KINI SULUA, MICHAEL ASHLEY CHANDRA v STATE (AAU0093 of 2008)

COURT OF APPEAL — CRIMINAL JURISDICTION

MARSHALL, TEMO, FERNANDO JJA

11 March 2011, 31 May 2012

Criminal law — sentencing — drug offences — soft drugs — hard drugs — possession — supply — amounts — inferences — cannabis — sentencing factors — legislative intent — guidelines — specific deterrence — general deterrence — mitigation — appellants were both convicted and then sentenced for possessing and supplying amounts of cannabis — both appellants appealed on basis that sentences imposed upon them were excessive — whether legislative sentencing guidelines had been complied with — whether possession of large quantity of cannabis justified an inference of supply — whether cannabis was to be differentiated from other drugs — whether statutory sentencing principles had been correctly applied — whether sentences imposed were overly harsh — whether factors in mitigation of penalty had been taken into account — Criminal Procedure Decree ss 5(1), 5(2) — Dangerous Drugs Ordinance ss 8, 41(2) — Dangerous Drugs Act — Illicit Drugs Control Act ss 2, 5 — Misuse of Drugs Act ss 4(1), 5(3), 28, Sch 4 — Narcotic Drugs.

In April 2008, Mr Kini Sulua, a 33 year old man who had not previously been convicted of any serious offences, climbed aboard a local carrier's vehicle with a knapsack bag and a white sack with a pack inside. He lived in the Nausori area to where he and the packages were bound. Outside Navosa police station a police road block terminated Sulua's journey with his bags. Those bags were then found by the police to contain nine packs of dried leaves. The government chemist later identified those leaves as 5203.2 grams of cannabis before Mr Justice Daniel Goundar and the assessors consequently found Mr Sulua guilty of possessing and supplying cannabis. In considering the sentence to be imposed, Justice Goundar noted the public policy imperatives of general and specific deterrence, particularly because the market for cannabis was predominantly composed of young people. By way of mitigation, Justice Goundar noted Mr Sulua's youth and the fact that he had not previously been convicted of any serious offences. A sentence of eight years' imprisonment was then imposed.

Mr Michael Ashley Chandra was a man in his thirties who, at the time of the alleged offence, was a taxi driver living and working in the urban corridor and residing in the Nausori area with his partner. He had a number of old convictions and three recent convictions for assault. In April 2008, Mr Chandra left a suitcase containing 2322.7 grams of cannabis in the home of his sister who was married to a Special Constable by name of Vijendra Prasad. Following a dispute with Mr Chandra, his partner phoned a sergeant at Nausori Police Station stating that drugs were in the suitcase and that the combination number was "*007*". Police attended and the suitcase was found in a bedroom occupied by Mr Chandra's father. At trial before Madam Justice Shameem and assessors, the assessors unanimous opinion was that Mr Chandra was "*guilty*" of both the supply and possession of cannabis. On that basis, he was convicted by the learned Judge. Following that, in June 2008, Madam Justice Shameem sentenced Mr Chandra to 6 years imprisonment.

Both Mr Sulua and Mr Chandra then appealed to the Fijian Court of Appeal. There were two main sets of issues in that context. The first was whether either Mr Sulua or Mr Chandra should have been sentenced for the 'supply' of cannabis. That argument was made particularly forcefully on behalf of Mr Sulua who was not actually convicted of the supply offence. With regard to Mr Chandra, it was argued that the mere possession of a large quantity of cannabis did not sustain an inference that the cannabis was to be marketed to other consumers. More specifically, it was contended that possession of 2322.7 grams of supply did not sustain an inference of supply. Secondly, it was argued that

the sentences were excessive in any event. In that respect, it was contended that conviction for possession and supply of 'soft' drugs like cannabis was not to be equated with equivalent offences in relation to 'hard drugs'. That was particularly because there was no evidence that cannabis was used disproportionately by young or vulnerable people.

5 **Held** –

Per Temo J (with whom Fernando concurred)

(1) The traditional role of the Courts was to interpret and apply the will of Parliament/the law makers, as enshrined in legislation. Consequently, it was the solemn duty of the Judiciary to interpret and apply the Illicit Drugs Control Act 2004,
10 notwithstanding any perceived imperfections.

(2) Justice Goundar had not erred in sentencing Mr Sulua to 8 years imprisonment in August 2008 for possessing 5,203.3 grams of cannabis sativa on 10th April 2008. More specifically, the sentence was not harsh and excessive, and was consistent with the intention of the 2004 legislation. His appeal was therefore to be dismissed.

(3) In addition, Justice Shameem had not erred in sentencing Mr Chandra to 6 years
15 imprisonment. The sentence was not harsh and excessive. The sentence is consistent with the intention of Parliament, as expressed in the 2004 legislation (when correctly interpreted). His appeal was therefore also to be dismissed.

Per Marshall J (in dissent)

(4) Fiji had a drug problem with cannabis. It was grown in the interior and "*farms*"
20 could not be spotted or easily accessed. The inland province of Navosa in Viti Levu was notorious as producing commercial quantities of high quality cannabis. Crime prevention focused on stopping buyers of cannabis in commercial quantities when they were in transit.

(5) It was to be noted that the legislature in Fiji by legislation in 2004 had imposed the maximum penalty of life imprisonment or a fine up to $1000,000 for both the offences
25 of possessing cannabis or any other illicit drug and engaging in dealing for sale with another of cannabis or any other illicit drug.

(6) The intention of the legislature in Fiji in 2004 was to increase the maximum penalty for import, export, supply, cultivation or production of heroin, cocaine and LSD and other Class A drugs from 8 years to life imprisonment. This is in line with the
30 international conventions and other applicable extrinsic material.

(7) If the prosecution did not charge "supply" but only "possession" of an amount that might, if "possession with intent to supply" had been available, have resulted in a verdict of "possession with intent to supply" then an accused being only charged with "simple possession" could only be sentenced as a "possessor".

35 (8) Given that Mr Sulua had only ever been charged with possession, it was clear that he was not to be charged with supply. However, the larger the amount possessed the lower the differential between supply and "simple possession" was to be. For 5.2 kilograms, the differential was to be 22 percent because of the significantly larger quantity by weight of cannabis involved.

(9) On the basis of that reasoning, the sentence for "simple possession" in respect of
40 5.2 kilograms of cannabis was 3 years and 6 months. The sentence of 8 years in respect of Kini Sulua was therefore to be reduced to a sentence of 3 years and 6 months. His appeal was therefore to be allowed.

(10) In the case of Mr Chandra, he was a small scale retail supplier. But the amount of cannabis at 2.322 kilograms was very small being only about one eighth of 20
45 kilograms. There were no previous convictions for drug offences and the only recent convictions were three convictions for assault.

(11) The correct "supply" sentence for Mr Chandra in Fiji was to be about 40 percent more than the 3 years and six months appropriate in the United Kingdom. On that basis, the sentence that Mr Chandra was to serve was to be set at 4 years and 3 months. Although that was longer than in Mr Chandra's case, that was because he had also been convicted
50 of supply.

Appeals dismissed.

Cases referred to

Aramah v R [1982] 4 Crim App Rep (S) 407; *Kingswell v The Queen* [1985] 159 CLR 264; *Newton* 77 Crim App Rep 13; *State v Anesh Ram and Others* HAC 124 of 2008; *State v Rasaku & Momoivalu* HAC 136 of 2007, approved.

5 *Astbury* [1997] 2 Crim App Rep (S) 93; *Blyth* [1996] 1 Crim App R (S) 388; *Daley* [1989] 11 Crim App Rep (S) 242; *Herridge* [2006] 1 Crim App Rep (S) 252; *Morrison* [1996] 1 Crim App Rep (S) 263; *Senivalati Ramuwai* AAU 81 of 2007; *State v Keasi Turaganikeli* HAC 6 of 2009; *State v Toroca* HAC 0006 of 2004; *State v Vione Tegu* (unreported) HAC 24/06; *The State v Joji Mate* HAA 28/08; *Uraia* 10 *Tirai v The State* Crim App No AAU0023 of 2009; *Vakalalabure v State* [2006] FJSC; *Vickers* [1999] 2 Crim App Rep (S) 216; *Wong Kam Hung v State* [2003] FJSC 13, considered.

Blackham [1997] 2 Crim App Rep (S) 275; *Dominus Rex v Turner* [1718] 1 Str 140; [93 ER 435]; *Elder* (1993) 15 Crim App Rep (S) 514; *Freeman* [1997] 2 Crim App 15 Rep (S) 224; *Kieu Vi To* [2006] 2 Crim App Rep (S) 380; *Lyall* [1994] 16 Crim App Rep (S) 600; *Meli Bavesi v State* Crim App HAA 027 of 2004; *R v De Simoni* 147 CLR 383; *State v Atunaisa Seru and Saimoni Coka* HAC 17 of 2009; *State v Kean* HAV 37 of 2007; *State v Mesulame Waqabaca and Tiko Uate* Criminal Case No HAC054 of 2009S; *State v Michael Ashley Chandra* Criminal Case No HAC 023 of 2006, High Court, Suva; *State v Bravo* [2008] HAC 145/07; *Watson* [1988] 10 20 Crim App Rep (S) 256, followed.

Booth [1997] 2 Cr App Rep (S) 67; *Chatfield* [1983] 5 Crim App Rep (S) 289; *Doyle* [1998] 1 Crim App Rep (S) 79; *Frazer* [1998] 1 Crim App Rep (S) 287; *Netts* [1997] 2 Crim App Rep (S) 117; *Pusser* [1983] 5 Cr App R (S) 225; *R v Bright* [1916] 2 KB 441; *R v Foo* [1976] CLR 456; *Ronchetti* (1998) 2 Crim App Rep (S) 25 100; *Rupeni Naisoro* AAU 81 of 2008; *State v Mereoni Adikube Koroi* HAC 189 of 2008; *State v Naidua* HAC 044 of 2007; *State v Petaia Vuli* HAC 47 of 2006; *State v Waqabaca & Others* HAC 54/09; *Tuckman* [2005] EWCA Crim 335, applied.

Hill [1988] 10 Crim App Rep (S) 150; *Royle* [1997] 1 Crim App Rep (S) 184, cited.

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S. Vaniqi instructed by *Legal Aid Commission* for the Appellants.

M. Korovou and N. Tikoisuva instructed by *Office of the Director of Public Prosecutions* for the Respondent.

35 **[1]** **Marshall JA.** These appeals both against sentence involving quantities of cannabis sativa are being heard together in view of a call for review of sentencing policy by the Court of Appeal. It is said the amounts by weight of the drugs in these cases is *"large"*. What is a *"large"* amount of cannabis is a matter requiring careful examination.

40 **[2]** The history of dangerous drugs legislation is that there has been international pressure since the early 20th century for states to make criminal the possession and supply of *"hard"* drugs like heroin and cocaine as well the possession and supply of *"soft"* drugs like cannabis and amphetamines. There have been international conventions 1961, 1971 and 1988. To begin with 45 everything was lumped together with an apparently omnibus maximum penalty. That penalty was for the worst case of *"hard"* drugs involving the *"supply"* or *"trafficking"* of very large quantities of heroin or cocaine. But sentencing decisions in common law jurisdictions quite quickly required three differentiations. Differentiation between sentences for offences involving *"hard"* 50 and *"soft"* drugs. *"Hard"* drugs require more substantial sentences. Differentiation between *"possession"* and *"supply"*. *"Supply"* of *"hard"* drugs

require the truly severe sentences. The third differentiation is between the amounts by weight of the drugs involved. So the worst case for the apparently omnibus maximum sentence was for offences of *"supply"* of huge quantities by weight of *"hard"* drugs. By 1971 the international signatories agreed a number of changes including that the original apparently omnibus maximum sentence of eight years was inadequate for supply of huge quantities of hard drugs. This resulted in signatories enacting what the Conventions required. That meant Classification into *"Class A"* drugs like heroin and cocaine and *"Class B"* drugs like cannabis. It also meant differentiation in legislation between *"possession"* and *"supply"* offences with considerably lower maximum sentences for *"simple possession"*. It also meant differentiation in sentences depending on the amounts by weight of the drugs involved in the offences. This was left to the courts of the signatory nations who would provide guidelines for sentences of imprisonment depending on the quantity by weight of the drug involved in the offending. This historical development in sentencing driven by international agreements is unique. But from 1971 onwards these differentiations were required by signatories in their sentencing decisions in respect of those committing offences in respect of dangerous drugs. This is so even if a signatory has failed to implement through municipal legislation the three differentiations required in 1971.

[3] In giving leave to appeal against sentence in the case of *Sulua* Randall Powell JA said:

> *"Leave to appeal the sentence is granted. Mr Sulua was charged with possession of marijuana, albeit a large amount. He was not charged with trafficking and much of what the trial judge said about marijuana (for example that use of marijuana in our community is linked with violent crime) could equally be said about kava and alcohol.*
>
> *I understand that the Court has not published any comprehensive sentencing guidelines for drug related offences but in all events in my opinion there are reasonable prospects that the Court of Appeal will in the circumstances of this case find 8 years prison manifestly excessive.*
>
> *I am supported in this conclusion by the decision of the High Court in State v Naidua HAC 044 of 2007 where possession of 1.765kg of cannibas sativa attracted a sentence of 3 years imprisonment even though the accused had 58 previous convictions a number of which were for possession of dangerous drugs.*
>
> *Moreover other relevant cases include State v Bravo* [2008] HAC 145/07 where a person tried and found guilty of the importation and possession of 2.1k of cocaine received an 8 year prison sentence and *State v Joji Mate* HAA28/08 where the accused received a 3 year prison sentence for possessing 544 grams even though he had served 5 years in prison for a previous drug offence.
>
> *It seems to me that it is time the Fiji Court of Appeal handed down some sentencing guidelines for drug offences which, inter alia, categorise the seriousness of offences according to types and quantities of drugs. Counsel for the State agrees that this appeal is a suitable vehicle for handing down such guidelines."*

The Facts in Kini Sulua

[4] On 10th April 2008, Kini Sulua, a 33 year old man, married with two children and no criminal record, if two offences of drunk and disorderly are overlooked, was in Navosa province. He climbed aboard a local carrier's vehicle with a knapsack bag and a white sack with a pack inside. He lives in the Nausori area to where he and the packages were bound. Outside Navosa police station a police road block terminated Sulua's journey with his bags. Denying the bags were his he contested his guilt of possession of nine packs of dried leaves which

the government chemist found to be 5203.2 grams of cannabis before Mr Justice Daniel Goundar and assessors. However the unanimous opinion of the assessors was *"guilty"*. Justice Daniel Goundar after convicting Sulua on 27th August 2008 and sentencing Sulua on the same day said as follows:

> "*In mitigation you said you are 33 years old, unemployed and married with two children aged 1 month and 3 years. Your education level is Form 6. You have no history of drug use or supply. I noted that you broke down into tears during mitigation. You sought forgiveness from the Court. You have two minor convictions and I treat you as a person of previous good character. I take into account that a custodial sentence will cause hardship to your family.*
>
> *The maximum sentence for being in possession of any illicit drug is life imprisonment or a fine up to $1,000,000.00 or both. The type of drug possessed, the purpose of possession, and the characteristics of the offender are matters to be taken into account in sentencing.*
>
> *The amount of marijuana is significant. 5203.3 grams is not "small scale possession". The drugs were properly wrapped. I take it that the drugs were for a commercial purpose with the object of deriving profit.*
>
> *Possession of marijuana is prevalent in our community. Obviously there is a market for this drug. Unfortunately the users are young people. Also the use of marijuana in our community in many cases is linked to violent crime. The courts take a serious view of those who sell or supply the drugs to others, for commercial profit or gain.*
>
> *In your favour is your previous good character and personal circumstances. You have spent about a month in custody pending trial.*
>
> *The aggravating factors are the significant amount of marijuana and that it was for a commercial purpose.*
>
> *After taking into account the mitigating and aggravating factors, and the time spent in custody, I sentence you to 8 years imprisonment.*"

The Facts in Michael Ashley Chandra

[5] Michael Ashley Chandra is a man in his thirties who at the time of the alleged offence was a taxi driver living and working in the urban corridor and residing in the Nausori area with his partner Ms Ragni Lata. He has a number of old convictions and three recent convictions for assault.

[6] On or about 7th April 2008 Chandra left a suitcase within which was 2322.7 grams of cannabis with a combination lock securing it at the home of his sister who is married to a Special Constable by name of Vijendra Prasad. His partner Ms Ragni Lata after a dispute phoned Sgt. Pita at Nausori Police Station stating that drugs were in the suitcase and that the combination number was "*007*". Police attended and the suitcase was found in a bedroom occupied by Chandra's sick father. At trial before Madam Justice Shameem and assessors the assessors unanimous opinion was that he was "*guilty*" and he was convicted by the learned Judge.

[7] On 13th June 2008 Madam Justice Shameem in sentencing Chandra to 6 years imprisonment said:

> *"Michael Ashley Chandra, you have been found guilty on one count of engaging in dealing with another for sale, with 2,322.7grams of cannabis sativa.*
>
> *The maximum sentence for this offence is life imprisonment and/or $1,000.000 fine. This sentence reflects how seriously Parliament expected the courts to approach the offence of dealing in illicit drugs. It is for this reason that a non-custodial sentence is inappropriate for this offence. In the case of Meli Bavesi v The State* Crim App HAA 027 of 2004, Winter J suggested sentencing guidelines for drugs offences in the following way:

Category 1 (a short prison term 1-2 years or a non-custodial term for a first offender) – growing a small number of cannabis plants for personal use only, or non-commercial supply.

Category 2 (2-4 years) – small scale cultivation, possession or sale for commercial use.

Category 3 (starting point 5-6 years) – large scale commercial growing or possession.

I accept these guidelines and use them as a basis for this sentence.

You are a drug dealer, who bought these drugs from one Isoa for $20, but with a promise to pay him $800, after the drugs were sold. Undoubtedly you would have profited from the sale of the drugs and contributed to the addiction, the misery and the drug-dependent lives led by your intended customers. The drug trade benefits from the weaknesses of those who are vulnerable and dependent. Drugs are a serious problem for Fiji.

I start at 5 years imprisonment. I take into account all that has been said on your behalf, your profession as a taxi driver, your family and your responsibilities. You have a number of previous convictions, which are old and which I disregard and three previous convictions for assault which are more recent.

The aggravating factors are the amount of the drugs, the fact that you put your family members at risk by hiding the drugs in their house and the commercial use to which you intended to put the drugs.

Taking all these factors into account I sentence you to 6 years imprisonment.

Guidelines on Sentencing Possessors of Cannabis

[8] It is not appropriate in a world where drug problems of one kind or another are common currency everywhere but where the pattern of drug smuggling and use is so varied, to attempt more than guidelines on appropriate sentencing in respect of cannabis resin. In Europe and metropolitan centres worldwide "*recreational*" drugs have moved on from chemical compounds such as LSD and ketamine to designer drugs which chemists produce with great skill so that the latest drug is not yet proscribed by subsidiary legislation.

[9] In Europe and America the refined product of the coca leaf known as cocaine is the subject of a multibillion US dollar criminal smuggling industry with production taking place in tropical South America. Cocaine use is very addictive and initial recreational use often results in addiction and in the West drug rehabilitation units are used by the wealthy to beat coca addiction.

[10] Dating back for centuries opium and its refined product heroin has been used in Asia and around the world for various purposes. It is still used medically in the pain killer morphine. Its medical use in the West gave rise to recreational use and addiction and it became a controlled substance. It is probably the most addictive drug of all and many addicts die prematurely from heroin overdosing. The international criminal trade in opium narcotics as with cocaine is a multibillion US dollar industry with international implications for the stability of nation states and influencing international relations between states.

[11] There are other *"substance abuses"* providing for recreational use. In the Pacific including Fiji, there is kava. The root of the pepper shrub (yaqona) is used as waka and is popularly known as *"grog"*. It is part of the culture of Fiji and the Pacific. Possession of kava or yaqona plants has never been illegal.

[12] Abuse of ethyl alcohol in the form of consumption of spirits and beers in the West has a similar cultural history to that of kava in the Pacific. While abuse of alcohol causes social problems western society still struggles with the damage social and personal that it causes. But at no time, other than during *"Prohibition"*

in the USA, has it been sought to make possession of alcohol illegal. The state has a vested interested in the flow of public revenue derived from sales of spirits and beers as well as from import duties. As I note below there is an alcohol problem in Fiji and there are cases where alcohol is linked to commission of violent crimes.

[13] I turn now to cannabis. The fibres from the hemp plant (cannabis sativa) have long been used to make rope. The plant grows naturally in tropical climates. I am informed that it was not native to Fiji but it was brought from the Indian sub continent where its use was in no way illegal.

[14] The Shorter Oxford English Dictionary published in 1933 describes the adjective "*cannabic*" as being derived from the classical Greek word for "*hemp*". It goes on to describe the noun "*cannabin*" as *"the poisonous resin of the extract of Indian hemp."*

And "*cannabis indica*" as *"Indian hemp; the dried, flowering tops of the female plants of cannabis sativa."*

The Oxford Advanced Learners Dictionary (7th Edition 2005) is a simplified and much shorter version of the Shorter Oxford. But it is at least culturally up-to-date to 2005. It says:

" 'cannabis' (a noun) – a drug made from dried leaves and flowers or RESIN of the HEMP plant, which is smoked or eaten and which gives the user a feeling of being relaxed. Use of the drug is illegal in many countries."

Finally there is the New Oxford Dictionary of English (2002 Revised) which has the following useful explanation:

"cannabis – noun - a tall plant with a stiff upright stem, divided serrated leaves and glandular hairs. It is used to produce hemp fibre and as a psychotropic drug. Also called Indian Hemp, Marijuana.

A dried preparation of the flowering tops or other parts of this plant, or a resinous extract of it (cannabis resin), used (generally illegally) as a psychotropic drug, chiefly in cigarettes.

ORIGIN from Latin, from Greek 'kannabis'.

Psychotropic

Adjective relating to or denoting drugs that affect a person's mental state.

Noun a drug of this kind."

[15] It seems that that what was regarded as poisonous in 1933 is regarded as inducing a relaxed feeling in 2005. In some parts of the world there is an exemption from illegality if the drug is medically prescribed in order to induce a relaxed feeling in patients. In many places like Amsterdam in Holland it can be bought for personal use and there is a policy of non-prosecution.

[16] Since the rise of possession and supply of cannabis sativa as criminal offences in the last seventy years or so, there has been much debate as to its role as a "*starter*" drug that leads those with addictive personalities into using progressively "*harder*" drugs such as heroin. There has never been proof of this. There have also been suggestions that addiction to cannabis leads to depressive illness. It may that it triggers depression on those prone to depressive illness. On the other hand many "*occasional*" and "*recreational*" users consider it merely as a social drug similar to the moderate use of spirits or beer. It does not seem that it is easy to derive hard results from the many studies that have been done on the use and abuse of cannabis. It clearly has different results for different people.

[17] Fiji has a drug problem with cannabis. It is grown in the interior and "*farms*" cannot be spotted or easily accessed. The inland province of Navosa in Viti Levu is notorious as producing commercial quantities of high quality

cannabis. Crime prevention focuses on stopping buyers of cannabis in commercial quantities when they are in transit with their '*stash*' on their person or in their baggage. There is also cannabis farming on Kadavu.

[18] In respect of cocaine and heroin or chemical designer drugs there seems at the present time to be little or no use of these at least by those born and raised in Fiji. There is no present problem or present danger to the body social in Fiji from these other drugs. Some of those visiting Fiji on holiday may bring one of these drugs in small quantities for personal use. Guidelines for dealers or personal users can be obtained from precedents within the mainstream common law jurisdictions. These are usefully set out and digested at Blackstone (2011) paragraph B19.109. These guidelines are in respect of possession and supply of Class A *"hard"* drugs such as heroin and cocaine.

Possession and Supply of Cannabis

[19] It is to be noted that the legislature in Fiji by legislation in 2004 has imposed the maximum penalty of life imprisonment or a fine up to $1000,000 for both the offences of possessing cannabis or any other illicit drug and engaging in dealing for sale with another of cannabis or any other illicit drug. It is trite law that maximum sentences are for offences that can accurately described as the worst examples of such offending; however since the possession of small or large amounts of cannabis cannot possibly attract such severe penalties, there is a problem. I will discuss it in detail below.

[20] Randall Powell JA, in giving leave in the case of Sulua in saying:

> *" …Mr Sulua was charged with possession of marijuana albeit a large amount. He was not charged with trafficking…"*

[21] In contrast, in the court below in *Sulua* in the passage above cited, Goundar J states that if it is a clearly commercial amount and packaged for sale, the offender must be treated and sentenced as a commercial supplier. This is justified by the life imprisonment maximum sentence imposed for possession.

[22] Then there is the question of cannabis use mostly among young people being linked to violent crime. It is stated and relied upon by Goundar J in *Sulua* in the passage cited above.

[23] In *Chandra* Shameem J stressed the social evil of contributing to the addiction, the misery, and the drug dependant lives led by intended consumers. Both judges in the court below said that drugs are a serious problem in Fiji.

[24] In contrast Randall Powell JA in giving leave in *Sulua* said that what had been said about marijuana being linked with violent crime could equally well be said about kava and alcohol. I will examine the contribution of alcohol to violent crime below.

[25] Very few of the users of cannabis become addicts. Some may become addicted to its use. But many others use it just like alcohol or kava for the pleasant euphoric *"relaxed"* feeling that it gives them. While in respect of alcohol, kava and cannabis a significant proportion of users may use the substance so frequently as to become addicted, there is probably a greater proportion of users that avoid addiction and who lead relatively normal lives.

Dangerous Drugs Legislation in Fiji

[26] In 1938 Fiji followed United Kingdom legislation in respect of dangerous drugs. The object was to control the legal use of dangerous drugs within pharmaceutical or medical practice. But for the first time, growing, importation

supply, and possession of *"opium poppy", "Indian hemp"* or *"coca leaf"* became statutory offences under the criminal law. Under this legislation there was an apparently omnibus maximum sentence. There was no differentiation between *"hard"* and *"soft"* drugs.

5 **[27]** The Dangerous Drugs Ordinance Cap 114 provided for offences in s 8 which stated:

> *"Every person –*
>
> *a) growing opium poppy, Indian hemp or coca leaf, whether for private use or otherwise; or*
>
> 10 *b) found in possession of or selling, or who has given or sold to any person, any substance to which this Part applies,*
>
> *is guilty of an offence against this Act."*

[28] Section 41(2) provides for penalties. It says:

> 15 *"Every person guilty of an offence against this Act shall in respect of each offence for which no penalty is otherwise prescribed be liable upon conviction to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding eight years or to both such fine and imprisonment, … (Substituted by 6 of 1978, s 2)."*

[29] It will be observed that although there were numerous changes and 20 amendments to the Dangerous Drugs Ordinance Cap 114 which in 1970 became the Dangerous Drugs Act Cap 114 there was no change to provide heavier penalties for *"hard"* drugs like heroin or cocaine and there remained a uniform maximum penalty of $2000 fine or eight years imprisonment. By 1971 the international agreements required the three differentiations in national legislation. 25 But Fiji did not implement the legislation for Fiji that was required. The Conventions are listed at paragraph 35 below.

[30] What was missed out in Fiji was the United Kingdom legislation passed in 1971. The Misuse of Drugs Act 1971 and its changes in the United Kingdom are described as follows at page 183 of *"Principles of Sentencing"* 2nd Edition 1979 30 by D A Thomas:

> *"The legislative framework contained in the Misuse of Drugs Act 1971 reflects distinctions which have been recognized in sentencing practice for many years. For the purpose of assessing culpability, offenders are divided into categories according to whether they are users or suppliers, and according to the nature of the substance* 35 *involved. Each category may be divided into further subcategories."*
>
> The most important sub category is the differentiation in respect of amounts by weight of the drug involved. Altogether the three differentiations referred to in paragraph 2 above should have been covered in appropriate Fiji legislation. Differential sentences according to quantities by weight involved do not require express words in 40 the statute. It is for the judges to provide for this differentiation by their decisions.

[31] One of the items in the Misuse of Drugs 1971 is the creation of an offence of possession with intent to supply. Section 4(1) makes it an offence *"to supply or offer to supply a controlled drug to another"*. Then the legislative scheme incorporates this in s 5(3) which says:

45

> *"Misuse of Drugs Act 1971, s 5*
>
> *(3) Subject to s 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of s 4(1) of this Act."*
>
> Section 28 provides a defence for an accused person if he proves:
>
> 50 *"that he neither knew of nor suspected, nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove."*

> See further Blackstone (2011) at B19:79 and B19:80
>
> The offence of *"possession with intent to supply"* can be proved by admission on the part of the accused as to his purpose in having possession. The amount of the drug possessed is a relevant factor. Also the way the drugs are packaged when found may be relevant. It may also be relevant if a large amount of money is found near the controlled drug. One way or another the offence of *"possession with intent to supply"* is extremely important if large amounts of drugs unlikely to be consistent with personal use are found by investigators.

[32] The second required innovation in the Misuse of Drugs Act 1971 was the classification into Class A, Class B and Class C drugs. There is then, in accordance with the class in which the controlled drug is within, statutory maximum penalties for possession and supply. As before in the United Kingdom it was left to the judges to develop and revise sentencing guidelines depending on the quantity by weight of drugs involved in the offending.

[33] Experience in the United Kingdom shows that the Class A hard drugs which are the subject of criminal cases are *"heroin, morphine, cocaine, LSD, opium and Ectasy"*. By Schedule 4 of the Misuse of Drugs Act 1971 maximum penalties are set for Class A, B and C offences. They refer to maxima on summary conviction as well as maxima for conviction on indictment. For present purposes I only refer to cases heard on indictment; that is to say heard by a High Court Judge sitting with assessors in Fiji where it is referred to as an *"information"* rather than indictment. For possession of one of the Class A drugs such as those listed above the maximum on indictment is 7 years or a fine, or both. For supplying or possession with intent to supply these Class A *"hard"* drugs the maximum penalty is life imprisonment or a fine or both.

[34] When it comes to Class B drugs those which are frequently the subject of criminal cases are *"cannabis, cannabis resin, amphetamine and codeine"*. The maximum for possession of Class B drug such as cannabis is 5 years imprisonment or a fine or both. The maximum for supplying or possession with intent to supply for Class B drugs including cannabis is 14 years imprisonment or a fine or both.

[35] In respect of Class C drugs such as anabolic steroids the maximum for possession is 2 years and for supply the maximum is 14 years imprisonment.

> In countries around the world the drug legislation is in the same format. This is because most nations are signed up to three main United Nations Conventions. These are the Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol)., the Convention on Psychotropic Substances 1971 and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. Since Fiji has signed and ratified these Conventions, its international obligation is to have on the statute book, something very close to the Misuse of Drugs Act 1971 as amended from time to time just as it exists in the United Kingdom. There is almost identical legislation in Australia and other mainstream common law jurisdictions.

The Origin of the 2004 Fiji Legislation

[36] Against a background of failure to implement local dangerous drugs legislation in line with the Convention and to enact in Fiji's legislation very close to the Misuse of Drugs 1971 as amended in the United Kingdom, a Class A drug seizure of world class proportions was made in Suva. In about December 1999 357.78 kilograms of 75% pure heroin imported from Burma by Hong Kong businessmen was in 2000 found stored in Tamavua. It was intended for Australia where in 2000 the Sydney Olympics was to take place. Some 35 kilos were

removed to Suva Yacht Club in September 2000 with a view to being moved to Australia in September 2000. One Wong Kam Hung pleaded guilty on 8th February 2002 to two counts of importing which together involved 357.78 kilos and one count of attempting to export. He was sentenced to 7 years on Count 1 and 5 years consecutive on Count 3 and the total sentence was 12 years. He appealed by way of the Court of Appeal to the Supreme Court (Justices Robert French, Kenneth Handley and Mark Weinberg) who refused special leave. The case reference in the Supreme Court is *Wong Kam Hung v The State* [2003] FJSC 13. Their Lordships said:

> *"…In our view, the overall sentence of twelve years' imprisonment does not offend the 'totality principle'. The offences in question were close to being the worst cases of their type, at least in any practical, or realistic, sense. Had the legislature heeded the repeated calls by the judiciary for the maximum penalty for this type of offence to be substantially increased, the petitioner would undoubtedly be facing a far heavier sentence than twelve years."*
>
> This was on 23rd October 2003. Had it not been that 35 kilos had been moved in a separate transaction the sentence for importing 357.78 kilos of heroin could not have been more than 8 years. Under the Conventions for a Class A drug like heroin the maximum penalty should have been life imprisonment.

[37] The executive in Fiji was afraid that the heroin incident might be repeated. If so the failure of Fiji to have in place controlled drug laws as required by the Conventions would attract adverse comment from other signatories. Especially so with regard to not yet having in local Fiji law, the level of sentencing required for supply offences of huge quantities of Class A *"hard"* drugs such as heroin. There was pressure for new legislation.

[38] The unfortunate result of this pressure is that without adequate research or consideration, at the request of the executive, the legislature passed the Illicit Drugs Control Act of 2004. The House of Representatives did so on 16th June 2004 and it was then passed by the Senate on 25th June 2004. It is obvious that the sense of urgency displaced the need for care. The result does not implement the international conventions as it should have done. But in setting a maximum of life imprisonment it is clear that this was intended by the Fiji legislation for the worst case of a supply offence of a Class A drug such as heroin.

[39] In s 2 of the Illicit Drugs Control Act 2004 the following definitions are relevant to the scope of offences:

> *"2. In this Act, unless the context otherwise requires –*
> *'illicit drug' means any drug listed in Schedule 1;*
> *'supply' includes distribute, give, sell and offer to supply."*

[40] In Part 2 – *"Offences"* the following sections create offences and fix maximum sentences:

> *"PART 2 – OFFENCES*
> *Unlawful importation and exportation*
> *4.1(1) Any person who without lawful authority (proof of which lies upon that person) imports or exports an illicit drug commits an offence and is liable upon conviction to a fine not exceeding $1,000,000 or to imprisonment for life or both.*
> *(2) In any proceedings under this Part, proof of lawful authority lies upon the accused person.*
> *Unlawful possession, manufacture, cultivation and supply*
> *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 $1,000,000 or imprisonment for life or both.

Controlled chemicals and equipment

6. Any person who without lawful authority imports, exports, manufactures, possesses, or supplies any controlled chemical or controlled equipment –

(a) knowing that the chemical or equipment is to be used in, or for, the commission of an offence under s 5; or

(b) being reckless as to whether that chemical or equipment is to be used in or for the commission of an offence under s 5;

commits an offence and liable to a fine not exceeding $1,000,000 or imprisonment for life or both.

[41] Schedule 1 contains a list of illicit drugs listed on no rational basis. What has happened is that the list of drugs in each Convention have been listed in seven lists (numbered from Part 1 to Part 7). Since the Conventions are all listed by name, there is no doubt that the intention of the legislature was to implement the Conventions with domestic Fiji legislation. Contrary to the Conventions there is no classification into Class A, Class B and Class C. Therefore the appropriate maximum sentence for supply of heroin or cocaine which is life imprisonment appears to apply to cannabis, amphetamines, and controlled chemical compounds, without differentiation. Yet the Conventions require this differentiation. The appropriate differentiations are those contained in the United Kingdom Misuse of Drugs Act 1971 as amended. But if a seemingly maximum penalty was intended by the Fiji legislature to leave it to common law sentencing principles as applied to earlier dangerous drug legislation and in particular the 1938 Ordinance then a solution becomes possible. The courts simply differentiate sentences on whether it is possession or supply, on whether it is *"hard"* drugs or *"soft"* drugs, and on whether it is a large or small amount of drugs by weight.

What is the Maximum Sentence for Possession of Cannabis in Fiji?

[42] It is urged upon the Court that the 2004 Illicit Drugs Control Act, must be interpreted so that in Fiji the worst case of possession of cannabis must be visited by life imprisonment. Yet under the implementation of the same international conventions the worst possible case of possession of cannabis attracts a maximum penalty at some times and places in the common law world of as little as 2 years imprisonment. The norm however is clearly set at 5 years as is set out in the Misuse of Drugs Act 1971 as later amended.

[43] The source of the mistake is the re-adoption by the Fiji legislature of the legal framework of the Dangerous Drugs Ordinance of 1938. It lumps possession and supply together and lumps *"soft"* drugs such as cannabis with *"hard"* drugs such as heroin and morphine which Lord Lane CJ in England in the landmark case of *Aramah v R* (1982) 4 Cr App Rep (S) 407 at 408 and 409 made the following comment:

"It is common knowledge that these are the most dangerous of all the addictive drugs. By 1971 international thinking demonstrated in the texts of the international conventions had moved on. So for supply of heroin the maximum was now life imprisonment. On the other hand possession of heroin even if it is 'the most addictive drugs' in consensus 1971 thinking attracts a maximum of 7 years imprisonment."

[44] The intention of the legislature in Fiji in 2004 was to increase the maximum penalty for import, export, supply, cultivation or production of heroin, cocaine and LSD and other Class A drugs from 8 years to life imprisonment. This

is in line with the international conventions, which prescribe the drafting instructions, the structure and the legal policy in respect of required legislation. It is also in line with the mischief and inadequacy with regard to existing legislation exposed by *Wong Kam Heng* (supra). The mischief remedied in 2004 was the lack of an adequate penalty for the supply of a vast quantity of Class A *"hard"* drug heroin.

[45] But in bringing a maximum of life imprisonment for supply of *"hard"* drugs, the 2004 neglected the other reforms required in 1971 by the Convention. In leaving in place the 1938 structure the legislature in 2004 omitted to provide any maximum penalty for possession of Class A, Class B and Class C Drugs. These *"hard"* and *"soft"* drugs were all lumped together. They also omitted to provide a maximum penalty for supply (in the usual various ways) of Class B and Class C drugs. Finally the Fiji legislature omitted to provide for an offence of *"possession with intent to supply"* which since 1971 the international consensus has required as a *"supply"* offence carrying *"supply"* penalties.

[46] The Courts must fill in the missing maxima together with differentiation between *"possession"* and *"supply"* offending and differentiation between *"hard"* (Class A) drugs and *"soft"* (Class B) drugs.

[47] I have noted above in paragraph 30 that D A Thomas who is regarded over many years as the leading and most authoritative writer on sentencing states that the 1971 Act reflected *"distinctions which have been recognized in sentencing practice for many years"*. He is referring to the period after the first Dangerous Drugs Act in about 1938 when the maximum without the differentiations now required was 8 years. He is also referring to the period under the statutory regime of the Dangerous Drugs Act 1965 in the United Kingdom when the maximum was 10 years.

[48] Just as the common law required these differentiations when there was an apparent omni-purpose maximum of 8 years and later (in the United Kingdom) 10 years they would have been required if there had been an apparent new omni-purpose maximum of life imprisonment. The differential between supply and possession and between *"hard"* Class A drugs and *"soft"* Class B drugs would result from common law sentencing decisions on an incremental basis.

[49] The only questions raised by the failures on the 2004 Act in Fiji on the present appeals are two. Firstly what is the appropriate sentence in Fiji for the worst possible case of *"simple possession"* of a huge amount of the *"soft"* (Class B) drug that is cannabis? Secondly, what is the appropriate sentence in Fiji for the worst possible case of *"supply"* of a huge amount of the *"soft"* (Class B) drug that is cannabis?

[50] The answers based on the same Conventions that bind Fiji according to common law jurisdictions such as the United Kingdom or Australia is 5 years imprisonment for *"simple possession"* and 14 years imprisonment for *"supply"*. For Fiji applying the common law principle of differentiation created by the courts and applied by them to sentences under the 1938 legislative scheme, the answer is *"around"* or *"about"* 5 years and 14 years. I have used the words *"around"* and *"about"* because the exercise is one of implementing international treaties. In that exercise differences in local conditions can justify margins of appreciation.

[51] I regret that the failure to enact a supply offence of *"possession with intent to supply"* cannot be the subject of a similar process. Since it is a statutory offence not known to the common law it can only be created by amending

legislation. In my view it is imperative that this be done immediately. I say this because the errors in sentencing that have arisen have been largely created by attempts to work without this essential supply offence.

The Appropriate Sentencing Guidelines For Possession and Supply of Cannabis in Fiji; the third differential on account of the quantity by weight of the dangerous drug involved

[52] The common law of England has sentencing guidelines based on the three differentials and in particular the differential on account of the quantity by weight of the dangerous drug involved. These sentencing guidelines are decisions within a statutory framework fully derived from the international conventions. The guidelines are also kept up to date by recent sentencing decisions. They derive from Lord Lane CJ in *Aramah* (1982) 4 Cr App Rep (S) 407. They were updated by the Court of Appeal in England in *Ronchetti* (1998) 2 Crim App R (S) 100. Within the relevant paragraphs of Blackstone [2011] are also included an up to date case digest of relevant decisions. Both *Aramah* as amended, and the Blackstone 2011 digest apply to Class A, Class B and Class C drugs. The present focus is limited to Class B drugs such as cannabis. Paragraph B19.110 explains revised *Aramah* and digested cases in respect of Class B drugs. It reads:

"Class B Drug Offences

B19.110 In Aramah (1982) 4 Cr App Rep (S) 407, the Court of Appeal (per Lord Lane CJ, at 409 – 10) distinguished importation, supply and possession of cannabis. The guidelines are set out here as amended by the Court of Appeal in Ronchetti [1998] 2 Cr App R (S) 100, with respect to the importation of large quantities of cannabis.

"Class B Drugs, particularly cannabis: We select this from among the Class B drugs as being the drug most likely to be exercising the minds of the courts.

Importation of cannabis: Importation of very small amounts for personal use can be dealt with as if it were simple possession, with which we will deal later. Otherwise importations of amounts up to about 20 kg of herbal cannabis or cannabis resin, or the equivalent in cannabis oil, will, save in the most exceptional circumstances, attract sentence of between 18 months and three years, with the lowest ranges reserved for pleas of guilty where there has been small profit to the offender. The good character of the courier (as he usually is) is of less importance than the good character of the defendant in other cases. The reason for this is, it is well known that the large scale operator looks for couriers of good character and for people of a sort which are likely to exercise the sympathy of the court if they are detected and arrested. Consequently one will frequently find that students and sick and elderly people are used as couriers for two reasons: first of all they are vulnerable to suggestion and vulnerable to the offer of quick profit, and secondly it is felt that the courts may be moved to misplaced sympathy in their case. There are few, if any, occasions when anything other than an immediate custodial sentence is proper in this type of importation.

Medium quantities over 20 kg will attract sentences of three to six years' imprisonment, depending upon the amount involved, and all the other circumstances of the case.

The importation of 100 kg by persons playing more than a subordinate role should attract a sentence of seven to eight years. Ten years was the appropriate starting point following a trial for importation by such persons of 500 kg or more. Larger importations would attract a higher starting point, which should rise according to the roles played, the weight involved and all the other circumstances of the case, up to the statutory maximum of 14 years. A discount from all the figures indicated would, of course, be called for according to the roles played and where there was a plea of guilty.

Supply of cannabis: Here again the supply of massive quantities will justify sentences in the region of 10 years for those playing anything more than a subordinate role. Otherwise the bracket should be between one to four years' imprisonment, depending

on the scale of the operation. Supplying a number of small sellers – wholesaling if you like – comes at the top of the bracket. At the lower end will be the retailer of a small amount to a consumer. Where there is no commercial motive (for example, where cannabis is supplied at a party) the offence may well be serious enough to justify a custodial sentence."

5

Cannabis: There are several Court of Appeal decisions following and applying the guidelines in Aramah, dealing with the appropriate sentences for offences in connection with Class B drugs offences, mainly cannabis. The first group is concerned with importation. At the top end of the scale, the offenders in Royle [1997] 1 Cr App R (S) 184 received sentences of 13 years and seven years respectively for their roles in the importation by boat of 1,609 kg of cannabis resin, estimated to be worth in excess of £5.5 million. The sentences were upheld, the Court of Appeal noting that only a modest reduction was appropriate for their guilty pleas since the offenders had been caught red-handed by the customs authorities. In Vickers [1999] 2 Cr App R (S) 216, the Court of Appeal indicated that, following a trial, the sentence appropriate for importations of the order of 100 kg by persons playing more than a subordinate role, should be seven to eight years. Ten years was appropriate, following a trial, for importations of 500 kg or more. Larger importations would attract higher starting points. In Frazer [1998] 1 Cr App R (S) 287, a sentence of six years was upheld in respect of an offender who was found to have 36 kg of cannabis in his suitcase at Gatwick Airport. The sentence, at the top end of the bracket in Aramah, was justified since this was the offender's third such conviction. Towards the lower end of the importation scale, in Watson (1988) 10 Cr App R (S) 256, the offender and another woman imported 12 kg of cannabis, the offender's suitcase containing 7.4 kg. She was convicted after a trial and sentenced to four years' imprisonment. This was reduced to two years, in line with the Aramah guidelines. The offender in Blyth [1996] 1 Cr App R (S) 388 arrived in Dover by coach and was found to be in possession of 16 kg of cannabis resin. He admitted having made several previous trips for the purposes of importing cannabis from Spain. A sentence of two years' imprisonment was upheld. In Astbury [1997] 2 Cr App R (S) 93, three months' imprisonment was said to be appropriate for importing cannabis from Spain. A sentence of two years' imprisonment was upheld. In Astbury [1997] 2 Cr App R (S) 93, three months' imprisonment was said to be appropriate for importing 1,100 grammes of cannabis, to the value of about £1,500, for personal use. The Court of Appeal in Elder (1993) 15 Cr App R (S) 514, found, with some hesitation, that importation by two defendants of 200 grammes of cannabis resin and 700 grammes of herbal cannabis for personal use was an offence which did not cross the custody threshold and could properly be dealt with by way of a community service order.

The second group of cases involves distribution of Class B drugs, mainly cannabis. Again, a scale of sentences may be ascertained, following the Aramah guidelines. At the top end of the range, the offender in Netts [1997] 2 Cr App R (S) 117 was convicted of possessing cannabis with intent to supply. He was stopped while driving his car, which was found to contain 90 kg of cannabis resin in 24 packages. It was accepted that the offender was acting as a courier within the UK. A sentence of seven years' imprisonment was reduced to five years on appeal, the Court of Appeal noting that the very large quantity of cannabis involved took the case above the four year level referred to in Aramah but also taking account of the fact that the offender had no previous involvement with drugs and no convictions of any kind. In Chatfield (1983) 5 Cr App R (S) 289, the offenders pleaded guilty to possession of 2 kg of cannabis, with intent to supply. Sentences of 30 months were upheld by the Court of Appeal, Watkins LJ commenting that:

'They came somewhere between about half-way towards and the end of the bracket, allowance being made for the fact that they pleaded guilty and for their characters'.

Thirty months was said to be 'at the top end of the appropriate scale' but was upheld in Daley (1989) 11 Cr App R (S) 242, where the offender, shortly after release from prison for burglary, was seen by a police officer selling cannabis. He sold the officer a small quantity and agreed to supply more; when arrested he was in possession of 450.5

grammes of cannabis resin. He pleaded guilty. In Hill (1988) 10 Cr App R (S) 150, the offender had been dealing in cannabis from his home on a regular basis for some time, earning £100 per week from this activity. A 30-month sentence, described by the Court of Appeal as 'near the top end of the bracket for offences of this sort', was reduced to 21 months, since 'although the supply was on regular basis to a large number of people the amounts involved were comparatively small' and greater recognition should have been given to the offender's guilty plea. Fifteen months' imprisonment was appropriate in Freeman [1997] 2 Cr App R (S) 224, where the offender, a man with previous convictions though not related to drugs, pleaded guilty to possession of cannabis resin with intent to supply. The offence was aggravated by the fact that he took the drug into prison to supply a serving prisoner. See also Doyle [1998] 1 Cr App R (S) 79.

The commercial production or cultivation of cannabis remains a serious offence carrying substantial penalties (see Xu [2008] 2 Cr App R (S) 308, Tuckman [2005] EWCA Crim 335 and Kieu Vi To [2006] 2 Cr App R (S) 380. The crucial matter is whether the cannabis was for personal use, or for supply. In Herridge [2006] 1 Cr App R (S) 252, the Court of Appeal noted that the offence of cannabis cultivation involved a wide variation in culpability, but would ordinarily attract a custodial sentence. For cultivation of 52 cannabis plants at home, for personal use, the appropriate sentence, following a guilty plea, was six months' imprisonment. For production of cannabis on a serious commercial scale, imprisonment for four years was upheld in Booth [1997] 2 Cr App R (S) 67. It was estimated that the operation would produce between 8 and 10 kg of cannabis each year. See also Lyall (1994) 16 Cr App R (S) 600. In Blackham [1997] 2 Cr App R (S) 275, 12 months' imprisonment was appropriate in a case where the offender cultivated 75 cannabis plants at home. The offender was intending to supply cannabis, though not on a commercial basis, and he had a previous conviction for possession of cannabis with intent to supply.

Few cases are reported on the appropriate sentencing pattern for the offence of permitting premises to be used for smoking cannabis. In Pusser (1983) 5 Cr App R (S) 225, however, the offender was the licensee of a public house at which cannabis was smoked, though there was no evidence that he used cannabis himself. After a warning, the police searched the premises and found cannabis in several forms. The Court of Appeal described this as a 'bad case' and upheld the sentence of six months' imprisonment. Twelve months' imprisonment was upheld in Morrison [1996] 1 Cr App R (S) 263, where the offender allowed young people aged 14 or 15 to visit his house and smoke cannabis; there was no evidence that the offender supplied cannabis to them."

[53] In view of the fact that simple possession of cannabis is not much mentioned in the *Aramah* guidelines or in the Blackstone commentary thereon, I attach the guidelines of D A Thomas in respect of possession of cannabis. It is from the 2nd Edition of *"Principles of Sentencing"* published in 1979. In this respect the author focuses on sentences in the period after the enactment of the Misuse of Drugs Act 1971. At pages 187 – 188 D A Thomas states:

"The distinction between the distributor and the consumer is well established in sentencing practice and reflected in the substantive law. While a person convicted of simple possession (see Murray 19.6.75, 1139/A/75) only may not be sentenced as a distributor, however much cannabis he has in his possession, the Court has upheld sentences of imprisonment on consumers in possession of substantial quantities of cannabis (by comparison with the more common user). In Andrews (16.5.74, 774/A/74) the appellant was sentenced to twelve months' imprisonment for simple possession of over 200 grammes of cannabis; upholding the sentence the Court stated that 'treating this man as not being a supplier, which in loyalty to his plea we must do, the quantity of cannabis found in his house entirely justified the sentence'. A similar sentence was upheld in Cox (23.8.74, 2012/B/74) on 'a user on a substantial personal scale' for possession of about 80 grammes of cannabis resin. In Greaves (23.7.74, 1510/B/74) the appellant admitted possession of 500 grammes of cannabis resin, which he had bought

as a supply to last for four months. The Court stated that while 'we cannot regard this as a trivial offence', the sentence could be reduced from eighteen months' imprisonment to nine.

In the more usual case of possession, where the quantities involved are measured in milligrammes, a custodial sentence will rarely be upheld; while in some cases the Court has suspended a sentence of imprisonment (See Roberts 17.6.74 1985/A/74), the more usual sentence is a fine. In Marsh (29.7.75, 2051/A/75) the appellant was convicted of possessing a small quantity of cannabis – one cigarette and some traces in the bowl of a pipe. The Court stated that 'having regard to the minimal nature of the offences within the spectrum of offences of this character, a fine of £25 would have been appropriate'; the sentence was varied accordingly."

Where there is a Conviction on Simple Possession, does the Common Law Allow Sentencing as a Supplier?

[54] The footnote referring to *Murray* in the citation in the last paragraph from page 187 of the 2nd Edition of Thomas answers the question:

"See Murray 19.6.75 1139/A/75, (simple possession of 3 kilograms; thirty months reduced to nine; appellant not to be sentenced as supplier)."

[55] Slightly earlier in the text at page 183 Thomas also directly answered the present question in the same way as the Court did in *Murray*. The text reads:

"In deciding into which category a particular offender falls, the sentencer is bound by the general principles governing the determination of a factual basis for sentence and must not impose a sentence on the assumption that the offender is guilty of a more serious offence than has been proved or admitted. In particular, the sentencer may not sentence the offender as a pusher or supplier if he has been convicted only of possession of the substance concerned, as opposed to possession with intent to supply, or supply of the substance. In Fleming (9.5.75, 4225/C/74) the appellant was convicted of possession of morphine but acquitted of possession with intent to supply. Observations made by the sentence indicated that 'he was plainly dealing with this man upon the basis that he was concerned in drug trafficking'. The Court stated that the sentence 'was wrong to do that; as the appellant had neither admitted nor been convicted of such an offence 'he was entitled to be dealt with upon the basis that all that had been proved against him was the unlawful possession of certain prohibited drugs'. The sentence was varied to borstal training."

[56] The next issue is whether the rules establishing a factual basis for sentence now associated with the case of *Newton* 77 Cr App R 13 can be used in this situation to sentence for supply (in one of its forms). The problem in *Newton* arose where the law was that anal intercourse with a woman (in this case his wife) even if it was consensual amounted to the crime of buggery. Mr Newton pleaded guilty to one count of buggery on the basis that it was consensual. The prosecution case was that it was not consensual. Judge Argyll QC at the Central Criminal Court sentenced Newton to 8 years imprisonment. Before doing so Judge Argyll had said that if the factual dispute was resolved by him on submissions rather than by him on hearing evidence under oath *"it was incumbent upon me … to accept the accused's version … and to pass sentence accordingly"*.

[57] Lord Lane CJ recited what Judge Argyll had said in sentencing. It was a finding of fact against the accused's version of what happened. Said Lord Lane CJ substituting a sentence allowing immediate release in place of 8 years imprisonment:

"It is plain … that the judge failed to adopt one of the three courses open to him, or that the one that he did adopt was wrongly performed by him."

An up to date summary of the law on *"Newton hearings"* is at Blackstone 2011 paragraphs D19-17 through D19-29.

[58] The following extract from Thomas although predating the case of *Newton* and the cases cited therein make it clear that these principles do not allow the judge to sentence on any other basis than what is consistent with the formal determination of guilt. Thomas at page 367 says:

"The first principle is that the version of the facts on which the sentence is premised must be consistent with the formal determination of guilt. If the offender has been acquitted of a graver charge and convicted of a lesser offence, the sentencer must accept that determination of the starting point for his consideration of the appropriate sentence, even though his own view is that the offender was guilty of the graver offence and has been fortunate in his jury. In Thomas (14.3.74, 5141/A/73) the appellant was convicted of maliciously inflicting grievous bodily harm on an indictment which charged him with attempted murder and causing grievous bodily harm with intent. The evidence was that he had attacked a man with a spade and boiling water. The Court observed that 'the judge seems to have taken the view that the jury had reached a verdict which was merciful' and imposed a sentence which would have been appropriate on a conviction for causing grievous bodily harm with intent. This was incorrect: 'the judge, despite his own views as to what the jury should have done, was …in law bound to sentence this man on the basis that he was not proved to have intended to do any of the harm which was in fact done'. Many similar cases can be found."

[59] It is clear that if the prosecution do not charge *"supply"* but only *"possession"* of an amount that might, if *"possession with intent to supply"* had been available, have resulted in a verdict of *"possession with intent to supply"* that the accused being only charged with *"simple possession"* can only be sentenced as a *"possessor"*.

[60] The general principle of this kind of sentencing error was discussed by the High Court of Australia (Gibbs CJ, Mason J, Murphy J, Wilson J and Brennan J) in *R v De Simoni* (1981) 147 CLR 383. The principle was accepted, although its application to the particulars of the offence under scrutiny caused difficulties and dissent. Said Gibbs CJ at pages 389 and 390:

"At common law the principle that circumstances of aggravation not alleged in the indictment could not be relied upon for purposes of sentence if those circumstances could have been made the subject of a distinct charge appears to have been recognized as early as the eighteenth century: Dominus Rex v Turner 1718, 1 Str 140 [93 ER 435]; and see Chitty, Criminal Law, 2nd ed. (1826), vol.1, p.231b. However, the modern authorities on the point normally commence with *R v Bright* [1916] 2 KB 441]. In that case the prisoner pleaded guilty to a charge of attempting to elicit information with regard to the manufacture of war material contrary to the Defence of the Realm (Consolidation) Regulations 1914 (UK). The trial judge took the view that it was the intention of the prisoner in doing the acts charged to assist the enemy. If such an intention had been charged and proved the prisoner was liable to the death penalty. He was sentenced to penal servitude for life. The Court of Criminal Appeal held that it was wrong of the trial judge to take this circumstance of aggravation into account when it had not been charged in the indictment. Darling J., who delivered the judgment of the Court, said that the judge 'must not attribute to the prisoner that he is guilty of an offence with which he has not been charged – nor must he assume that the prisoner is guilty of some statutory aggravation of the offence which might, and should, have been charged in the indictment if it had been intended that the prisoner was to be dealt with on the footing that he had been guilty of that statutory aggravation."

[61] A number of later authorities were also cited. The most relevant for present purposes is *R v Foo* [1976] Crim LR 456. The report in *Foo* is short and I set it out in full:

“ R v Foo*: Geoffrey Lane LJ., Swanwick and Eveleigh JJ: January 15, 1976.*

Age: 24 (m). Facts: pleaded guilty to attempting to possess heroin contrary to s 5(2) and 19 of the Misuse of Drugs Act 1971. The heroin was left under a carpet in a house where he lived. It was found by another resident and F attempted to recover it, he said for a third party. There was found in his possession a letter which indicated that he was a trafficker and on this basis the judge sentenced him to four years’ imprisonment and recommended him for deportation.

Previous convictions: none.

Special considerations: it was submitted that she had not been charged under s 5(3) of the Act it was wrong to sentence him as a trafficker. Decision: in all the circumstances the submission was correct and the sentence would be varied to two years. It was a proper case for a recommendation. [W.G.]”

[62] In his commentary as Sentencing Editor of the Criminal Law Review D A Thomas stated:

“All of these principles are subject to the overriding rule that the version of the facts adopted for the purpose of sentence must be consistent with those implied by the formal determination of guilt, whether by plea or verdict. In particular the sentencer may not adopt a version of the facts, whether on his own motion or on the suggestion of the prosecution, which involves the assumption that the offender has committed either a more serious offence, a different kind of offence, or similar offences more frequently, than is reflected in the verdict; to do so would amount to depriving the offender of his right to be tried in respect of those offences. (The best illustration is probably Huchison (1972) 56 Cr App R 307). Applied to the common case of a person found in possession of a substantial quantity of drugs, these principles mean that such an offender may be dealt with on the basis that he is a trafficker or pusher only if he is convicted either of supplying the drug contrary to Misuse of Drugs Act 1971, s 4(1) or possession with intent to supply contrary to s 5(3). Where such a person is convicted or pleads guilty to ‘simple’ possession under s 5(2), the sentencer may not draw any inference of an intent to supply or of acts of supply, and sentence on that basis; although he may presumably differentiate between those in ‘simple’ possession of greater and lesser quantities of the various drugs, and those in possession of different classes of drugs.”

[63] In the case of *Vakalalabure v The State* (2006) FJSC 8; with judgment on 15th June 2006 the Supreme Court of Fiji. (Daniel Fatiaki President, Justice Kenneth Handley and Justice Michael Scott) followed *R v Bright* [1916] 2 KB 441, *R v Di Simoni* (1981) 147 CLR 383 and *Kingswell v R* (1985) 159 CLR 264 and reduced the sentence of the Appellant from 6 years imprisonment to 4 years imprisonment. Ratu Rakuita Vakalalabure had been sworn in in a televised ceremony as Attorney General and Minister of Justice on 20th May 2000 during the Speight coup. He was charged with *“taking an oath”* contrary to s 5(2) of the Public Order Ordinance and sentenced to 6 years imprisonment. The learned High Court Judge had taken into account in sentencing Ratu Rakuita that he had been a prime mover in plotting Speight’s conspiracy and putting it into action.

[64] The Supreme Court concluded:

“55. This point was not taken in the petition and was not raised before the Court of Appeal. However it is a fundamental principle of our criminal law, inherited from England, that a person must not be punished except for offences for which he had been tried and convicted. It is a necessary corollary of this principle that a convicted person must not be sentenced for uncharged offences or matters of aggravation. It applies with special force where a prosecution for those uncharged matters would be time barred.”

[65] The next Fiji case was a cannabis case heard in the Magistrates Court. Uraia Tirai a 46 year old with two recent convictions for drunk and disorderly and a number of old *"spent"* convictions had been found in possession of 617.6 grams of cannabis. He was sentenced on the basis that he was a supplier. The Magistrate said that in stating that he was remorseful he had said that he had been a supplier. The Court of Appeal heard the matter and gave judgment on 23 September 2005 and pointed out that there was no such admission in the record.

[66] The case in the Court of Appeal is *Uraia Tirai v The State* Criminal Appeal No AAU0023 of 2009. Following *Vakalalabure* supra as they were bound to do, the Court of Appeal (Byrne JA, Pathik JA and Daniel Goundar JA) said:

> *"[13] According to the court record, the appellant in his mitigation said he was remorseful. He made no mention that he was remorseful for dealing in drugs or that he was no longer dealing in drugs. We cannot find any facts to support the finding of the learned Magistrate that the appellant was supplying drugs to the public. We are satisfied that the learned Magistrate erred in taking into account the drugs were for sale as a matter of aggravation to increase the sentence by three months when there was no evidence to support that finding. The appellant was virtually sentenced for an offence for which he was not being charged and tried."*
>
> Applying the principles of law correctly it could not have made any difference even if Uraia had admitted previously being a dealer. Under these principles if the charge is possession, the offender cannot be sentenced as a supplier. Anything that is an allegation of either another offence or of a factor of aggravation that might have been charged as a more serious version of the offence cannot sound in any way when it comes to sentencing.

[67] The Court of Appeal found that the Magistrate had added three months for Uraia being a supplier. The sentence was reduced on this basis and because Uraia was not treated as substantially a person of good character. The 2 years was reduced to 1½ years imprisonment. By the time he adjudicated in *Uraia Tirai* on 23rd September 2009 Daniel Goundar JA had long since departed from the case of *Kini Sulua* who was sentenced by him on 10th April 2008. But the mistake of sentencing *"possessors"* as *"suppliers"* had arisen in Fiji from the case of *Meli Bavesi v The State* (2004) FJHC 93 of 14th April 2004. There the charge was simple possession of cannabis. The quantity was unmeasured. Meli Bavesi denied possessing it saying it had been brought there without his knowledge by a family member. In cross examination he continued to deny that the charged cannabis belonged to him. He was asked if he had supplied in the past and said he had done so. The magistrate had sentenced him to two years imprisonment. Although this was a classic situation in which the situation of *Foo* and *Murray* (both cited above) applied, the High Court Judge Justice Gerard Winter failed to consider or apply the *Vakalalabure* principle. Instead the error was compounded when Justice Winter said:

> *"In my view it is time to recognize 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."*
>
> Since *"possession with intent to supply"* was not available Meli Bavesi was charged with *"simple possession"*. On the principles discussed above and approved in *Vakalalabure* by the Supreme Court, Meli Bavesi had to be sentenced as a *"simple possessor"*.

Is there any Support in Fiji Criminal Cases for a View that
"*the Use of Marijuana in our Community is Linked to Violent Crime*"?

[68] I am grateful to Ms S Vaniqi and Ms M. Savou who, instructed by Legal Aid, appear for Sulua and Chandra in this case. They have prepared a multi faceted submission on findings in Fiji and overseas on cannabis use. They have searched reports of criminal cases and have not found consumption of cannabis (or kava) being blamed for the serious crimes sentenced by the courts. However if the search is focused on the consumption of alcohol the result is rather different. I here set out paragraphs 12 though 28 of the submission on this.

"12. Rather, the common story that is played out in criminal courts on a daily basis is that the Accused was drinking alcohol with his friends, they become drunk and went on to rob, rape or assault while heavily intoxicated. Or alternatively, the Accused was drinking all night with his co-accused, the alcohol finished and with no money left to buy more drinks, the Accused then go and rob, break into or assault.

13. A few recent examples of this are State v Waqabaca & Others – HAC 54/09 *where a group of Fijian youths, robbed, assaulted and subsequently killed a man while drunk, in an attempt to get money from him to buy more alcohol. Justice Temo made the following remark in sentencing two of the Accused for murder:*

'Simione Navalutamata was returning from work on 16th May 2009, between 8pm and 9pm. He got off the bustop at Hanson Supermarket, and then proceeded to take a short cut to his home, at Karobo Street, Makoi. You two were drinking with others near the Makoi Methodist School driveway. It was noted that you two have been drinking liquor since the morning. Mesulame, you then encouraged the others in your drinking party to attack and rob Simione. Only Tiko responded. Tiko held Simione up, while you rained punches on Simione. A heavy punch landed on Simione's left side of his head, causing brain injuries, resulting in his death.

A message of advice should be sent to our youths, through you two. They should learn to control the effects of alcohol, or it will destroy them'.

14. These same sentiments were echoed again by Justice Temo in another case of State v Vione Tegu (unreported) HAC 24/06 *involving drunk youths who attack each other, causing one to die. In sentencing the 22 year old, the court said this in relation to the effect of alcohol on the Accused and the deceased:*

'Your case is particularly a sad one, for you and your family and for Sairusi and his family. Sairusi has been dead since 28th May 2006 and you are about to lose your freedom for a long time. All because you two were unable to control the effects of alcohol. Both you and Sairusi were very drunk on 27th May 2006. Sairusi was so drunk that he started the commotion by winking at your cousin Lenaitasi's wife, while drinking beer and rum, at his home'.

15. And then again, in reference to the influence of alcohol:

"You were very drunk at the time …Your inability to control the effects of alcohol caused your present problems, and also caused Sairusi's death. As I have said in State v Mesulame Waqabaca and Tiko Uate, Criminal Case No.HAC054 of 2009S, High Court, Suva, the youths of this country must learn to control the effects of alcohol, or it will destroy them. A message will have to be sent to our youths, through you."

16. It is submitted that the reason the esteemed Judge took this harsh view was because of the number of times youths charged with serious problems appear in the criminal justice system as a result of alcohol consumption. We submit that is the true evil causing chaos in Fiji society, not those who are smoking cannabis.

17. In yet another High Court case where a person died at a drinking party is State v Atunaisa Seru and Saimoni Coka – HAC 17 of 2009. *In Kadavu, several village youths were drinking home brew and rum when a series of fights broke out, and a person died as a result. But for the alcohol consumption, the death and subsequent charges would not have been laid.*

18. In State v Anesh Ram and Others – HAC 124 of 2008*, this was another drinking party where a group of men were alleged to have taken 2 prostitutes to an isolated spot to drink beer and rum, and then raped and murdered one of the prostitutes. Again, a*

rape and murder that occurred at a drinking party where alcohol, not cannabis was being abused by the Accused and the deceased.

19. In State v Keasi Turaganikeli – HAC 6 of 2009 *another drunk deceased had left the Whistling Duck nightclub in Nausori, both heavily inebriated from a night of alcohol consumption. An altercation arose, the drunk Accused punched the deceased causing his head to land on the cement footpath causing his death. Alcohol again being the common factor here that saw an otherwise law abiding citizen and Army Officer being charged with manslaughter. Alcohol being involved, not drugs.*

20. State v Mereoni Adikube Koroi – HAC 189 of 2008 *is another case where a boyfriend and girlfriend were drinking rum and beer over a course of some 12 hours. Sexual comments were made by the deceased in front of his drunk girlfriend about one of her female friends. In a fit of rage, while heavily drunk, the Accused picked up a knife and stabbed her boyfriend twice in the chest.*

21. In State v Kean – HAV 37 of 2007 *the then Commander of the Navy was also heavily intoxicated having become drunk at his nieces wedding reception at the Yacht Club. Upon leaving the party to go home the Accused got into a fist fight with a heavily drunk deceased, also attending the reception, and the punch to the head by the Accused caused the drunk deceased to fall heavily on the concrete caused head injuries which led to his death. Both the Deceased and the Accused were intoxicated from alcohol.*

22. State v Toroca – HAC 0006 of 2004 *the accused was charged with manslaughter involving provocation as a result of the accused thinking the deceased was performing some sexual act on his drunk brother.*

23. State v Petaia Vuli – HAC 47 of 2006 *the 20 year old Accused was part of a group that was drinking rum, and when they ran out of alcohol, one of the group members decided to rob a nearby family. Drunk, and not thinking clearly, this young offender joined in the robbery in which the home owner later died because of the injuries sustained during the robbery.*

24. The Lautoka High Court case of State v Rasaku & Momoivalu – HAC 136 of 2007 *is another example where a group of youths (in this case a soccer team) got together and were drinking beer and rum at a neighbourhood bus stop. The deceased got off a minivan, and two of the drunk soccer players attacked and robbed the deceased who later died. In his sentence, Justice Govind stated on page 1, para 2 that:*

'I have no doubt that the liquor had a large part to play in this sad and tragic case where the life of an innocent person was lost. The assault was vicious in nature.'

25. And later on page 6 when deciding sentence the Court observed that:

'Sentencing for young first offenders in a case of this nature is not an easy task. I have taken cognizance of their youth and their prior good character and all that has been urged on their behalf. I am also satisfied that they are genuinely repentant and extremely remorseful for what they have done without wishing the end result. That had it not been for their intoxication this may not have occurred. I have no doubt that the two accused will not do anything similar in future and have the potential for rehabilitation.'

26. These are just several examples of how criminal activity arises as a result of intoxication from alcohol. We submit, rarely do those who abuse marijuana go on to commit a crime. The only damage that cannabis causes is on the abuser himself in that it affects his mental capacity.

27. Alcohol, however, can be directly related to many of the crimes that are committed. A majority of Fijian youths are at present incarcerated because they either got drunk and committed an offence, or wanted to drink alcohol, could not afford to, so went on a crime spree to find money to buy alcohol.

28. Therefore the Appellants submit it is drunks who cause havoc and commit crimes, not so much the marijuana users."

[69] I can find no evidence, arising from the cases, of cannabis use as a prelude to commission of a violent crime. There is one case of murder namely HAC 033 of 2005 heard before a High Court judge and assessors in 2007. A 17 year old

driver had been murdered. The prosecution case against the two accused was that they had been paid by someone to assault and beat the victim. In fact it ended up being an intentional killing. The prosecution alleged that immediately before these events both defendants had sought out and smoked cannabis. Both men were convicted. But when an unconnected person in 2009 came forward and confessed to robbing and killing the driver by himself alone there was an enquiry. Now it is accepted by the DPP on the appeal hearing and by the Court of Appeal that the two original suspects are completely innocent. See the judgment in *Senivalati Ramuwai* and *Rupeni Naisoro* Criminal Appeals AAU 81 of 2007 and AAU 81 of 2008 with judgment on 23rd March 2012. So what might have seemed evidence of cannabis consumption leading to a crime of violence, is wholly discredited. This story and similar stories may have given rise to an opinion within civil society about cannabis use leading to violent crime. But if that is true, it gives cannabis an unmerited and false reputation. On the other hand the drug which when consumed does lead to violent crime is alcohol.

Use of Cannabis by School Age Students

[70] The legal aid submission shows that in schools in Fiji in the year 2010 that there were 68 cases involving alcohol and 49 involving marijuana. Of 49 involving marijuana 39 were in the urban districts of Suva and Lautoka. But anecdotal evidence suggests that in country areas the centre of marijuana supply and use is not at school but in the villages. If so it is likely that cannabis is mostly the drug of choice of young persons around the ages of 17 and 18 and that supply and user are evenly spread over urban and rural areas. In Suva and Lautoka there are proportionately less young people living in villages and villages are socially not the same places as they are in rural areas. In cities around the world drug problems of supply and use focus on schools so far as young people are concerned.

[71] There are statistics for substance usage /abuse history from the outpatient department at St Giles Hospital. They cover the years 2005 to 2009 although there are no figures for 2008. There is a steady decline from 2005 when there were 612 cases to 2009 when there were 178 cases. In respect of cannabis there was a drop of more than two thirds from 386 in 2003 to 107 in 2009. For kava there were 57 cases in 2005 compared with 14 cases in 2009. For alcohol the figures were 99 in 2005 as compared with 15 in 2009. The only rise was for abuse of tobacco with 11 in 2005 and 38 in 2009.

[72] As to treatment of admitted mental patients in St Giles about 60% relate to schizophrenia and about 22% to mood disorder which includes depressive illness.

[73] As to whether those being counselled as outpatients for substance usage/abuse suffered from either schizophrenia or mood disorder is not shown. It may be that addicts only attended for help to reduce or finish with their particular addictions.

[74] The expert report presented to the House of Commons in 2000 of the Royal College of Psychiatrists (UK) and the Royal College of Physicians in UK said this about cannabis and schizophrenia:

> *"In individuals already affected by the condition, it can exacerbate the symptoms, but whether cannabis can cause schizophrenia is uncertain …It is not clear whether cannabis causes schizophrenia or whether the personality characteristics which predispose adolescents to use cannabis are also linked."*

[75] Unlike every developed country Fiji would seem fortunate in only having one Class B drug, cannabis in use as opposed to Class A drugs like heroin, cocaine or LSD. In as much as Fiji has kava addiction it is a problem shared only by other South Pacific nations. Alcohol abuse in Fiji at least on anecdotal evidence is probably slightly higher than in other countries. As to alcohol drinking causing crime and disorder it seems that Fiji has a more serious problem than more economically developed countries.

The Factors and the Resolution in the Kini Sulua Appeal

[76] The first point is that this Court is bound by the Supreme Court decision in *Vakalalabure* (supra) to allow the appeal in that Kini Sulua was sentenced as a supplier although convicted of simple possession. This contrasts with the appeal of Michael Ashley Chandra who was convicted of a *"supply"* offence.

[77] Therefore the outstanding issue is to focus on, in the case of Kini Sulua, what in 1976 D A Thomas in his commentary in *Foo* (supra) identified as the question. He said the sentencer (or the appeal judge):

> *"may presumably differentiate between those in 'simple' possession of greater and lesser quantities of the various drugs and those in possession of different classes of drugs."*

[78] As we have seen the international conventions were not followed in Fiji in the way they should have been and we are left in the 2004 Act with the unreformed structure of the 1938 legislation and a maximum sentence of life imprisonment. Accepting the need to differentiate sentences in respect of amounts found, whether it is Class A drugs like heroin or Class B drugs like cannabis, the life imprisonment is there for the worst possible case of *"supply"* of huge quantities of Class A drugs like heroin. So the maximum for simple possession of a huge quantity of cannabis should be around 5 years. This result is the same if stated by the legislature or obtained by application from the common law principles developed after the inception of national and international dangerous drugs legislation dating from about 1938.

[79] What is a large amount of cannabis whether in simple possession or in possession with intent to supply? This is fully discussed in paragraph 56 above. Since 1998 when guidance was given in *Ronchetti* [1998] 2 Cr App R (S) 100 large quantities are 1609 kilograms attracting a *"supply"* sentence of 13 years. For a lesser amount of 100 kilograms now attracts a *"supply"* sentence of 7 to 8 years. In between these amounts supply of 500 kilograms attracts a sentence of 10 years. So in the present situation with supply of cannabis, 5203.3 grams (5.2033 kilograms) is not a large amount. It may be regarded as a large amount but it is only one twentieth in weight of what now attracts a *"supply"* sentence of 7 to 8 years. In addition following the Supreme Court in *Vakalalabure* the sentence must be that appropriate to simple possession of 5.2 kilograms of cannabis.

[80] I note the position again for supply offences involving relatively small amounts of cannabis and I derive some guidance from these cases in these passages taken from Blackstone (2011) B19.110 (paragraph 52 above):

> *"The second group of cases involves distribution of Class B drugs, mainly cannabis. Again, a scale of sentences may be ascertained, following the Aramah guidelines. At the top end of the range, the offender in Netts [1997] 2 Cr App R (S) 117 was convicted of possessing cannabis with intent to supply. He was stopped while driving his car, which was found to contain 90 kg of cannabis resin in 24 packages. It was accepted that the*

offender was acting as a courier within the UK. A sentence of seven years' imprisonment was reduced to five years on appeal, the Court of Appeal noting that the very large quantity of cannabis involved took the case above the four year level referred to in Aramah but also taking account of the fact that the offender had no previous involvement with drugs and no convictions of any kind. In Chatfield (1983) 5 Cr App R (S) 289, the offenders pleaded guilty to possession of 2 kg of cannabis, with intent to supply. Sentences of 30 months were upheld by the Court of Appeal, Watkins LJ commenting that:

'They came somewhere between about half-way towards and the end of the bracket, allowance being made for the fact that they pleaded guilty and for their characters'.

Thirty months was said to be 'at the top end of the appropriate scale' but was upheld in Daley (1989) 11 Cr App R (S) 242, where the offender, shortly after release from prison for burglary, was seen by a police officer selling cannabis. He sold the officer a small quantity and agreed to supply more; when arrested he was in possession of 450.5 grammes of cannabis resin. He pleaded guilty. In Hill (1988) 10 Cr App R (S) 150, the offender had been dealing in cannabis from his home on a regular basis for some time, earning £100 per week from this activity. A 30-month sentence, described by the Court of Appeal as 'near the top end of the bracket for offences of this sort', was reduced to 21 months, since 'although the supply was on regular basis to a large number of people the amounts involved were comparatively small' and greater recognition should have been given to the offender's guilty plea."

[81] The sentence being appealed is 8 years. I note that *Netts* (supra) as a supplier of 90 kilograms had his sentence reduced to 5 years. So a supplier of 5.2 kilograms in the United Kingdom could expect much less than 5 years. The 8 years in the present case is excessive on the basis of these United Kingdom cases.

[82] I note that in *Chatfield* (supra) a supplier of 2 kilograms in the United Kingdom was sentenced to 2 years and to 6 months. If so 5.2 kilograms in a supply offence would attract 3 years and 3 months imprisonment. If in Fiji there was available a *"possession with intent to supply"* offence and Kini Sulua was convicted of such offence, the appropriate sentence would be 4 years and 6 months. That arises from the margins of appreciation discussed below. But clearly Kini Sulua for *"simple possession"* must not be sentenced as a supplier. What is the differential in Fiji if the supplier should receive 4 years and 6 months for 5.2 kilograms? How much less should it be for *"simple possession"* of 5.2 kilograms?

[83] I note that in *Murray* (Unreported C.A. 19.6.75 No 1139/A/75) for 3 kilograms the differential for *"simple possession"* as against *"supply"* was a reduction from 2 years to 9 months which is about 62% less. But in my view the larger the amount possessed the lower the differential between supply and *"simple possession"* should be. For 5.2 kilograms the differential should be 22% because of the significantly larger quantity by weight of cannabis involved. The result in respect of Kini Sulua is that for *"simple possession"* of 5.2 kilograms of cannabis in Fiji I propose a sentence of 3 years and 6 months.

[84] Having said in paragraph 82 above that I would increase the sentence of 3 years and 3 months applicable to a *"supply offence"* in the United Kingdom to 4 years and 6 months in Fiji. I need to explain how and to what extent margins of appreciation are applicable to the sentencing process in this case.

[85] In international human rights law there is the concept of a *"margin of appreciation"*. I have used the word such as *"around"* or *"about"* to refer to maximum sentences for differentiated categories. I have done so because the matter derives from Fiji's international treaty obligations. But while the treaties (see paragraph 35 above) require structured municipal legislation as discussed,

the details within limits are left to individual signatories. So if the maximum for possession of cannabis in England is 5 years, it follows that the *Aramah* guidelines provide sentences that are relative to the five years maximum. Since the maxima in the 2004 Fiji legislation do not state a maximum for the worst case of possession of a Class B drug such as cannabis it is appropriate to fix the maximum at a figure marginally higher than 5 years if it is adjudged that Fiji public opinion on possession of cannabis is more conservative than that applicable in the United Kingdom and other common law jurisdictions like Australia and New Zealand. In my view Fiji should work on 7 years imprisonment as the appropriate sentence for the worst imaginable case of simple possession of cannabis. The margin of appreciation on this factor I take at 20%. There is also a second margin of appreciation. Within the permissible range, it is appropriate based on the quantity by weight as derived from the *Aramah* guidelines in the United Kingdom to impose longer sentences in Fiji.

[86] A second margin of appreciation of 20% arises in this way. If public opinion is more conservative on sentencing in Fiji the appropriate sentences for given quantities by weight should be 20% higher in Fiji.

[87] For these two factors, it is appropriate to increase an appropriate United Kingdom sentence of 3 years and 3 months for a supplier of 5.2 kilogram of cannabis by about 40% to a sentence in Fiji of 4 years and 6 months. But because the omission of a relevant supply offence in the Illicit Drugs Act of 2004 Kini Sulua must be sentenced as a *"simple possessor"*. On the reasoning set out at paragraph 83 above that means that the sentence for *"simple possession"* in respect of 5.2 kilograms of cannabis is 3 years and 6 months. I propose that the sentence of 8 years in respect of Kini Sulua be reduced to a sentence of 3 years and 6 months.

The Factors and the Resolution in the Michael Ashley Chandra Appeal

[88] In the *Chandra* appeal, this court is concerned with a supplier of 2.322 kilograms of cannabis. The learned High Court judge sentenced to 6 years imprisonment. Yet in common law countries working under the same international treaties as apply in Fiji importation of 1.6 metric tonnes of cannabis was sentenced to 13 years for a principal offender and 7 years for an accomplice. That was in *Royle* [1997] 1 Cr App R (S) 184. I repeat that is said above within the revised *Aramah* guidelines in Blackstone B19.110 set out at paragraph 52 above.

> *"Importation of cannabis: Importation of very small amounts for personal used can be dealt with as if it were simple possession, with which we will deal with later. Otherwise importations of amounts up to about 20kg of herbal cannabis or cannabis resin, or the equivalent in cannabis oil, will, save in the most exceptional circumstances, attract sentence of between 18 months and three years, with the lowest ranges reserved for pleas of guilty where there has been small profit to the offender.*
>
> *Medium quantities over 20 kg will attract sentences of three to six years' imprisonment, depending upon the amount involved, and all the other circumstances of the case."*

I also derive guidance from the following digest of small scale supplying taken from Blackstone (2011) B19.110 (paragraph 52 above).

> *"The second group of cases involves distribution of Class B drugs, mainly cannabis. Again, a scale of sentences may be ascertained, following the Aramah guidelines. At the top end of the range, the offender in Netts [1997] 2 Cr App R (S) 117 was convicted of possessing cannabis with intent to supply. He was stopped while driving his car, which was found to contain 90 kg of cannabis resin in 24 packages. It was accepted that the*

offender was acting as a courier within the UK. A sentence of seven years' imprisonment was reduced to five years on appeal, the Court of Appeal noting that the very large quantity of cannabis involved took the case above the four year level referred to in Aramah but also taking account of the fact that the offender had no previous involvement with drugs and no convictions of any kind. In Chatfield (1983) 5 Cr App R (S) 289, the offenders pleaded guilty to possession of 2 kg of cannabis, with intent to supply. Sentences of 30 months were upheld by the Court of Appeal, Watkins LJ commenting that:

'They came somewhere between about half-way towards and the end of the bracket, allowance being made for the fact that they pleaded guilty and for their characters'.

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[89] Chandra is a small scale retail supplier. But the amount of cannabis at 2.322 kilograms is very small being only about one eighth of 20 kilograms. There are no previous convictions for drug offences and the only recent convictions were three convictions for assault. Since the offence is a supply offence at all levels of the relevant tariff, it is inappropriate to find in applying the relevant tariff that supply is an *"aggravating"* feature. In this case *Chandra* was informed upon by his wife after a matrimonial dispute and in such circumstances it is not appropriate to increase the sentence because he put his family members at risk of prosecution.

[90] Applying the cases of *Chatfield*, *Daley* and *Hill* digested at paragraph 88, I find that in the United Kingdom the appropriate sentence for *"supply"* of 2.322 kilograms of cannabis would be 3 years and 6 months.

[91] I have explained two applicable margins of appreciation of 20% at paragraph 85 above. The correct *"supply"* sentence for Michael Ashley Chandra in Fiji should be about 40% more than the 3 years and six months appropriate in the United Kingdom. I propose that the sentence that Michael Ashley Chandra must serve be set at 4 years and 3 months.

[92] This proposed sentence is longer than that proposed in respect of Kini Sulua. That is because in Chandra's case it is a *"supply offence"*. Although it is only about half the amount in Kini Sulua, the guidelines show that supply will always result in considerably longer sentences than possession.

Guidelines for Sentencing Possessors or Suppliers of Cannabis

[93] There are problems with the guidelines for suppliers that were set out in *Meli Bavesi v The State* Criminal Appeal No HAA 027 of 2004. For one thing the revised *Aramah* guidelines set out in paragraph 52 above (Blackstone 2011 B19-110) should be the starting point. The fact is that there is in these revised *Aramah* guidelines a comprehensive detailed coverage of the relevant area with up to date citation of precedent cases making it the preferred analytical tool.

[94] From the starting point derived from the revised *Aramah* directions, there are in my opinion two ways in which it is appropriate to apply a margin of appreciation. I repeat that the opportunity to apply margins of appreciation arises out of the context. The context requires signatories of international treaties to implement domestic dangerous drugs legislation in accordance with the instructions or norms set out or implicit in the Treaties themselves.

[95] In the case of Fiji there is clearly conservative public opinion requiring an increase in the figure derived from the revised *Aramah* guidelines. The first margin of appreciation arises in the maximum sentences appropriate for simple possession and for supply (in its various forms) in Fiji. If internationally these are fixed at 5 years for possession and 14 years for supply, the fact that the 2004 legislation has omitted to fix maxima for simple possession or supply of Class B drugs such as cannabis enables the courts, since it is appropriate to do so in Fiji, to regard the maxima as 7 years and 16 years. This results in the first margin of appreciation which will raise sentences in Fiji to higher levels than those provided in the revised *Aramah* guidelines. Recognition of higher maxima requires an upward pull on sentences for possession and supply of cannabis across the board.

[96] The second matter is that the level of sentences following the revised *Aramah* guidelines, might not be high enough to reflect public opinion in Fiji. If so they can be raised by an appropriate amount which could not be more than about 20%. In this what is under scrutiny is the application of sentences based on the third differential discussed above. The third differential looks at quantities of weight of the drugs involved. If 20 kilos for supply of cannabis requires 18 months to 3 years in the United Kingdom different conditions and public opinion in Fiji may require a 20% higher sentence.

[97] If these two factors are appropriate for conditions in Fiji they can be used to increase by about 40% over the figure arrived from the revised *Aramah* guidelines. But a higher appreciation than 40% in total could not be defensible on application of the sentencing principles derived from the international conventions. Nor could it be defensible on the sentencing principles in this context which are derived from the common law. If these margins are adopted then sentences for simple possession and for supply in its various forms will be higher in Fiji than in any other jurisdiction in the common law world. This higher tariff is justified by local conditions and local public opinion. If it is higher than 40% it cannot be justified and would be out of line with the guidelines for municipal legislation to be derived from the international conventions.

[98] As to *Meli Bavesi* there are a number of issues. Although there is lip service to *Aramah* it is based on New Zealand legislation in place many years ago. That legislation provided presumptions that if the weight of the drug was at a certain level there was a presumption of *"supply"*. That is not the approach in mainstream common law jurisdictions. An example is that under that legislation possession of 28 grams or over raised a presumption of *"supply"*. Under the revised *Aramah* guidelines possession of 28 grams of cannabis would usually not qualify for the imposition of an immediate custodial sentence.

[99] The second point concerning *Meli Bavesi* is that the cases relied upon are all New Zealand cases in the 1970s. Since then the United Kingdom decision in *Ronchetti* [1998] 2 Crim App R (S) 100 has redefined what is a large amount of cannabis. This is reflected throughout the revised *Aramah* guidelines. It results in the new threshold of 20 kilograms or over for medium suppliers attracting a

range of three to six years imprisonment. In Fiji the amounts found to be held by retailers are less than 10 kilograms and more often between 2 to 5 kilograms. Fiji is about large scale cultivation and small scale retail distribution.

[100] A third point in respect of *Meli Bavesi* is that when it comes to the guidelines for punishing suppliers there are no clear indications in respect of quantities. The High Court judge in *Chandra* where about 2.2 kilograms was involved interpreted *Meli Bavesi* as requiring a 5 years starting point. This is an error derived from the paucity of analysis and detail in *Meli Bavesi*. Yet under the very clear revised *Aramah* guidelines in the United Kingdom Chandra would have been sentenced to 2 years imprisonment at most.

[101] The legacy of *Meli Bavesi* in Fiji is unfortunate. I have referred in paragraph 71 to this case being the genesis of the erroneous practice in Fiji of sentencing possessors as suppliers. This error no doubt caused Justice Daniel Goundar in *Kini Sulua* to sentence the defendant Kini Sulua to 8 years imprisonment. Under the revised *Amarah* guidelines as operated in the United Kingdom the sentence would have been 2 years at most in respect of simple possession of 5.2 kilograms of cannabis. Indeed if Kini Sulua had been charged with a supply offence the sentence would have been 2 years at most in the United Kingdom. In my view another grave error in *Meli Bavesi* is the failure to note and highlight the absence in Fiji of an offence of *"possession with intent to supply"*. It seems that Winter J thought that the courts on a charge of possession could sentence for *"possession with intent to supply"*. This statutory offence cannot be the subject of judicial legislation. If the absence of it in the 2004 legislation had been spotted and highlighted, swift amending legislation would surely have avoided the practice of unlawfully charging with *"simple possession"* and sentencing convicted persons on the basis of *"possession with intent to supply"*.

[102] *Meli Bavesi* in Fiji at a time when differentiation between *"hard"* and *"soft"* drugs was required and when sentencing at common law also required differentiation between possessors and suppliers was a most unfortunate event. It has for years in Fiji had the baneful effect of perpetuating the handing down of sentences in respect of possession and/or supply of cannabis which were wrong in principle. It caused the errors that have resulted in the sentences on Kini Sulua and Michael Ashley Chandra which must be revised in allowing their appeals.

[103] I conclude by expressing surprise that the conservative views of Fijians has not resulted in prosecutions of large scale farmers in Navosa or elsewhere. In the revised *Aramah* guidelines set out in paragraph 56 above which cites in full Blackstone 2011 paragraph B19.110 it says *inter alia*:

> *"The commercial production of cultivation of cannabis remains a serious offence carrying substantial penalties (see Xu [2008] 2 Cr App R (S) 308, Tuckman [2005] EWCA Crim 335 and Kieu Vi To [2006] 2 Cr App R (S) 380. The crucial matter is whether the cannabis was for personal use, or for supply. In Herridge [2006] 1 Cr App R (S) 252, the Court of Appeal noted that the offence of cannabis cultivation involved a wide variation in culpability, but would ordinarily attract a custodial sentence. For cultivation of 52 cannabis plants at home, for personal use, the appropriate sentence, following a guilty plea, was six months' imprisonment. For production of cannabis on a serious commercial scale, imprisonment for four years was upheld in Booth [1997] 2 Cr App R (S) 67. It was estimated that the operation would produce between 8 and 10 kg of cannabis each year. See also Lyall (1994) 16 Cr App R (S) 600."*

If there is evidence of the numbers of plants and the annual production in terms of kilograms, it would, where the number of plants was large, justify sentences of 10 years under the revised *Aramah* guidelines in the United Kingdom. With appropriate margins

of appreciation that could equate to a justified sentence of 13 years in Fiji. Such prosecutions would result in serious changes to what is happening in Fiji at the present time. For a period distribution of cannabis might be significantly reduced. The price per unit at street level would increase. New methods of cultivation would develop. Partially at least there might be a move to supply in Fiji by importation rather than by cultivation in Fiji.

[104] **Salesi Temo JA.** Before writing this judgment, I had the honour and privilege of reading His Lordship Mr Justice William Marshall's draft judgment on this matter. Generally speaking, I have no reservation with His Lordship's observations, but for the observations I respectfully make hereunder.

[105] In paragraph 35 of His Lordship judgment, His Lordship commented:

"…In countries around the world the drug legislation is in the same format. This is because most nations are signed up to three main United Nations Conventions. These are the Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol), the Convention on Psychotropic Substances 1971 and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. Since Fiji has signed and ratified these Conventions, its international obligation is to have on the statute book, something very close to the Misuse of Drugs Act 1971 as amended from time to time just as it exists in the United Kingdom. There is almost identical legislation in Australia and other mainstream common law jurisdictions…".

[106] In paragraph 41 of his judgment, His Lordship said:

"…Since the Conventions are all listed by name, there is no doubt that the intention of the legislature was to implement the Conventions with domestic Fiji legislation. Contrary to the Conventions there is no classification into Class A, Class B and Class C. Therefore the appropriate maximum sentence for supply for heroin or cocaine which is life imprisonment appears to apply to cannabis, amphetamines, and controlled chemical compounds, without differentiation. Yet the Conventions require this differentiation. The appropriate differentiations are those contained in the United Kingdom Misuse of Drugs Act 1971 as amended. But if a seemingly maximum penalty was intended by the Fiji legislature to leave it to common law sentencing principles as applied to earlier dangerous drug legislation and in particular the 1938 Ordinance then a solution becomes possible. The courts simply differentiate sentences on whether it is possession or supply, on whether it is "hard" drugs or "soft" drugs, and on whether it is a large or small amount of drugs by weight…".

[107] Again in paragraphs 45 and 46 of his judgment, His Lordship said:

"…But in bringing a maximum of life imprisonment for supply of "hard" drugs, the 2004 Act neglected the other reforms required in 1971 by the Convention. In leaving in place the 1938 structure the legislature in 2004 omitted to provide any maximum penalty for possession of Class A, Class B and Class C Drugs. These "hard" and "soft" drugs were all lumped together. They also omitted to provide a maximum penalty for supply (in the usual various ways) of Class B and Class C drugs. Finally the Fiji legislature omitted to provide for an offence of "possession with intent to supply" which since 1971 the international consensus has required as a "supply" offence carrying "supply" penalties…The Courts must fill in the missing maxima together with differentiation between "possession" and "supply" offending and differentiation between "hard" (Class A) drugs and "soft" (Class B) drugs…".

[108] In paragraph 50 of his judgment, His Lordship said:

"…The answers based on the same Conventions that bind Fiji according to common law jurisdictions such as the United Kingdom or Australia is 5 years imprisonment for "simple possession" and 14 years imprisonment for "supply". For Fiji applying the common law principle of differentiation created by the courts and applied by them to

sentences under the 1938 legislative scheme, the answer is "around" or "about" 5 years and 14 years. I have used the words "around" or "about" because the exercise is one of implementing international treaties …" (emphasis is mine).

5 **[109]** In paragraph 52 of his judgment, headed, *" The Appropriate Sentencing Guidelines For Possession and Supply of Cannabis in Fiji "*, His Lordship said:

"…The common law of England has sentencing guidelines based on the three differentials and in particular the differential on account of the quantity by weight of the dangerous drug involved. These sentencing guidelines are decisions within a statutory framework fully derived from the international conventions. The guidelines are also 10 *kept up to date by recent sentencing decisions. They derive from Lord Lane CJ in Aramah (1982) 4 Crim App R (S) 407. They were updated by the Court of Appeal in England in Ronchetti (1998) 2 Crim App R (S) 100. Within the relevant paragraphs of Blackstone [2011] are also included an up to date case digest of relevant decisions. Both Aramah as amended, and the Blackstone 2011 digest apply to Class A, Class B and* 15 *Class C drugs. The present focus is limited to Class B drugs such as cannabis. Paragraph B19.110 explains revised Aramah and digested cases in respect of Class B drugs…"* (emphasis is mine).

[110] In my view, although His Lordship's analysis of the alleged short fall of the Dangerous Drug Legislations in Fiji, appear to be correct, with the utmost 20 respect, it is not the function of the Courts to correct it. It is not the function of the Court to import the United Kingdom Misuse of Drugs Act 1971 and its amendment to Fiji, and apply it, while paying lip service to the Illicit Drugs Control Act 2004. The Misuse of Drugs Act 1971 and its amendments were passed by the United Kingdom Parliament to deal with the drug problems in the 25 United Kingdom. Likewise, the United Kingdom case laws under the Misuse of Drugs Act 1971, were decided to resolve the drug problems in the United Kingdom. In Fiji, the drug problem be-devilling this country, was of another type.

[111] While debating the passage of the *"Illicit Drugs Control Bill 2004"* in 30 Parliament in May 2004, the then Attorney General and Minister of Justice, said the following:

"…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, 35 *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 problems in Fiji, in particular those who are planting and selling it, that is marijuana…"*

40 *"…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 (taro) and yaqona (kava), because of the speed with which they can market, as well as the commercial returns to them on these* 45 *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 (taro) and yaqona (kava). 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…"*

50 *"…With regard to the reasons for this enactment, Mr Speaker, Sir, may I mention that in sentencing two offenders, in relation to the staggering quantity of 357 kilograms of heroin found in Namadi Heights in the year 2000, that happened to be the third largest*

heroin seizure in the world's history, outside a source country. The current Chief Justice referred to a heroin importation case about 25 years ago in which the High Court lamented the poor illicit drug laws that we have in Fiji and had recommended amendments. In this recent case, the Chief Justice went on to say, and I quote: "Unfortunately, since then, (25 years ago) nothing has been done to increase the sentencing powers of the courts in relation to morphine or heroin". He also noted that: "…there is no denying that this country has been used and will continue to be used as a staging post or an easy transit point for drug traffickers unless our laws and enforcement agencies are considerably enhanced and strengthened to be able to cope with these modern developments". This legislation meets all these challenge that has been talked about head-on and takes the fight straight back to the drug pushers and producers".

[112] Given the principle of the separation of powers between Parliament/the law makers, the Executive and the Judiciary, our traditional role is to interpret and apply the will of Parliament/the law makers, as enshrined in our Legislations. Consequently, it is our solemn duty as members of the Judiciary, is to interpret and apply the Illicit Drugs Control Act 2004, notwithstanding any perceived imperfections. The United Kingdom Misuse of Drugs Act 1971, and the case laws thereunder, can be used in Fiji, as an aid to interpretation, so long as they assist in promoting and advancing the intention of the Illicit Drugs Control Act 2004. This also applied to the authorities from other commonwealth or common law countries. They should not be used, if the effect is to defeat the purpose and intention of the Illicit Drugs Control Act 2004. As courts of law, our duty is to give effect to the Illicit Drugs Control Act 2004, not to defeat it. Any amendment to the 2004 Act, is a matter for Parliament/law makers to make, rather than the Courts.

[113] I have therefore read and analyzed 50 cases decided under the Illicit Drugs Control Act 2004, to assist me draw up a sentencing guideline. Although, most of these cases were decided while citing *Meli Bavesi v The State* (2004) FJHC 93 of 2004 (now discredited: *see paragraphs 67, 93, 98 to 102 of His Lordship Justice William Marshall's judgment),* they nevertheless indicated how the Courts interpreted and viewed the Illicit Drugs Control Act 2004. The cases are attached as "appendix No 1" to this judgment, as a point of reference, to the categories I intend to propose. It must be noted that most of the 50 cases mentioned above are prosecutions for "possession of cannabis" contrary to s 5(a) of the Illicit Drugs Control Act 2004.

[114] I now propose the following four categories:

Category 1: 0 to 100 grams

Of the 50 cases referred to us by prosecution, 30 cases were prosecution for possession of cannabis below 100 grams i.e. 60%. Of the 30 cases, 14 were disposed by short prison sentences between 1 month and 12 months. Of the 30 cases, 11 were disposed by suspended prison sentences. Of the 30 cases, 5 were non-custodial sentences. It was observed from the cases, that there was a general reluctance by the courts to give a custodial sentence in this category, but if a custodial sentence was warranted, it was generally between 1 to 12 months.

When considering the 50 cases referred to us, it was found that too much time and resources had been wasted in arresting, investigating, prosecuting and sentencing those in this category. Those in this category are often the *"small players"* in the illicit drug criminal industry. There need to be a change in policy in targetting the *"big players"* in the drug industry i.e. the cultivators and suppliers. Time and resources must be re-channelled to target the *"big players"* in the industry.

It is therefore crucial that those found guilty under this category, be given a non-custodial sentence in the form of fines, community service, counseling etc. Only in the worst case scenario is a suspended prison sentence or a short sharp prison sentence warranted.

Category 2: 100 to 1,000 grams

Of the 50 cases referred to us, 11 cases were prosecution for possession of cannabis below 1,000 grams i.e. 22%. The sentences given in this category varied from a conditional discharge to 5 years imprisonment, however, for those possessing less than 500 grams, the sentence varied mostly between a discharge and 18 months imprisonment.

Those found possessing over 500 grams were given sentences between 2 to 5 years imprisonment. Looking at the 11 cases together, most of the sentences were between 1 to 3 years imprisonment. For those possessing less than 500 grams, the sentences were generally below 2 years imprisonment, while those possessing more than 500 grams, the sentences were generally more than 2 years imprisonment.

It is suggested that based on the above, the tariff be a sentence between 1 to 3 years, with those possessing below 500 grams, be sentenced to less than 2 years, and those possessing above 500 grams, be sentenced to more than 2 years imprisonment.

Category 3: 1,000 to 4,000 grams

Of the 50 cases referred to us, 5 cases were in this category i.e. 10%. The sentences given in this category varied from 3 years to 6 years imprisonment, with 4 of the cases with possession below 2,000 grams, been sentenced to between 3 to 5 years imprisonment. Only 1 case was for possession over 2,000 grams, and the sentence was 6 years imprisonment.

It is suggested that based on the above, the tariff be a sentence between 3 to 7 years imprisonment, 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 imprisonment.

Category 4: 4,000 grams and above

Of the 50 cases referred to us, 2 cases were in this category ie 4%. One was for possession of 4,833.7 grams and he got a sentence of 10 years imprisonment; the other possessed 5,200 grams, and he got a sentence of 8 years imprisonment. It was obvious that the courts were harsh on those who possess more than 4,000 grams of Indian hemp. It is suggested that based on the above, the tariff be a sentence between 7 and 14 years imprisonment.

[115] In summary, the four categories are as follows:

(i) *Category 1:* possession of 0 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, and those possessing more than 500 grams, be sentenced to more 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 between 7 to 14 years imprisonment.

[116] Section 5 of the Illicit Drugs Control Act 2004 reads as follows:

"…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 $1,000,000 or imprisonment for life or both".

[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.

[119] Furthermore, the time has come for the State to conserve its time, energy and resources. Categories numbers 1 to 3 are to be tried in the Magistrate Courts, which has jurisdiction, by virtue of sections 5(1) and 5(2) of the Criminal Procedure Decree 2009. Category 4 is to be tried in the High Court, in addition to overseeing appeals and revisions, on Categories 1 to 3 cases from the Magistrate Courts. In the 50 cases examined, the High Court's time was "bogged down" with Category 1 cases. This was a waste of scarce resources. The time has also arrived for the State to increase prosecution in Categories 3 and 4 cases. This would be consistent with the purpose and intent of the 2004 Act, as highlighted in paragraph 111 hereof.

[120] On Kini Sulua and Michael Ashley Chandra's appeal against sentence, I accept what His Lordship Mr Justice William Marshall said in paragraphs 4 to 7 of his judgment. I have noted His Lordship Mr Justice Daniel Goundar's sentencing remarks in State v Kini Sulua, Criminal Case No HAC 023 of 2008, High Court, Lautoka. If the categories mentioned in paragraph 115 hereof were applied, the case would be dealt with under Category 4. The tariff would be a sentence between 7 to 14 years imprisonment. Of the 50 cases referred to us, the 5,203.3 grams of cannabis sativa found on Kini Sulua on 10th April 2008, was the largest of the lot. In his sentencing remarks, His Lordship Justice Goundar took into account the aggravating and mitigating factors. Although, in his sentencing remarks, His Lordship commented on the commercial purpose of Mr Sulua's possession i.e. to supply or sell for a profit; this was not fatal, because in

s 5(a) of the Illicit Drugs Control Act 2004, possession and supply are treated equally. Neither offences are treated any higher or lower than the other. They enjoy the same treatment and penalties in the four categories mentioned in paragraph 115 hereof. In fact, with the utmost respect, I find that His Lordship Mr Justice Daniel Goundar had not erred in sentencing Mr Kini Sulua to 8 years imprisonment on 27th August 2008, for possessing 5,203.3 grams of cannabis sativa on 10th April 2008. In my view, the sentence is not harsh and excessive, and is consistent with the intention of the 2004 Act, as highlighted in paragraph 111 hereof.

[121] On 26th September 2008, roughly a month after the above sentence, Mr Kini Sulua, was sentenced to 2 years imprisonment, for possessing 541.5 grams of cannabis sativa, on 18th May 2005 *[Criminal Case No HAC 102 of 2008, High Court, Suva]*. His Lordship Mr Justice Daniel Goundar made the above 2 years imprisonment, concurrent to the 8 years imprisonment, mentioned above.

[122] As for Michael Ashley Chandra's sentence appeal, I have taken note of Her Ladyship Madam Justice N. Shameem's sentencing remarks in State v Michael Ashley Chandra, Criminal Case No HAC 023 of 2006, High Court, Suva. If the categories mentioned in paragraph 115 hereof were applied, the case would be dealt with under Category 3. The tariff would be a sentence between 3 to 7 years imprisonment. Although, Her Ladyship relied on the discredited authority of Meli Bavesi v The State, Criminal Appeal HAA 027 of 2004, High Court, Suva, she nevertheless did not lose sight of Parliament's intention when she said:

> *"…The maximum sentence for this offence is life imprisonment and/or $1,000,000 fine. This sentence reflects how seriously Parliament expected the courts to approach the offence of dealing in illicit drugs. It is for this reason that a non-custodial sentence is inappropriate for this sentence…"*.
>
> Her Ladyship took into account the mitigating and aggravating factors in the case. She started with 5 years imprisonment, which was within the tariff for Category 3 offences. She arrived at a sentence of 6 years imprisonment. In my view, with respect, Her Ladyship had not erred in sentencing Michael Ashley Chandra to 6 years imprisonment. The sentence was not harsh and excessive. The sentence is consistent with the intention of Parliament, as highlighted in paragraph 111 hereof.

[123] On 27th March, 2009, 9 months 8 days after the above 6 years prison sentence, Michael Ashley Chandra was sentenced on four more *"unlawful possession of cannabis sativa"* cases, contrary to s 5(a) of the Illicit Drugs Act 2004. In *HAC 041/06*, he was found in possession of 897.2 grams of cannabis sativa on 3rd October 2005. He was sentenced to 2 ½ years imprisonment on this file. In *HAC 012/08*, he was found in possession of 199.5 grams of cannabis sativa, on 27th December 2005. He was sentenced to 1 year imprisonment on this file. In *HAC 173/07*, he was found in possession of 4.7 grams of cannabis sativa, on the 2nd April 2007. He was sentenced to 3 months imprisonment. In HAC 093/08, he was found in possession of 273.1 grams of cannabis, on 7th March 2008. He was sentenced to 1 year imprisonment. All the above cases were in High Court, Suva. All the above sentences were made concurrent to each other, and concurrent to the 6 years imprisonment mentioned above. In a sense, the court was lenient on Mr Chandra.

[124] The following is my appendix 1:

APPENDIX 1

RECORD OF DRUG CASES

CATEGORY 1: 0 to 100 grams

State v John Raivotu HAC 197/08, HC, Suva; State v Rusiate HAC 031/09, HC, Suva; State v Taione Meli HAC 169/08, HC, Suva; State v Laisiasa V N HAC 35/09, HC, Suva; State v Semisi Waqa HAC 4/09, HC, Lautoka; State v Frank Wise HAC 032/09, HC, Suva; State v Ratunaisa Vunibobo HAC 014/09, HC, Lautoka; State v Sowani Daini HAC 041/09, HC, Suva; State v Alipate Naura MC 762/07, Suva; HAC 064/07, HC, Suva; State v Iliesa Namasia HAC 98/06, HC, Suva; State v Ben Cagilaba HAC 4/07, HC, Suva; State v Daniel A. Ram MC 482/07; State v David Holmes MC 320/06, Suva; HAC 118/06, HC, Suva; State v Eloni Goneyali HAC 151/08, HC, Suva; State v Eroni Saqayalo HAC 153/08, HC, Suva; State v Eroni Tabuanimeke HAC 9/07, HC, Suva; State v Eroni Yabakivou HAC 40/06, HC, Suva; State v George Pickering HAC 35/06, Suva; State v George Wise MC 284/06, Suva; HC 110/06, HC, Suva; State v Sarah L. Borba HAC 023/08, HC, Suva; State v Herbert Wise HAC 44/06, HC, Suva; State v Ilisoni Naigulevu HC 175/08, HC, Suva; State v Immanuel Smith MC 2209/06, Suva; State v Iowane Rabakele MC 1979/06, Suva; State v Jone Ravia HAC 82/06, HC, Suva; State v Jone Ravili HAC 81/06, HC, Suva; State v Jovilisi Ducia HAC 48/06, HC, Suva; State v Kelepi Ledua N. HAC 44/07, HC, Suva; State v Kemueli Busa HC 179/08, Suva; State v Daya Wati HAC 118/08, HC, Suva; State v Leone Marawa AAU 061/06, CA, Suva; State v Leone Marawa HAC 071/06, HC, Suva

CATEGORY 2: 100 to 1000 grams

State v M. Kuru HAC 199/08, HC, Suva; State v Tukai Taura HAC 146/08, HC, Suva; State v Avaitia Tulele HAA 3/08, HC, Suva; Misc Action No 4/08, CA, Suva; State v Joji Mate AAU 65/08, CA, Suva; State v Lose Helu HAC 34/06, HC, Suva; State v Manasa Naituku HAC 30/09, HC, Suva; State v Manasa Naituku HAA 005/09, Lautoka; State v Kini Sulua HAC 102/08, Suva; State v Saula Samu AAU 0085/2007, CA, Suva; State v Viliame Vuru AAU 084/07, CA, Suva; State v Uraia Tirai AAU 0023/09, CA, Suva

CATEGORY 3: 1000 to 4000 grams

State v Michael Ash. HAC 023/06, HC, Suva; & 4 other cases i.e. HAC 041/06; HAC 173/07; HAC 012/08 & HAC 093/08; State v Peni Kakalicava HAA 8/09, Lautoka; Sate v Sailosi Roko HAC 160/07, HC, Suva; State v James R. Singh HAM 86/07, HC, Suva; HAM 87/07, HC, Suva; State v Kelepi Ledua N. HAC 12/06, Labasa

CATEGORY 4: 4000 grams and above

State v Sheik Moh'd HAC 33/09, HC, Labasa; State v Kini Sulua HAC 023/08, HC, Lautoka

[125] **Fernando JA.** I agree with the judgment and reasons and the proposed orders of Salesi Temo JA.

Marshall JA.

ORDERS OF THE COURT

[126] The orders of the Court are by a majority, William Marshall JA dissenting. The orders are:

1. The sentence appeal of Kini Sulua is dismissed. His 8 years imprisonment imposed by the High Court at Lautoka, on 27th August 2008, is confirmed. He is eligible for parole after serving 5 years, from the date of sentence.

2. The sentence appeal of Michael Ashley Chandra is dismissed. His 6 years imprisonment imposed by the High Court at Suva, on 19th June 2008, is confirmed. He is eligible for parole after serving 4 years, from the date of sentence.

Appeals dismissed.

Alex de Costa
Solicitor