IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 90 of 2016
(High Court HAC 288 of 2016)

BETWEEN : **APAKUKI KAUYACA VITUKAWALU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr K Maisamoa for the Appellant**
Ms J Prasad for the Respondent

Date of Hearing : **12 July 2018**

Date of Ruling : **30 August 2018**

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on one count of unlawful cultivation of an illicit drug being cannabis sativa with a weight of 11kgs. On 8 July 2016 the appellant was sentenced to 13 years imprisonment with a non-parole term of 11 years effective from 8 July 2016.

[2] This is his timely application for leave to appeal against conviction and sentence pursuant to sections 21(1)(b) and (1) (c) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable and the test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (**Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.

[3] The grounds of appeal against conviction are:

> *"1) That the learned trail Judge erred in law and fact when the defence counsel asked the trial judge during the summing up to address the assessors in regards to the inconsistency of the prosecution witnesses, but the trial judge directed the defence counsel to withdraw such a statement.*
>
> *2) The learned trial judge erred in law and in fact when he found the prosecution witnesses credible despite the significant inconsistencies per se and inter se in their evidence.*
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> *3) The learned trial judge erred in law and in fact when he failed to direct the assessors during the summing up that the prosecution witnesses were carrying out a raid at the Appellants house and farm illegally since the prosecution failed to produce the 'search warrant' during the raid of the Appellants house and farm on the 3rd January 2012 causing substantial prejudice to the Appellant.*
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> *4) That the learned trial judge erred in law and in fact when he failed to direct the assessors the effect of carrying out the raid without the 'search warrant' being issued by the Magistrate or Justice of the peace pursuant to section 98 of the Criminal Procedure Decree 2009 causing substantial prejudice to the Appellant.*
>
> *5) That the learned trial judge erred in law and in fact when he failed to direct the assessors during the summing up about the medical report tendered as evidence by the Appellant, which was not opposed by the prosecution causing substantial prejudice to the Appellant.*
>
> *6) That the learned trial judge erred in law and in fact when he did not adequately direct himself and the assessors that the medical report*

was tendered as evidence to proof that the Appellant was actually assaulted before and during the caution interview.

7) *That the learned trial judge erred in law and fact when he failed to direct the assessors during the summing up that the Appellant was not questioned in his 'caution interview' about whether or not he was forced, threatened, induced of given any promise during his caution interview.*

8) *That the learned trial judge erred in law and fact when he failed to direct the assessors during the summing up that the prosecution failed to establish that they saw the Appellant cultivating the illicit drugs not give any documentary evidence that the area that the marijuana uprooted owned by the Appellant causing substantial prejudice to the Appellant.*

9) *That the learned trial judge erred in law and in fact during the voir dire to give written ruling as to why he admitted the caution interview admissible as evidence in spite that during the voir dire enquiry the Appellant tendered the Medical Report to show he was actually assaulted before and during the caution interview, causing substantial prejudice to the Appellant.*

10) *That the learned trial judge erred in law and in fact when he did not give a fair and balance summing up to the assessors causing substantial prejudice to the Appellant.*

11) *That the learned trial judge erred in law and in fact in convicting the accused based on involuntary confession taking into consideration that the Appellant was assaulted in which the trial judge lean to the prosecution as this can be evidence in his summing up."*

[4] The ground of appeal against sentence is :

"12) That the learned trial judge erred in principle also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence when conflicts with the provisions of section 27 of the Prison and Correction Act 2006."

[5] In relation to ground 1 whether the allegation is well founder and its consequences can only be determined by reference to the appeal record and should be determined by the Court of Appeal. Leave is granted.

[6] As for ground 2, leave to appeal is refused. As the ultimate trier of fact it is for the trial judge to accept or reject the evidence of any witness and so long as he agrees with the opinions of the assessors he is not required to give reasons in a judgment pursuant to section 237 of the Criminal Procedure Act 2009.

[7] As for grounds 3 and 4, there does not appear to have been any attempt by Counsel for the appellant to seek further directions from the Judge on the issue of the need to produce search warrant. The reason for that may be the right to proceed without a warrant under section 22 of the Illicit Drugs Control Act 2004. In any event whether a search warrant was required is a question of law for which leave is not required.

[8] A proper consideration of grounds 5, 6, 7 and 9 requires the court record to determine the existence if any and effect of the medical report to which reference is made in the grounds of appeal. Leave is granted to enable the allegations and assertions in the 4 grounds to be assessed by the Court of Appeal.

[9] In relation to ground 8 leave is refused. The obligation of the trial judge is to fairly summarise the evidence adduced by the prosecution and the defence. The evidence relied upon by the prosecution in relation to cultivation included the admissions made by the appellant.

[10] In relation to ground 10, leave is refused. The issues raised by the appellant in the submissions were not the subject of any request for further directions by the Judge to the assessors.

[11] In relation to ground 11, leave is granted on the basis that it is connected to grounds relating to the voluntariness of the admissions in the caution interview.

[12] So far as the one ground of appeal against sentence is concerned, the issue is the fact that the non-parole term is too close to the head sentence thereby affecting the operation of section 27 of the Corrections Service Act 2006. Leave to appeal against sentence on this

ground is refused. The sentencing court is obliged to fix a non-parole term that must be served before a prisoner may be considered for release. The sentencing court is not concerned with how the Corrections Office classifies prisoners nor with section 27 of the Corrections Service Act 2006. Any decision taken by the authorities under section 27 is a decision by the executive branch of government and is not a matter for consideration by a sentencing court.

Order:

1. *Leave to appeal against conviction is granted on grounds 1, 5, 6, 7, 9 and 11.*
2. *Leave to appeal against conviction is refused on grounds 2, 8 and 10.*
3. *Leave to appeal on grounds 3 and 4 is not required.*
4. *Leave to appeal against sentence is refused.*

W. Calanchini

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