

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

**CRIMINAL APPEAL NO.AAU 110 of 2019**  
**[High Court at Labasa Case No. HAC 69 of 2017]**

**BETWEEN** : **ILISAVANI KOROITAMANA**

**Appellant**

**AND** : **STATE**

**Respondent**

**Coram** : **Prematilaka, ARJA**

**Counsel** : **Appellant in person**  
: **Ms. E. A. Rice for the Respondent**

**Date of Hearing** : **20 October 2021**

**Date of Ruling** : **21 October 2021**

**RULING**

[1] The appellant had been charged in the High Court at Labasa on a single count of Unlawful Cultivation of Illicit Drugs contrary to section 5(a) of the Illegal Drugs Control Act of 2004 committed between 01 August 2017 and 09 October 2017 at Naqilo, Tacilevu, Cakaudrove in the Northern Division. The information read as follows:

**'Statement of Offence**

**UNLAWFUL CULTIVATION:** *Contrary to section 5(a) of the Illicit Drugs Control Act 2004.*

**Particulars of Offence**

**ILISAVANI KOROITAMANA** : *between 01 August 2017 and 09 October 2017, at Naqilo, Tacilevu, Cakaudrove in the Northern Division, without lawful authority,*

*cultivated 462 plants of cannabis sativa, al illicit drug, weighing a total of 7.6 kilograms (7636.5grams).’*

- [2] On 13 January 2018 the appellant represented by counsel (two from the Legal Aid Commission) had pleaded not guilty. However, on the trial date namely 24 August 2018 the appellant had changed his plea to one of guilty. The trial judge had been satisfied that the appellant knew of the consequences of his plea and his plea was voluntary. The appellant had then admitted the summary of facts and the trial judge had heard his counsel on mitigation. On 27 August 2018 the appellant was sentenced to 07 years’ imprisonment with a non-parole period of 05 years.
- [3] The appellant had first signed an untimely appeal against sentence addressed to the High Court at Labasa on 19 May 2019. His appeal against conviction and sentence (signed on 19 November 2019) had reached the CA registry on 20 December 2019. He had filed amended grounds (29 July 2020 = 27 October 2020) and written submissions & additional grounds (02 October 2020). Though he is supposed to have filed Form 3 seeking to abandon his conviction appeal, it is not clear whether he intended to do as his grounds of appeal still discuss the propriety of the conviction. The State had tendered its written submissions 29 December 2020. The appellant participated at the hearing *via* Skype.
- [4] The summary of facts is as follows:

*‘8. The facts agreed are these:*

*“On 9 October 2017 police officers, acting on information, conducted a search at a farm in Naqilo, Tacilevu. They found and uprooted 264 plants. At an adjacent site they found and uprooted 198 plants. They suspected all 462 plants to be marijuana.*

*The plants were exhibited and kept at the Labasa Police Station. They were analyzed by a Government chemist who produced two separate reports for each of the seizures respectively. The total weight of the two seizures was 7.6 kilograms.”*

- [5] According to the sentencing order in an interview under caution with the police at Savusavu Police Station, the appellant had admitted having planted all 462 plants and had said that his intention was to sell the product of the plants.
- [6] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?
- [7] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].
- [8] The delay of the sentence appeal (by 19 May 2019) is over 06 months and conviction appeal (by 19 November 2019) is over 01 year; both of them are substantially delayed. Other than his ignorance of the law (that too in the context of the main appeal and not as an excuse for the delay) the appellant had not come out with any explanation for the delay. Thus, there is no acceptable explanation for the delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent has not averred any prejudice that would be caused by an enlargement of time.

- [9] The ground of appeal are not properly elaborated and somewhat obscure but could be considered under the following headings:

**Conviction grounds**

- 1. The real cultivator/owner of the cannabis sativa plants was one Josefa Taoba and the appellant was not in possession of them and he had been falsely implicated by others including the village headman. The land where plants were uprooted was Mataqali land and every member was cultivating on it. The police may have been bribed by Josefa Taoba. The appellant pleaded not guilty during interrogation.*
- 2. The plea was equivocal. The appellant's legal adviser advised him to plead guilty as the court would show lenience for offenders who plead guilty at the first opportunity and show remorse.*
- 3. The appellant was kept at the police station beyond 48 hours in breach of his Constitutional rights.*
- 4. The appellant was deprived of a fair trial as the only evidence was his guilty plea and the plants were not found in his possession. If a new trial takes place he could prove his innocence with legal representation.*

**Sentence grounds**

- 1. The sentence is manifestly wrong in principle.*
- 2. Non-parole term had exhausted all chances of rehabilitation.*

**01<sup>st</sup> ground of appeal (conviction)**

- [10] This appeal ground contains factual matters which should have been canvassed at the trial and if the appellant wished them to be considered by the High Court he should and could have contested the case and advised his counsel accordingly. Since he had chosen to plead guilty these aspects involving pure facts cannot be entertained as proper appeal points.
- [11] Therefore, there is hardly any merit in this ground of appeal.

**02<sup>nd</sup> ground of appeal**

- [12] This ground of appeal is based on ‘unequivocal plea of guilty’ arising from incompetent advocacy. According to him, he pleaded guilty as advised by his LAC counsel.
- [13] It is trite law that a guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (see **R v Murphy** [1975] VR 187) and a valid plea of guilty is one that is entered in the exercise of a free choice (see **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132).
- [14] **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter as follows:

*‘[26] The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496).’*

- [15] The High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132);

*"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did*

*not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."*

- [16] In any event, in **Ensor** [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial which later appeared to have been mistaken or unwise. Taylor J said in **Gautam** [1988] Crim. LR 109 CA (Crim Div):

*‘ ... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal. ’*

- [17] Yet, O’ Connor LJ said in **Swain** [1988] Crim LR 109 that if the court has any lurking doubt that an appellant might have suffered some injustice as result of flagrantly incompetent advocacy by his advocate it would quash the conviction. In **Boal** [1992] QB 591 where the appellant pleaded guilty on the basis of his counsel’s mistaken understanding of the law, despite having a defense which was likely to have succeeded, was regarded as grounds of appeal though not being a case of *‘flagrantly incompetent advocacy’*.

- [18] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court stated:

*‘[21] ..... It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. ....But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client.....’*

- [19] The appellant seems to suggest that the trial counsel from LAC had ill-advised him to plead guilty. However, he had not stated in any of the papers filed before this court anything that may have provided a basis to challenge his cautioned interview where he had admitted to have cultivated the cannabis plants in issue. Thus, faced with an unqualified admission, the

trial counsel appears to have given the appellant the best possible advice to tender a plea of guilty in return for the least harsh sentence. There is no evidence of equivocality in the guilty plea or '*flagrantly incompetent advocacy*' displayed by the appellant's trial counsel in this case.

[20] The Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal. The appellant had not complied with those procedural steps and therefore this ground of appeal in so far as it criticizes the trial counsel cannot be even entertained.

[21] There is no real prospect of success in this ground of appeal.

**03<sup>rd</sup> ground of appeal**

[22] The appellant complains that he was kept at the police station beyond 48 hours. Once again this could and should have been taken up as a trial issue and canvassed at the trial if the appellant wanted to make it an issue affecting the validity of his confession. If the appellant defended by his counsel raised this issue at the trial it would have afforded an opportunity for the law enforcement authorities to explain, if possible, as to why it was not reasonably possible to bring the appellant before a court of law not later than 48 hours after the time of arrest.

[23] There is nothing to substantiate the appellant's allegation at this stage. Assuming that his complaint is true the following legal position would apply. In **Heinrich v State** [2019] FJCA 41; AAU0029.2017 (7 March 2019) having considered several previous judicial decisions the Court of Appeal remarked:

*'[32] ....., I am of the view that though an accused in criminal proceedings against him is not prevented from making a collateral attack on his confessional statement on the bases of a breach of Article 13(1)(f) by the investigators, despite*

Article 44 making specific provision for enforcement of his rights under Bill of Rights, the breach of Article 13(1)(f) by itself would not be a bar for the admission of the caution interview in a court of law. However, the presiding Judge in any criminal proceedings is entitled to consider the fact of wrongful detention, length of time the accused was held under arrest, reasons for the delayed production of the accused before court, what impact the prolonged detention has had on the accused etc. in the broader context of oppression vis-à-vis the voluntariness of his confessional statement towards its admissibility. After the judge rules the caution interview voluntary and admissible, he may consider, whether it should be excluded on the general ground that it may operate unfairly against the accused, if required by the nature of the case or if the circumstances so warrant or demand.'

[24] Therefore, since detention beyond 48 hours of arrest without the accused being brought before a court of law has not been held to be absolutely critical and decisive to the admissibility of a confessional statement, it is *per se* unlikely to affect the validity of lower court proceedings. In any event, if bringing a person arrested or detained before a court of law not later than 48 hours after the time of arrest is not reasonably possible that person could be so produced as soon as thereafter in terms of section 13(1)(f) of the Constitution. Such a delay, even if unreasonable, in producing him before a judge should not *ipso facto* nullify the entire proceedings, be it at a trial or when a plea of guilty is entered.

[25] There is no real prospect of success in this ground of appeal.

#### **04<sup>th</sup> ground of appeal**

[26] There is nothing to demonstrate that there was any unfairness in the lower court proceedings. The appellant had not been charged with possession but cultivation and therefore, his assertion that he was not in possession of the cannabis plants has no relevance to the conviction at all. He did have legal representation and his plea of guilty was entered by him having first tendered a not guilty plea, obviously on a later reflection of the case against him carefully. He cannot have a second bite at the cherry under flimsy grounds such as this.

[27] There is no merit or real prospect of success in this ground of appeal.



**01<sup>st</sup> ground of appeal (sentence)**

- [28] The appellant asserts that the sentence is manifestly wrong in principle.
- [29] The appellant had been dealt with under category 4 of sentencing guidelines in **Sulua v State** [2012] FJCA 33; AAU0093.2008 (31 May 2012) where the sentencing tariff for possession of cannabis sativa of 4000g or above was set between 07-14 years of imprisonment.
- [30] The trial judge had taken 11 years based on the large seizure/quantity [462 plants of cannabis sativa weighing a total of 7.6 kilograms (7636.5grams)] as the starting point and added nothing as there were no aggravating factors. The judge had discounted 02 years for the guilty plea (tendered on the date of trial) and 01 year for the previous good character. After reducing 12 months for the remand period the final sentence became 07 years (with a non-parole period of 05 years).
- [31] There is a general state of confusion prevalent in the sentencing regime on cultivation of illicit drugs among trial judges which is yet to be resolved by the Court of Appeal or the Supreme Court.
- [32] Some High Court judges and Magistrates apply sentencing guidelines in **Sulua v State** (*supra*) in respect of cultivation as well while some other High Court judges have suggested different sentencing regimes on the premise that there is no guideline judgment especially for cultivation of marijuana<sup>1</sup> meaning that **Sulua** guidelines may not apply to cultivation and the sentences not following **Sulua** guidelines have been based by and large on the number of plants and scale and purpose of cultivation<sup>2</sup>. State has earlier cited before this court the scale of operation measured by the number of plants (incorporating potential

---

<sup>1</sup> See **State v Bati** [2018] FJCA 762; HAC 04 of 2018 (21 August 2018).

<sup>2</sup> **Tuidama v State** [2016] FJHC 1027; HAA29.2016 (14 November 2016), **State v Matakoroatu** [2017] FJHC 742; HAC355.2016 (29 September 2017), **Dibi v State** [2018] FJHC 86; HAA96.2017 (19 February 2018) and **State v Nabenu** [2018] FJHC 539; HAA10.2018 (25 June 2018).

yield) and the role of the accused as a measure of his responsibility as the basis for possible guidelines in ‘cultivation’ cases deviating from Sulua guidelines<sup>3</sup>.

[33] These disparities and inconsistencies have been amply highlighted in eleven recent Rulings<sup>4</sup> in the Court of Appeal and therefore, the same discussion need not be repeated here.

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

[35] I do not see the appellant having a real prospect of success in appeal with the sentence of 07 years of imprisonment with a non-parole period of 05 years despite the trial judge having applied Sulua guidelines given the quantity of the cannabis involved in cultivation.

---

<sup>3</sup> Raivasi v State [2020] FJCA 176; AAU119.2017 (22 September 2020) and Bola v State [2020] FJCA 177; AAU132.2017 (22 September 2020).

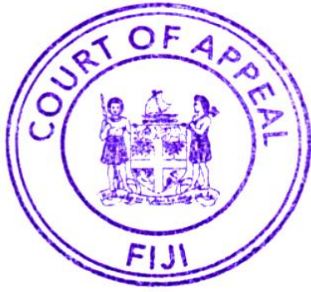
<sup>4</sup> Matakorovatu v State [2020] FJCA 84; AAU174.2017 (17 June 2020), Kaitani v State [2020] FJCA 81; AAU026.2019 (17 June 2020), Seru v State [2020] FJCA 126; AAU115.2017 (6 August 2020), Kuboutawa v State AAU0047.2017 (27 August 2020), Tukana v State [2020] FJCA 175; AAU117.2017 (22 September 2020), Qaranivalu v State [2020] FJCA 186; AAU123.2017 (29 September 2020) and Kaloulia v State [2021] FJCA 6; AAU0036.2017 (8 January 2021), Nageleca v State [2021] FJCA 7; AAU0093.2017 (8 January 2021), Ravia v State [2021] FJCA 65; AAU0071.2019 (4 March 2021), State v Tuidama [2021] FJCA 73; AAU0003.2017 (16 March 2021) and Tobua v State [2021] FJCA 155; AAU028.2019 (1 October 2021)

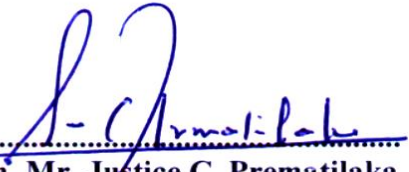
**02<sup>nd</sup> ground of appeal**

- [36] The appellant claims that the non-parole period has exhausted all chances of rehabilitation.
- [37] The legislative intention behind a court having to fix a non-parole period was to remedy the perceived mischief that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences [vide **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23; **Raogo v The State** CAV 003 of 2010: 19 August 2010)].
- [38] The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation; Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent; the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court (vide **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019)).
- [39] The sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case (vide **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154).
- [40] Assessed against the above principles I do not think that there is any sentencing error in fixing the non-parole period at 05 years.
- [41] Thus, there is no real prospect of success in the above ground of appeal.

## **Orders**

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is refused



  
.....  
**Hon. Mr. Justice C. Prematilaka**  
**ACTING RESIDENT JUSTICE OF APPEAL**