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

CRIMINAL APPEAL NO. AAU 0071 OF 2019
[Suva Criminal Action No: HAC 255 of 2017]

BETWEEN : **NEMANI RAVIA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, JA**
Qetaki, JA
Morgan, JA

Counsel : **Appellant in person**
Ms Vavadakua for the Respondent

Date of Hearing : **13th September, 2023**

Date of Judgment : **28th September, 2023**

JUDGMENT

Mataitoga, JA

[1] I have read in draft the judgment of Qetaki, JA. I concur with the reasons and conclusions.

Qetaki, JA

Background

[2] This is an appeal challenging the appellant's conviction and sentence at the High Court in Suva where the appellant had been charged, with unlawful cultivation of illicit drugs contrary to section 5(a) of the Illegal Drugs Control Act 2004 committed on 09 June 2017 at Naqia Village, Wainibuka in the Eastern Division.

[3] The information read as follows:

> *"Statement of Offence*
>
> *UNLAWFUL CULTIVATION OF ILLICIT DRUGS: Contrary to section 5 of the Illicit Drugs Control Act 2004.*
>
> *Particular of Offence*
>
> *NEMANI RAVIA on the 9th day of June 2017, at Naqia Village, Wainibuka, in the Eastern Division, without lawful authority cultivated 87 plants of cannabis sativa, an illicit drug weighing 34.2 kilograms."*

[4] Section 5 of the Illicit Drugs Control Act 2009 states:

> *"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, transportation, supply, use, manufacture, offer, sale, import or export of an illicit drug*
>
> *commits an offence and is liable on conviction to a fine not exceeding $1 million or imprisonment for life or both."*

[5] At the conclusion of the summing up on 29 April 2019 the assessors had unanimously opined that the appellant was guilty as charged. On the same day the learned trial judge

had agreed with the assessors, convicted the appellant and sentenced him on 30 April 2019 to 12 years of imprisonment subject to a non-parole period of 10 years.

[6] Aggrieved by the decision of the High Court, the appellant had:

(a) Signed an appeal against conviction and sentence on 20 May 2019 (received by the Court of Appeal Registry on 07 June 2019).
(b) Followed it up with amended grounds of appeal on 25 February 2020 and 01 May 2020.
(c) Restated his grounds of appeal dated 20 May 2020 and supplemented them with written submissions on 10 September 2020.
(d) Confirmed on 30 October 2020, and again at the leave hearing that he would rely on the above grounds of appeal and written submissions.

[7] The State had tendered its written submissions in response to those grounds of appeal on 4 December 2020. Both parties made oral submissions at the hearing on 03 March 2021.

Leave Stage

[8] The grounds for the application for leave to appeal are as follows:

Against Conviction

Ground 1

That the learned trial judge failed to consider that the investigation in my matter was not conducted in a proper manner.

Ground 2

That the learned trial judge did not consider that I only admitted planted one plant of marijuana at my land only.

Ground 3

That the learned judge failed to consider that I had informed the Police Officers about Samu who had planted the marijuana alleged in this case.

Ground 4

That the learned judge did not consider my evidence that PW 1, Emosi Nokonokovou was not present during the investigation.

Against sentence

Ground 1

That the sentence is too harsh and excessive.

Ground 2

That the Court did not take into account that I had assisted the Police Officers and cooperated with them to locate the marijuana.

[9] Under section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with the approval of the court. As established through the Courts, the test for leave to appeal is '***reasonable prospect of success***': See **Caucau v State** AAU0029 of 2016:4 October 2018[2018] FJCA 171; **Navuki v State,** AAU0038 of 2016; 4 October 2018[2018] FJCA 172; and **State v Vakarau,** AAU0052 of 2017; 4 October 2018 [2018] FJCA 173 **and Sadrugu v The State,** Criminal Appeal No. AAU0057 of 2015; 6 June 2019[2019] FJCA 87; **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July2019).

[10] The guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled -See **Naisua v State** CAV0010nof 2013:20 November 2013[2013] FJCA 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.

[11] The test for leave to appeal against sentence is not whether the sentence is wrong in law but whether the grounds of appeal are arguable points under the four principles set in the case **Kim Nam Bae v The State** [1999] FJCA 21; Criminal Appeal No. AAU0015. The four guidelines are whether the learned sentencing Judge:

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide of affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

[12] For the reasons given in his Ruling, the learned single judge allowed the appellant's application for leave to appeal against both conviction and sentence. In this Court, the appellant had filed written submissions dated 27 January 2023 (26 pages) containing submissions on two grounds of appeal against conviction (pages 1-23) and one ground of appeal against sentence (pages 24 -26). At the hearing, the appellant had expressed his reliance on the written submissions as filed at the Registry.

[13] I have reviewed the Records of the High Court of Fiji, including the Summing Up Judgment and the Sentencing delivered in this case. The *"Agreed Facts"*, (at pages 68 and 69 of the Record), signed by the parties to the criminal proceedings and the learned trial judge in line with section 135 of the Criminal Procedure Act, 2009, are as follows:

"1. That Nemani Ravia was 36 years old at the time of the alleged incident.

2. That Nemani Ravia was a farmer by profession.

3. That Nemani Ravia was residing at Naqia, Wainibuka, Tailevu.

4. That on 9th of June, 2017, the Police Officers raided the house of Nemani Ravia at Naqia Village, Wainibuka, Tailevu.

5. That Nemani Ravia was arrested by Police Officers on 9th of June, 2017 at his house at Naqia Village Wainibuka, Tailevu."

[14] The case by the prosecution adopted from the Summing Up (pages 52 – 54) of the Record of the High Court is as follows:

"14. .... On 9 June 2017, the accused Nemani Ravia (DW 1) was 36 years old. He was married with 4 young children aged 12, 10, 7 and 5 years old. He resided with his family in their residence at Naqia, Wainibuka, Tailevu. He is a subsistence farmer by profession and plants bananas, dalo, cassava, vegetables, Yaqona and other crops. He also kept domesticated animals. According to the Police Investigation Officer, Corporal 4106 Waisea (PW 4), Naqia Village was considered a 'red-zone area" as far as the unlawful cultivation of cannabis sativa plants was concerned.PW 4 said, their information were normally received from the relatives of those alleged to be cultivating cannabis sativa commonly known as marijuana.

15. According to the prosecution, the Police decided to raid Naqia Village on 9 June 2017 to catch the alleged marijuana cultivators. According to PC 3908 Emosi Nokonokovou (PW 1) the police received information that Mr. Nemani Ravia (DW 1) was allegedly selling and cultivating marijuana.PW 1 said, a team was formed, which included him. PC 5382 Jimutasa Taiki (PW 2), SC2089 Saimoni Kete (PW 3) and police driver to apprehend Ravia. On 9 June 2017 at about 4am, PW 1 and his team left Korovou Police Station in a Police vehicle and went to Mr. Ravia's house. At 8am, they knocked at Mr. Ravia's house, and later searched the same with the authority of a search warrant.

16. According to police, nothing was found at Ravia's house. He was later taken to Nayavu Police Post by Police. <u>According to PW 1, PW 2 and PW 3, Mr. Ravia admitted to them, at the Police Post, that he had marijuana farm at Naqia.</u> They returned to his residence at Naqia. According to the prosecution, Mr. Ravia later led PW 1, PW 2 and PW 3 through bush and mountain tracks, to his marijuana farm, which was 2 hours journey to and from his residence. At the farm, the police saw marijuana plants growing, and according to prosecution, <u>Mr. Ravia allegedly admitted to police that the marijuana farm and plants were his.</u>PW 2 and PW 3 later uprooted the plants. There were 86 in total, and 1 consisting of plant materials. Altogether, there were 87 plant materials.

17. PW 1, PW 2 and PW 3 later carried the marijuana plants from the farm to the road. They later took the same to Korovou Police Station and handed the same to Corporal 4106 Waisea (PW 4). PW 4 was the police investigation officer.PW 4 later handed the 87 marijuana plants to WPC 4501 Mere (PW 5), the Korovou Police Station exhibit writer, for safe keeping. At 2>40pm on 9 June 2017, PW 4 handed the 87 marijuana plants to the police forensic officers, Ms Susana Lewedrau (PW 6) and MS Miliana Werebauinona (PW 7), to analyse for cannabis sativa content. <u>After examining and analyzing the 87 plant materials, PW 7 found the same to be cannabis sativa, and it weighed a total of 34.3 kilograms.</u> The plants were later handed back to PW 5 for safe keeping.

18. *Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution."*

[15] The accused's case adopted from the Summing Up (page 54) is as follows:

"19. On 23 April 2019, the first day of the trial, these information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charges. In other words, he denied the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case wherein he was called upon to make his defence, he chose to give sworn evidence and called his first cousin (DW 2) as his only witness. That was his right.

20. The accused's case was very simple. On oath, he denied the allegation against him, He, however admitted planting one marijuana plant on his dalo plantation, for his personal use. He denied that the 86 marijuana plants and 1 plant material obtained from a farm he showed the police were his. According to the accused (DW 1), he wanted to help the police by showing them the marijuana farm. He said, instead of thanking him, the police framed him by saying the farm was his.

21. Furthermore the accused said, he did not admit to the police that the marijuana farm was his. He said the police were lying. Because of the above, the defence is asking you, assessors and judges of fact, to find the accused not guilty as charged. That is the case for the accused."

Court of Appeal-Full Bench

[16] In this Court the following two grounds of appeal against conviction were pursued by the appellant – (See the Appellant's written submissions filed on 27 January 2023 at 9:15 am at the Court of Appeal Registry). At the hearing, the appellant stated that he will rely on the said written submissions in this appeal.

Ground 1:

That the trial judge did not consider that the investigation in my matter was not conducted in a proper manner. This ground is the same as Ground 1 at the leave stage before a single judge. It relates to procedural impropriety in investigation.

Ground 2:

That the learned trial judge did not consider that I only admitted planting 1 plant only in farm. This ground is the same as Ground 2 at the leave stage.

[17] In addressing Ground 1, the learned single judge stated in his Ruling:

> *"[8] The appellant's contention relates to the manner in which the investigation had been carried out. He submits that when the police party raided his residence, they could not find any prohibitory items yet he was arrested and taken to the police station where he is supposed to have admitted orally to PW 1- PW 3 that he had a marijuana farm at Naqia. However, according to the summing up the police officers had in their possession a search warrant. Thereafter, the appellant is alleged to have led the police party to a farm where they had uprooted 86 plants assessed 01 plant materials and the appellant is alleged to have admitted once again orally that the farm and the plants were his. These allegations had been denied by the appellant in his evidence. It is not clear whether the police officers had made any contemporaneous notes of the said admissions in their notebooks.*
>
> *[9] Thus, it is clear that no caution had been administered before the alleged confessions. However, it is not clear that the appellant had been told that he was under arrest in connection with the marijuana farm. It does not appear that the police had cautioned the appellant of his right to remain silent or advised him of his right to counsel. Clearly there had been no voir dire inquiry either but according to the trial judge the appellant had not challenged leading in evidence the oral submissions.*
>
> *[10] **Singh v State** [2011] FJCA 3; AAU0005.2009(24 January 2011) is a case where at the time of making a confession, parents of the accused had been present and the police officer had explained the judge's rules and after cautions and formalities the accused had made the oral confession. There had been no voir dire on the admissibility of the oral confession too. In the circumstances, the Court of Appeal held that considering the nature of the evidence and the evidence before court the trial judge had not erred in law by admitting the oral confession.*
>
> *[11] Needless to say that the circumstances in this case is far less satisfactory and convincing for the alleged oral confessions to be admitted and acted upon. I think this aspect of the case needs to be looked at more closely by the full court and I am inclined to grant leave to appeal."*

[18] In his written submissions, the appellant had raised issues pointing to procedural irregularity and breach of the Judges' Rules. The appellant's contention in relation to

Ground 1 is with the manner in which the investigation had been carried out. In considering this aspect, it is pertinent to point out that the appellant was legally represented by Counsel at the trial.

[19] The issues now raised in the appellant's written submissions, in my view ought to have been raised and contested at the trial. Prosecution witnesses were not cross-examined, or if they were, it was not thorough, to address fully the procedural aspects of the investigation especially, any breaches of the procedural laws and rules which are now being raised. The later may be raised during the course of the trial and in legal submissions prior to Summing Up, Judgment, and Sentencing, to also address succinctly the elements of the offence for which the appellant had been charged. And it is not as if the accused did not have the benefit of legal counsel, to assist him and to whom he ought to have given full instructions in the conduct of his defence at the trial.

[20] The evidence of PW1, PW2 and PW3, and indeed the evidence given by all the prosecution witnesses were given in open court based on the statements they had made to police in the course of the investigations, especially, the conduct of the raid at Naqia at the appellants' home and the operations conducted at the remote farm.

[21] It is to be noted also that PW1 in his evidence had alluded to having received information that Nemani Ravia was selling drugs, at page 128 of the Record of the High Court. *"The houses that were selling drugs was identified. I was instructed to raid Nemani Ravia."* Issues associated with activities deemed unlawful under section 5 of the Illicit Drugs Control Act 2004 need to be approached and viewed in the light of purpose and object of the legislation enacted with intent to target illegal activities under the Act.

[22] But, the appellant has the right to raise issues concerning his constitutional and other rights that are protected by the Constitution, however, these travesties and breaches have to be raised at the appropriate time at the trial, to be addressed as appropriate, and be raised by way of appeal to this Court, except in exceptional circumstances. If no objections were raised at trial, and they were unchallenged at the trial, there had to be

cogent reasons formally presented for not pursuing the issues at that stage when the issues are first raised in this Court of record and review.

[23] The conduct of the learned trial judge with regard to the rights of the accused has been raised having failed to consider that the investigation by the police, were not conducted in the "*proper manner*". To the contrary, the Records of the High Court on the trial proceedings does not bear this out. Also, the Summing Up (pages 49 to 59 of Record of the High Court of Fiji) was comprehensive and comprehensible, being communicated to the assessors in simple and plain English language. It is divided into major and relevant areas of concern in a criminal trial but focusing on the case at hand. It covers the following aspects: A. Role of Judges and Assessors; B. The burden and Standard of Proof; C. Information; D. The Main Issue; E. The Offence and Its Elements; F. The Prosecution Case; G. The Accused's Case; Analysis of the Evidence; I. Summary.

[24] The Summing Up was fair and balanced. It reflects the level of attention and analysis that the learned trial judge had invested in ensuring that the assessors are effectively empowered to consider the evidence and make their own minds up on their decisions as to the guilt or otherwise of the accused /appellant given the evidences at the trial. The learned trial judge asked for application for Re-Directions, however, there was none. The assessors after due deliberations returned a unanimous verdict of guilty.

[25] Paragraphs 1 to 9 of the Judgment in this case are reproduced below;

> "*1. The three assessors had returned with a unanimous opinion finding the accused guilty as charged.*
>
> *2. It appears that the three assessors had accepted the prosecution's version of events. It also showed that the three assessors had accepted the prosecution witnesses' evidence. It also meant: the three assessors had rejected the accused's sworn denials.*
>
> *3. I have reviewed the evidence called in the trial and I have directed myself in accordance with the summing up I delivered to the assessors today.*

4. *The three assessors' opinion was not perverse. It was open to them to reach such conclusion on the evidence.*

5. *Assessors are there to assist the trial judge come to a decision on whether the accused was guilty as charged. The three assessors' opinions represent the public's view and their opinion must be respected.*

6. *On my analysis of the case, I agree entirely with the three assessors' opinion. The police had done a proper investigation. They had gathered good intelligence from the public. Their raid, uprooting the marijuana plants, taking it to Korovou Police Station and having it analyzed by their forensic team, was clock work in a day of operation. The police team must be commended in their conduct in this case. It was well organized, fast and competent, within one day.*

7. *I accept the evidence of PW 1, PW 2 and PW 3 that the accused admitted to them that the marijuana plants were his. I find their evidence credible and accept the same.*

8. *I reject the accused's sworn denial. It was not credible to me. He admitted cultivating one marijuana plant and, in my view, that was sufficient qualification to cultivate 87 marijuana plants/materials in this case.*

9. *Given the above, I entirely agree with the three assessors' unanimous opinion and I find the accused guilty as charged. I convict him accordingly as charged."*

[26] The respondent had provided assistance to this Court through its submissions filed on 12 September 2023 in response to the appellant's submissions on the grounds of appeal. I agree with the State's submission that Ground 1 of the appeal is misconceived. The learned trial judge had specifically expressed his consideration about the manner of the investigation at paragraph 6 of the Judgment (see paragraph 18 above at paragraph 6 thereof).

[27] I am also in agreement with the respondent's submission related to legal representation, as follows:

> *"The Appellant was represented by 2 legal counsels during trial as per the Summing Up, Judgement and Sentence of the case, however, the legal counsels did not seek a voir dire to challenge any constitutional rights being breached so that the prosecution could have been disallowed from leading any confession evidence at all, if his voir dire grounds were successful. It was not his position that the*

admission was involuntary: he was suggesting that the admission to the 87 plants as being cultivated by the Appellant was fabricated. It was the trial strategy taken up by the two learned Defiance Counsels to not go through a voir dire and the learned trial judge chose not to interfere with the trial strategy of the learned defence counsels."

[28] The State added that in a similar situation in **Radininausori v State** [2012] FJCA 19; CAV0005.12 (16 *August) 2012), the Court said:*

> *"16. The facts of the case revealed that the Accused was represented in the trial by a learned counsel of the Legal Aid Commission. The learned counsel for the Accused moved court to dispense with the trial within a trial (voir dire).This may be a tactical over so that he could challenge the contents of the caution interview during the trial before the assessors.*
>
> *17. Counsel for the accused challenged the caution interview on the basis it was fabricated and it has inconsistent statements. He has not suggested that undue influence or force was used ion the accused to give the said confessionary statement.*
>
> *18. It is the duty of the Trial judge to adequately direct the assessors in relation to voluntariness and fabrication of statements when evidence in relation to confession is relied upon*
>
> .....
>
> *20. The above directions have sufficiently met the requirement of proper direction to the assessors in relation to the voluntariness of the confession and complaint of fabrication contained in the caution interview. The trial judge has given clear and adequate directions to the Assessors in relation to voluntariness and fabrication the Court of Appeal is not obliged to consider the issue in appeal as no substantial miscarriage of justice has in fact occurred."*

[29] Similarly, His Lordship Justice Temo [as he was then] carefully laid down the position of the Defence in relation to their stance on the *voir dire* and his Lordship went on further to give the similar directions about the confessions, as was done in **Radininausori case** (supra). His Lordship at paragraph 27 of the Summing Up, page 56 of the Record of the High Court of Fiji, stated:

"The defence did not challenge the admissibility of the above verbal confession in a voir dire proceeding. In any event, when considering the above alleged verbal confession by the accused, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – i n this case, you as assessors and judges of fact- is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his verbal statements? If your answer is no, then you have to disregard the statements,. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the verbal statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those verbal statements. If it is otherwise, you may give it less weight and value. It is a matter entirely for you."

[30] As such, his Lordship proceeded to assess the issue without the *voir dire* grounds and give directions to the assessors on the same.

[31] The appellant also chose to give evidence himself during the trial. The appellant is pleading against his conviction as charged for unlawful/ unauthorized cultivation of illicit drugs, namely cannabis sativa. However, he did not deny the simple fact that he had planted marijuana plant.

[32] With respect to Ground 2 of the appeal, the appellant had admitted to planting one marijuana plant in his dalo plantation .He did not deny that he was involved in cultivation. The Summing Up (page 54 of the Record of the High Court at paragraphs 20 and 21), his Lordship stated:

"20. The accused's case was very simple. On Oath, he denied the allegations against him. He, however, admitted planting one marijuana plant on his dalo plantation, for his own personal use. He denied that the 86 marijuana plants and 1 plant material obtained from a farm he showed the police were his. According to the accused (DW 1), he wanted to help the police by showing them the marijuana farm. He said, instead of thanking him, the police framed him by saying the farm was his.

21. Furthermore, the accused said, he did not admit to the police that the marijuana farm was his. He said, the police were lying. Because of the above, the defence is asking you, as assessors and judges of fact, to find the accused not guilty as charged. That was the case for the accused."

[33] In response to Ground 2 of the appeal, the respondent had addressed the relevance of *"number or weight of plants cultivated by an accused"* in the context of the elements of the offence of unlawful cultivation under section 5(a) of the Illicit Drugs Control Act 2004. It is submitted that the number of plants is relevant to the issue of Sentencing. Paragraphs 32-33 of the State's Submissions state:

"32. However, one factor that this honorable court might wish to consider too is that number or weight of plants cultivated by an accused, under section 5(a) of the illicit Drugs Act, is not, an element of the offence. Even under the old tariff for cultivation of illicit drugs, namely marijuana, the Courts considered number of plants or weight of plants as an issue that could affect sentence. ***Sulua v State*** *[2012] FJCA 33; AAU0093.2008 (31 May 2012].In this case, it could affect conviction, respectfully, if he denied ever planting any marijuana whether 1 or 87, but that is not the case here.*

33. Respectfully, the number of plants cultivated have more significance towards the tariff range that the Appellant/ an Accused can expect in sentencing, especially in a case such as this where the Appellant does not deny cultivation but contests the number of plants, as noted by the recent decision on the new tariff for cultivation of marijuana plants, ***State v Jone Seru*** *AAU115.2017."*

[34] I agree with the respondent's submission. Given ground 2 of the conviction appeal, and the admission by the accused/appellant to unlawful cultivation of only one plant, that is sufficient to convict the appellant. Whether there were 1 or 86 plants that were cultivated was, an issue of sentence.

Appeal Against Sentence

[35] The appellant's complaint is that the sentence is harsh and excessive considering the starting point selected and the possibility of double counting. The appellant was convicted for the cultivation of 87 plants weighing 34.2kg and was sentenced to 12 years imprisonment, with a non- parole period of 10 years.

[36] Section 23, subsection (3) of the Court of Appeal Act states:

> *"On an appeal against sentence, the Court of Appeal shall, if they think a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution thereof as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."*

[37] The cultivation of illicit drugs in Fiji is viewed seriously by Parliament of the Republic of Fiji. It carried a maximum penalty of $1 million fine or life imprisonment, or both – (section 5 of the Illicit Drugs Control Act 2004).

[38] The facts brings this case within Category 4 of the Sentencing Guidelines established in the case **Kini Sulua, Michael Ashley Chandra v The State** FLR, Vol 2, 2012. The Guideline was laid down by this Court after considering 50 cases of illicit drugs offending in Fiji:

> *"Category 4: possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment."*

[39] The appellant was sentenced to 12 years imprisonment, with a non-parole period of 10 years. The sentencing approach (paragraph 8) on "Sentence" at page 65 of Record of the High Court is set out below:

> *"8. I start with a sentence of 10 years imprisonment. I add 4 years for aggravating factors, making a total of 14 years imprisonment. For time already served while remanded in custody, I deduct 3 months, leaving a balance of 13 years 9 months imprisonment. For co-operating with the Police, I deduct 1 year 9 months*, leaving *a balance of 12 years."*

[40] The aggravating factor was the amount of illicit drugs cultivated, that is, 34.2kg.This was 6.5 times the illicit drugs found on **Kini Sulua's** case (supra)-See paragraph 6 of Sentencing at page 65 Record of High Court of Fiji. Adding 4 years as aggravating factor to the starting point of 10 years amounts to "*double counting*" which is not permissible, that is, the use of the same factor twice to increase sentence. In **Senilolokula v State**

[Criminal Appeal No.AAU0095 of 2013, on an appeal against sentence, this Court (Gamalath, JA,) stated:

> *"[23]....I perceive them to be inseparable , interconnected and in the circumstances, a valid doubt can be entertained with regard to the maintainability of both aggravating factors , side by side, parallel to each other.....*
>
> *[24].....In the circumstances the aggravating factors of abuse of position of authority and the breach of trust should attract only 3 years composite imprisonment."*

[41] In the result, the 16 years sentence was reduced to 12 years. Additionally, in **Saqanaivalu v State** [2015] FJCA 168; AAU0093.2010, Gounder JA, pointed out that what is not permissible is '*double counting*'. In this case the appellant was charged with manslaughter of his wife contrary to section 198 of the Penal Code Cap.17.The appellant pleaded guilty to the charge and was sentenced to 7 years imprisonment with a minimum term of 5 years.

[42] In **Togidugu v State** [2022] FJCA 42; AAU109.2016, this Court stated:

> *"[18]When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (vide **Koroicakau v State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and in **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).*

[43] The tariff selected for this case was Category 4 under **Kini Sulua** decision. The learned judge selected a starting point of 10 years which is within the current tariff range under the new Sentencing Guidelines set **in Jone Seru v The State** [2023] FJCA 67, AAU0115.2017. If the appellant is to be re-sentenced, this should be done in line with the new Sentencing Guideline. In **Joseph Shyam Narayan v State** [2018] FJCA 200; AAU107.2016 (29 November 2018) a similar approach was adopted by this Court.

[44] There is an error in sentencing that has been established , that of double counting, as the tariff selected already was in reference to the number of the plants, thus to add more years because of the number of plants risks double counting. Given that it was a total of 4 years that was added as the aggravating factors, a mistake of double counting had occurred.

[45] From the totality of the evidence, including the appellants admissions and the circumstances, the appellant is "*owner*" under Category 2 of the new Guideline. He plays a significant role and his sentence should be one between 12- 16 years.

[46] Given that this current sentence is at the lowest end of the tariff, although the ground of appeal against sentence has merit, there is no substantial miscarriage of justice considering the fact that it is at the lowest end of the new tariff.

[47] There were obvious aggravating factors which the learned sentencing judge failed to consider; such as the impact on the person using it. This factor was considered in the decision of this Court in **Ratuyawa v State** [2016] FJCA 45; AAU121.2014 (26 February 2016), where this Court said:

> "*.....Further he had failed to consider the ramifications on the health and wellbeing 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."*

Conclusion

[48] Grounds 1 and 2 of the appeal against conviction are dismissed. They do not have merit. The appellant did not deny he cultivated cannabis sativa. He is contesting the number of plants. Conviction is affirmed. There is no substantive miscarriage of justice as a result.

[49] Ground 1 of appeal against sentence is dismissed. Although there is merit in that there is an error of double counting in the learned trial judges sentencing. If the appellant is to be

re-sentenced, it would be in line with the new Sentencing Guideline tariff in **Jone Seru's** case, which would be 12- 16 years. However, given the appellant admitted to Police that he was a farmer and the number of plants within Category 2 (**Jone Seru**), he is serving the lowest end of that tariff. Appeal against sentence dismissed and the sentence is affirmed.

Morgan, JA

[50] I have read the draft judgment of the Hon Justice Qetaki, JA and concur with the reasoning and conclusions of the judgment.

Order of the Court:

1. *Appeal against conviction is dismissed.*
2. *Conviction is affirmed.*
3. *Appeal against sentence is dismissed.*
4. *Sentence is affirmed.*

Hon Mr Justice Isikeli Mataitoga
JUSTICE OF APPEAL

Hon Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon Mr Justice Walton Morgan
JUSTICE OF APPEAL