(a) of the Court of Appeal Act. It had been stated by the Supreme Court of Fiji in the case of **Simeli Bili Naisua v The State**; Criminal Appeal No. CAV 0010 of 2013 that the issue of jurisdiction to try an offence is a point of law.

15. **Section 5(2) of the Criminal Procedure Decree 2009** states:

"When no court is prescribed in any law creating an offence and such offence is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Court in accordance with any limitations placed on the jurisdiction of classes of magistrate prescribed in any law dealing with the administration and jurisdiction of the Magistrates Courts."

16. **Section 5 of the Illicit Drugs Control Act 2004** which creates the offence of cultivation of illicit drugs does not prescribe the court nor state whether the offence is an indictable or

a summary offence. I am therefore of the view that the offence is triable by the Magistrate's court subject to the limitations set out in section 5 pertaining to sentence. There is no evidence of the Magistrate having acted contrary to such limitations.

17. Learned Counsel for the Appellant submitted that the retrospective operation of 'statute law' is limited and that too in relation to procedural matters. Citing the case **Yunus v State** [2013] FJSC 3; CAV0008.2011 (24 April 2013) which makes reference to the cases of **Colonial Sugar Refining Company Limited. v Irving** (1905) A.C. 369, Counsel submitted that the situation has to be different where the retrospective application would in effect take away a vested right or where a new disability or obligation has been created by the statute.

18. Learned Counsel for the Respondent submitted that the settled position in common law is that the retrospective effect of a judicial decision is excluded from cases already finally determined. He has cited the case of **Cadder v Her Majesty's Advocate** [2010] UKSC 43 which derived guidance from the judgment of Murray CJ in **A v The Governor of Arbour** Hill Prison [2006] 4 IR 88, 177 wherein it was held: "....*That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position.*" Cases which have not yet gone to trial, cases where the trial is still in progress and appeals that have been brought timeously but have not yet been concluded may be re-opened on the basis of a subsequent decision as stated by Lord Hope in the **Cadder** case. But to suggest that all previous cases should be capable of being reopened or re-litigated in the light of subsequent decisions would in the opinion of Murray J. render a legal system uncertain, incoherent and dysfunctional and its consequences would cause widespread injustices.

19. As stated earlier, the Appellant was sentenced by the Magistrate's Court at Suva on 13th April 2012. The judgment in **Kini Sulua** was handed down on 31st May 2012, after the appeal period had expired and thus the Appellant's case had been finally determined. The Respondent has argued that there is no specified period for the exercise of revisionary

jurisdiction of the High Court and thus there is no time period specified for the final determination of Magistrate Courts proceedings. This may if the time period is long amount to a contravention of **Article 15(3) of the Constitution** which states: "*Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.*" However I find the time period within which the revisionary powers had been exercised had been just over six months.

20. In answer to the two issues, referred to in paragraphs 11, 13 and 14 above, left for the determination of this Court, I am of the view that the Magistrates Court had the jurisdiction to try all offences created by the Illicit Drugs Act 2004 in view of the clear provisions in Section 5(2) of the Criminal Procedure Decree 2009 and a Court is not competent to amend the Illicit Drugs Act, prospectively or with retrospective effect. That is a matter for the Legislature and to act contrary to this would be a violation of the principle of Separation Powers ingrained in our Constitution.

21. I am of the view that the learned High Court Judge was in error to have quashed the conviction of the Magistrate's Court. What the learned High Court Judge should have done was to have called for the record from the Magistrates Court and maintained the conviction and only vary the sentence, in view of the fact that the sentence was totally inadequate. Since the Appellant had pleaded guilty before the High Court, I would therefore dismiss his appeal against conviction as I consider that no substantial miscarriage of justice had occurred.

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

"Category 1 – The growing of a small number of cannabis plants for personal use by an offender or possession of small amount of cannabis coupled with "technical" supply of the drug to others on a non-commercial basis. First offender a short prison term, perhaps served in the community. – Sentencing point 1 to 2 years.

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

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

23. In **Meli Bavesi,** Winter J had stated:

"I emphasise that these indications relate to starting points before aggravating features (like previous offending) or mitigating features (like early guilty pleas) are applied. In addition there will of course have to be focus on the quantities of drugs involved and their relationship to the 3rd schedule of the decree, not forgetting Pickering (supra) and the disproportionality test.

In my view it is time to recognise that the true culpability of these offenders lies in their degree of involvement and profit from this offending. There is no logical reason why possession of cannabis for the purposes of supply should be treated any more leniently than offences involving actual sale or trafficking. If the intention is to make money out of supply the inevitable consequence is lengthy terms of imprisonment.

When set in this context the quantities of drugs found in an offenders' possession simply delineate a proper context within which enquiry might be made about the degree of involvement of the offender. In this way appropriately stern sentences can be reserved for those who would possess the drug for the purpose of supply. Addressing that specific evil will send a clear message that supply for commercial gain even on a casual basis will inevitably involve lengthy sentences of imprisonment."

24. Unfortunately in **Meli Bavesi,** Winter J gives no indication of what a small scale and large scale cultivation would be.

25. Prior to the decision in **Meli Bavesi,** during the period of 2000-2002, sentencing in cases for possession of cannabis, weighing between 200 to 750 grams, had ranged between 1 ½ years to 5 years.

26. The Appellant who was single and 23 years of age and who planted yaqona and dalo for a living had told the learned Magistrate that he had intended to purchase a fibreglass boat to assist the women and children of his village in Naikorokoro and to raise their standard of living in cultivating the cannabis with his co-accused Paula Nawadradra. He had admitted that the quantity of drugs seized from him was substantial. The learned Magistrate had been of the view that the Appellant falls into the second category set out in **Meli Bavesi** with a sentencing tariff of 2 to 4 years. The learned Magistrate had been of the view that "There are no further aggravating factors as there is no evidence of commercial preparation or of sale, indeed the plants were still under cultivation." However he had later contradicted himself when he said that the Appellant had cultivated the cannabis plants with the intention of gaining money. Further he had failed to consider the ramifications on the health and well being of others who would use the crop and the harmful effects of the abuse of marijuana which is a factor a Court should have necessarily take into consideration under section 4(2) of the Sentencing and Penalties Decree. I do not think that the learned Magistrate had in passing sentence given due regard to his own statement: "This is one case where a message of deterrence needs to be sent as a warning to others who like you may think that this is an opportunity to earn quick payday and that the end justifies the means."

27. I am of the view that the learned High Court Judge erred in not following the guidelines for sentencing set out in **Meli Bavesi v The State** [2004] FJHC 93; HAA 0027.2004, which was the sentencing pattern at the time of offending; and sentencing the Appellant on the basis of the guidelines for sentencing in **Kini Sulua and Michael Ashley Chandra v The State,** Criminal Appeal No. AAU 0093 of 2008 and AAU 0074 of 2008. I am therefore of the view that his Ruling on Sentence needs to be quashed. I have therefore decided to exercise the powers of this Court under Section 23(3) of the Court of Appeal Act. In **Meli Bavesi** it was stated that: "...In addition there will of course have to be focus on the quantities of drugs involved.... If the intention is to make money out of supply the

inevitable consequence is lengthy terms of imprisonment." I am of the view that taking into consideration that there were 221 plants weighing 69.5 kilograms and the evidence of commercial involvement; this case should have fallen under category 3 with a starting point of 6 years. I have taken into consideration the impact this type of offence has on society which the learned Magistrate failed to take into account. I have given due consideration to his guilty plea at the first instance and previous good conduct. I would therefore substitute for the sentence passed by the learned High Court Judge, a sentence of 8 years with a non parole period of 6 years. This sentence to be effective from the 13th of April 2012.

A.Wengappuli JA

28. I have read and concur with the draft judgment of A. Fernando JA.

The Orders of the Court are:

1. *Appeal against conviction dismissed.*
2. *Appeal against sentence allowed.*
3. *Sentence varied to 8 years with a non-parole period of 6 years.*

.....
Hon. Justice W. Calanchini
PRESIDENT, FIJI COURT OF APPEAL

.....
Hon. Justice A. F. T. Fernando
JUSTICE OF APPEAL

.....
Hon. Justice A. Wengappuli
JUSTICE OF APPEAL