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

CRIMINAL APPEAL NO.AAU 174 of 2017
[High Court of Suva Criminal Case No. HAC 355 of 2016]

BETWEEN	:	**ATEKINI MATAKOROVATU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasendra for Appellant**
		Ms. S. Kiran for the Respondent
Date of Hearing	:	**08 June 2020**
Date of Ruling	:	**17 June 2020**

RULING

[1] The appellant had been charged with the appellant in AAU 026/2019 (Arisi Kaitani) in the High Court of Suva on two counts of Unlawful Possession and Unlawful Cultivation of Illicit Drugs contrary to section 5(a) of the Illegal Drugs Control Act. The information reads 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 the 15th day of September 2016 at Kadavu in the Eastern Division, unlawfully possessed 1184.4grams 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 the 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] The appellant pleaded guilty to both counts and on 29 September 2017 the appellant was convicted and sentenced to 08 years and 11 months of imprisonment subject to a non-prole period of 06 years and 11 months.

[3] The appellant had signed an application for leave to appeal out of time on 27 November 2017 (received by the registry on 18 December 2017) against sentence. Legal Aid Commission had tendered an amended notice of appeal and an application for enlargement of time 08 May 2020 against sentence along with written submissions. The delay is nearly a month or at most less than 02 months. The State had tendered its written submissions on 01 June 2020.

[4] The brief summary of facts is as follows. The prosecution had led evidence of nine witnesses and relied on direct evidence and the admissions made by the accused in the cautioned interview to prove the two charges. The accused had given evidence and called one witnesses. Having considered the evidence of police witnesses PW1, PW2, PW3 and the military officer PW6 who took part in the raid, the learned trial judge had accepted their evidence that they saw the appellant uprooting plants in the farm before they were arrested. Given the demeanour and deportment of the accused when he gave evidence taken together with all the relevant evidence led in this case, the learned trial judge had found the appellant's evidence that he was arrested on his way while he was looking for the herbal medicine and brought to the farm thereafter, not credible and reliable.

[5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.

[6] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[7] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[8] Under the third and fourth factors in ***Kumar***, **test for enlargement of time now is 'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

> *'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a 'real prospect of success' (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal.....'*

[9] I would rather consider the third and fourth factors in ***Kumar*** first, as the delay is not substantial though the reason for the delay is not acceptable. I also do not think that there will be prejudice to the State as a result of enlargement of time.

> ***Ground of appeal against conviction***
>
> *'THAT the sentence ordered by the Court of 8 years 11 months with anon-parole of 6 years 11 months is manifestly harsh because of the Sentencing Judge adding 11 years for the aggravating factor which is an error given that he had used the same factor(s) for a starting point and again for aggravating factor(s).'*

[10] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For an untimely ground of appeal against sentence to be considered arguable there must be a real prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[11] The appellant argues that the learned trial judge had erred in law by using the same aggravating factors to select the starting point and then adding 11 years for the same aggravating factor resulting in the excessive enhancement of the sentence. In other words the appellant contends that there had been double counting in the sentencing as articulated recently in **Senilolokula v State** [2017] FJCA 100; AAU0095 of 2013 (14 September 2017).

[12] The learned trial judge had taken 07 years as the starting point for the second count on cultivation for the reasons set out in paragraphs 7-10 of the sentencing order.

> *'7. In the case of **Tuidama v State** [2016] FJHC 1027; HAA29.2016 (14 November 2016) this court decided to apply the following tariff for the offence of unlawful cultivation of illicit drugs*
>
> *a. The growing of a small number of plants for personal use by an offender on a non-commercial basis - 1 to 2 years imprisonment;*
>
> *b.Small scale cultivation for a commercial purpose with the objective of deriving a profit - 3 to 7 years imprisonment;*
>
> *c.Large scale commercial cultivation - 7 to 14 years imprisonment.*
>
> *8. Cultivating up to 10 plants can be considered as non-commercial cultivation if there is no other evidence to the contrary. Cultivating more than 10 plants up to 100 plants can be considered as a small scale commercial cultivation and cultivating more than 100 plants can be considered as a large scale commercial cultivation.*
>
> *9. With regard to the second count you have admitted that you were involved in cultivating 824 plants. Your sentence for the second count should be within the range of 7 to 14 years imprisonment as you have been engaged in large scale commercial cultivation according to the above categorisation.*
>
> *10. I will first determine the sentence for the second count. I select 7 years imprisonment as the starting point of your sentence.'*

[13] The Learned trial judge had then stated why he added 11 years as aggravating factors as follows.

> *'11.Even though the weight of the plants was recorded as 7975.7 grams, you have been involved in cultivating 824 plants of cannabis sativa. The number of plants suggests that you have been involved in a very large scale cultivation of illicit drugs. Considering this factor I add 11 years to your sentence. The summary of facts does not reveal any other aggravating factor. Your sentence now is 18 years imprisonment.'*

[14] The summary of facts is not before me. However, it appears from the evidence led in the co-appellant's case (taken up for leave to appeal hearing together) that cannabis plants were being uprooted by the appellant and the co-appellant in AAU 026/2019 (Arisi Kaitani) in a farm when the police arrested them. The police officers had uprooted a total of 824 plants which included the plants uprooted by the appellant and his co-appellant. Evidence had not revealed how many plants had been uprooted by each of the accused. For the purpose of sentence of the appellant he had been considered as having been responsible for the cultivation of all 824 plants. Evidence had also not revealed whether the appellant and his co-appellant were uprooting cannabis plants in their own farm or whether they had been employed as workmen for wages or any other form of remuneration by someone who owned the farm. It is also not in evidence as to whether they participated only in the act of uprooting the plants on the day in question or whether they had been involved from the beginning in bringing the plants up till the stage of harvesting. Clearly, these considerations had not gone into the equation in the matter of sentence as there was no evidence led in the appellant's case and even in his co-appellant's case those things had not been revealed. Should such matters or similar aspects not be considered in the matter of sentence when accused are sentenced for 'cultivation' as aggravating or mitigating features? Of course, to unearth these matters there needs to be an efficient investigation by well-trained law enforcement officers. On the other hand if the legislative intention is zero tolerance in the cultivation of cannabis then sentencing anyone caught in any of the acts deemed to constitute cultivation with deterrent sentences in respect of the whole of the end product regardless of his role, degree of involvement, benefits to be received etc. may be justified. Perhaps, these are matters

for the full court of the Court of Appeal or the Supreme Court to consider in the future.

[15] Be that as it may, I do not think that the learned trial judge could be faulted for having taken into account the substantially high quantity as an aggravating factor, for he had taken as the starting point the lowest of the range of sentencing tariff prescribed in **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012). It is too naive to argue that any weight over and above the threshold of a category should attract the same sentence. Had the learned trial judge started at a higher end of the tariff there would have been some merit in the appellant's argument.

[16] ***Sulua*** was a case concerning possession; not cultivation. However, the majority of judges of the Court of Appeal in ***Sulua*** had determined that the sentencing guidelines for possession of cannabis sativa should apply to offending verbs of *"acquire, supplies, produces, manufactures,* ***cultivates****, uses or administers"* in section 5(a) of the Illicit Drugs Control Act 2004. ***Sulua*** guidelines were based only on the weight of the illicit drug. They were made applicable to other acts too namely *'transfer, transport, supply, use, manufacture, offer, sale, import, or export'* of an illicit drug as set out in section 5(b).

[17] However, it appears that the sentencing judges have not always applied ***Sulua*** guidelines when it comes to offences involving cultivation. The learned High Court judge had followed **Tuidama v State** [2016] FJHC 1027; HAA29.2016 (14 November 2016).

[18] In ***Tuidama*** the High Court had decided to apply the following tariff based on the number of cannabis plants for the offence of unlawful cultivation of illicit drugs calling in aid the judgment in **Meli Bavesi v State** [2004] FJHC 93; HAA 0027.2004:

> *a. The growing of a small number of plants for personal use by an offender on a non-commercial basis - 1 to 2 years imprisonment; [Cultivating up to 10 plants]*

b. Small scale cultivation for a commercial purpose with the objective of deriving a profit - 3 to 7 years imprisonment; [Cultivating more than 10 plants up to 100 plants]

c. Large scale commercial cultivation - 7 to 14 years imprisonment. [Cultivating more than 100 plants]

[19] In **State v Nabenu** [2018] FJHC 539; HAA10.2018 (25 June 2018) the High Court suggested the following tariff after considering a number of previous decisions including ***Tuidama***;

a. The growing of a small number of plants (less than 9 plants with assumed yield of 40g per plant) for personal use by a first offender - non-custodial sentence or a fine at the discretion of the court.

b. Small scale cultivation (10 to 30 plants with assumed yield of 40g per plant) for a commercial purpose with the objective of deriving a profit - 1 to 3 years imprisonment, with or without a fine at the discretion of the court.

c. Medium scale commercial cultivation (30 -100 plants) - 3 to 7 years imprisonment with or without a fine at the discretion of the court.

d. Large scale cultivation capable of producing industrial quantities for commercial use (more than 100 plants) 7 - 14 years imprisonment with or without a fine at the discretion of the court.

[20] ***Nabenu*** *inter alia* had equated the number of plants to a corresponding assumed weight. Both ***Tuidama*** and ***Nabenu*** had also considered the purpose of cultivation (*i.e.* personal or commercial) and scale of the cultivation to determine the sentence.

[21] **Dibi v State** [2018] FJHC 86; HAA96.2017 (19 February 2018) had referred to **In re Koroi** [2012] FJHC 1029; HAR002-006.2012 (20 April 2012) where the following tariff for cultivation had been pronounced deviating from ***Sulua*** on the basis that ***Sulua*** did not apply to sentences involving cultivation.

'19.] For ease of reference those tariffs as suggested by the U K. Sentencing Council and adopted by this Court in Koroi are.

(i) Possession of up to 100 grammes or cultivation of no more than 5 plants, non-custodial sentences at the discretion of the Court

(ii) Possession of 100-1000 grammes and cultivation of 5-50 plants; custodial sentences in the range of one year to six years

(iii) Possession of more than 1000 grammes and cultivation of more than 50 plants, custodial sentences of six years or more
(iv) Possession of very large quantities (5kg or more) custodial sentences in the range of 10 to 15 year

20.] There will be times when the plants are many, but small, yielding a minimal weight (as in the present appeal) and a balance will have to be struck between use of the above categories.

[22] ***Tuidama*** had been criticized in ***Dibi*** on the ground that it had failed to consider ***Koroi*** and instead followed 'discredited' ***Meli Bavesi.***

[23] ***Meli Bavesi*** in considering an appeal against possession stated the following guidelines for cultivation and possession.

'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.

[24] There is an appeal pending against the decision in ***Tuidama*** filed by the State bearing No. AAU003 of 2017 where the State had in its written submissions (a copy of which was filed in this appeal) had demonstrated with 08 examples that while some High Court judges follow ***Sulua*** guidelines others rely on ***Tuidama***, ***Dibi*** and ***Nabenu*** and stated that this had resulted in lack of uniformity in the sentencing in cases involving cultivation of illicit drugs. Regarding this anomaly in sentencing I can only reiterate my observations in paragraph 25 of the Ruling in **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020) made on a similar situation in sentencing relating to aggravated burglary.

[25] It has to be admitted that there was no specific discussion on sentencing guidelines on cultivation in ***Sulua*** or in subsequent decisions in **State v Dreduadua** [2020] FJCA 7; AAU65 of 2016 (27 February 2020) and **State v Mata** [2019] FJCA 20; AAU0056 of 2016 (07 March 2019) as this issue of disparity of sentencing arising from different tariff regimes was not argued before the Court of Appeal. Therefore, there is an urgent need for the Court of Appeal or the Supreme Court to revisit the sentencing guidelines on cultivation of illicit drugs in the light of the current situation which has surfaced. Whether sentencing in offences involving cultivation should be based on weight of cannabis or the number of plants or a combination of both cultivated in any given extent of land where cannabis plants are found with all other factors being considered as aggravating or mitigating the offence, would be a vital question to answer. Similarly, if the number of plants could be equated scientifically to a corresponding weight then whether ***Sulua*** guidelines could still be applied perhaps with suitable modifications even in the case of cultivation with other aggravating and mitigating factors specific to cultivation being taken into account in arriving at the final sentence, is also another matters to be considered.

[26] Though, the ground of appeal urged by the appellant against sentence does not have a reasonable prospect of success the above issue poses a question of law requiring no leave to appeal. However, the appeal is out of time.

[27] In the circumstances, I am inclined to grant enlargement of time against sentence.

[28] The learned High Court judge had imposed 02 years of imprisonment on the first count of possession but had stated as follows as to why ***Salua*** guidelines should not be applied to the appellant's case. However, the appellant for obvious reasons does not challenge the sentence on the first count.

> *'6.The sentencing tariff established in the majority judgment in the case of* ***Sulua v State*** *[2012] FJCA 33; AAU0093.2008 (31 May 2012) is based on the weight of dried leaves of cannabis sativa. In your case on the first count you have been convicted of being in possession of loose plant material. The summary of facts prepared by the counsel for the State which you have admitted does not describe what is meant by plant material. However, it is clear that what you had in your possession were not dried leaves. Therefore, in my view, it would be unfair by you to apply the tariff established in* ***Sulua*** *(supra) to determine your sentence for the first count. The counsel for the State did not properly assist the court on this issue though it was raised by the court.*

[29] Therefore, enlargement of time to appeal against sentence is allowed.

Order

1. Enlargement of time against sentence is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka

JUSTICE OF APPEAL