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

CRIMINAL APPEAL NO.AAU 126 of 2015
High Court Criminal Case No. HAC 084 of 2015]

BETWEEN	:	**JOSEFA VONOKULA** **ILIAVI SAULABECI**
		Appellants
AND	:	**THE STATE**
		Respondent
Coram	:	**Chandra, RJA**
Counsel	:	**Ms. S Ratu for the Appellant** **Mr. S Babitu for the Respondent**
Date of Hearing	:	**8 November, 2018**
Date of Ruling	:	**6 December, 2018**

RULING

[1] The Appellants were convicted by the High Court at Lautoka on 24thth September 2015 for the offence of Unlawful Cultivation of Illicit Drugs contrary to Section 5(a) of the Illicit Drugs Control Act, 2004 when they pleaded guilty.

[2] On 30th September 2015 they were sentenced to 10 years imprisonment with a non-parole period of 8 years.

[3] The Appellants had cultivated marijuana in the highlands of Navosa. The Police had uplifted 329 plants from two places near the stream in the jungle. The plants were sent to the Government Analyst and it was confirmed that the plants were Indian hemp, and contained 119.2 kilograms.

[4] The Appellants made a timely appeal on 13th October 2015 and their notice of appeal was amended subsequently which set out the following grounds:

i. The learned High Court Judge erred in law and fact when he failed to deduct the time the Appellants spent in remand;

ii. The learned Trial Judge erred in fact and law when he failed to justify the imposition of a non-parole period considering the circumstances of the Appellants;

iii. The learned Trial Judge erred in law and in fact when he failed to justify the starting point he chose for the sentence of the Appellants.

[5] In **Simeli Bili Naisua v State** (Criminal Appeal No.CAV0010 of 2013) the Supreme Court held that a sentence will not be interfered with by an Appellate Court unless the following errors are shown:

i. The Court acted on a wrong principle;

ii. The Court allowed irrelevant matters to guide it;

iii. The Court wrongfully considered the facts;

iv. The Court failed to take into account any relevant considerations.

[6] When sentencing the learned sentencing Judge applied the tariff set out in **Kini Sulua and Another v. The State** (2012) FJCA 33; AAU0093 (31 May 2012), according to which where the charge related to possession of cannabis sativa coming within category 4 which is possessing 4000 grams and above, the sentence should be between 7 to 14 years.

[7] The learned sentencing Judge had taken 14 years as the starting point taking into account that both Appellants had admitted in their caution interview that the cultivation was for commercial purposes and without adding anything on account of aggravating factors had taken into account the fact that the Appellants had made an early guilty plea for which 3 years were deducted and for the other mitigating factors deducted 1 year in arriving at the head sentence of 10 years. The Appellants had spent 42 days in remand.

[8] There is no indication that the remand period was deducted separately and may be argued was an error in the sentencing exercise. However, that has to be weighed against the fact of whether such error caused prejudice to the Appellants **Thakur v. State** [2018] FJCA 30; AAU0052.2012 (19 March 2018). They were given a deduction of 1 year for the mitigating factors which would have subsumed the remand period.

[9] I do not consider this to be an arguable ground as I do not see any prejudice being caused to the Appellants.

[10] The second ground of appeal relates to the failure to justify the imposition of a non-parole period.

[11] In terms of the Sentencing and Penalties Act, 2009 Section 18(1) where the sentence is to be for life or for a term of 2 years or more, the Court must fix a period during which the offender is not eligible to be released on parole.

[12] The fixing of the non-parole period in the above circumstances is left to the discretion of the sentencing judge and there is no mandatory requirement to give any reasons for fixing a non-parole period. All that is required is to see that a non-parole period is set where the sentence is over 2 years and that the non-parole period should be at least 6 months less than the term of the sentence.

[13] In the circumstances of this case, I do not consider this ground to be arguable.

[14] The third ground of appeal is regarding the choosing the starting point for sentencing as 14 years by the learned Judge.

[15] As stated above the tariff that had to be considered for sentencing was between 7 to 14 years. The learned trial Judge had chosen the highest point by choosing 14 years as the starting point which at first glance would appear to be high.

[16] On the other hand, the learned trial Judge has not added to the starting point as he seems to have considered the weight of the cannabis involved and the circumstances in which the detection had been made in choosing such a high point and not got into a situation of double counting by trying to deal with the aggravating factors in addition.

[17] In the above circumstances I do not consider this ground has sufficient merit to be arguable.

Orders of Court:

The application for leave to appeal is refused.

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL