IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 63 OF 2016
(High Court HAC 61 of 2016 at Suva)

BETWEEN : **TOMASI TAWAKE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr T Lee for the Appellant**
Mr Y Prasad for the Respondent

Date of Hearing : **12 July 2018**

Date of Ruling : **30 August 2018**

RULING

[1] The appellant was convicted on 23 March 2016 on his plea of guilty on one count of cultivating without lawful authority, an illicit drug being cannabis sativa with a weight of 84.6kgs. On 1 April 2016 the appellant was sentenced to 13 years imprisonment with a non-parole term of 12 years imprisonment effective from 1 April 2016. This is his application for an enlargement of time to appeal against conviction and his timely application for leave to appeal against sentence.

[2] The appellant's notice of appeal against sentence was filed first and was timely. The notice of appeal against conviction was filed on 30 March 2017 and is about 11 months out of time.

[3] The application for the enlargement of time to appeal conviction is made pursuant to section 26(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court of Appeal power to enlarge time. The application for leave to appeal against sentence is made pursuant to section 21(1)(c) of the Act and under section 35(1) of the Act, a single judge has the power to grant leave.

[4] The factors to be considered for an enlargement of time are (a) the length of the delay, (b) the reason for the failure to file within time, (c) whether there is a ground of merit justifying the appellate court's consideration and where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced: **Kumar and Sinu –v- The State** [2012] FJSC 17; CAV 1 of 2009, 21 August 2012. The test for granting leave to appeal against sentence is whether there has been an arguable error in the exercise of the sentencing discretion (**Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013).

[5] The delay in filing the application for leave to appeal against conviction is about 11 months. The appellant has not given any compelling reasons for this lengthy delay. The question at this stage is whether the one ground of appeal against conviction is likely to succeed. The ground raises the issue of a right to choose which court the appellant wants to be tried in. That right to elect arises when the offence is one that is indictable but triable summarily. The appellant was charged and convicted under section 5(a) of the Illicit Drugs Control Act 2004. That section is silent as to whether the offences created under section 5(a) are indictable, indictable triable summarily or summary offences. The maximum penalty prescribed upon conviction is a fine not exceeding $1,000,000.00 or imprisonment for life or both.

[6] Under those circumstances it is necessary to turn to section 5 of the Criminal Procedure Act 2009 which provides:

> *"(1) Any offence under any law other than the Crimes Act 2009 shall be tried by the court that is vested by that law with jurisdiction to hear the matter.*
>
> *(2) When no court is prescribed in any law creating an offence and such offence is not stated to be an indictable offence or summary offence it may be tried in the Magistrates Court in accordance with any limitations placed on the jurisdiction of classes of magistrates prescribed in any law dealing with the administration and jurisdiction of the Magistrates Courts."*

[7] There is a statutory limit placed on the Magistrates jurisdiction by section 7 of the Criminal Procedure Act 2009. This section limits the power of a Magistrate to impose penalties not exceeding 10 years imprisonment or a fine of not exceeding 150 penalty units.

[8] In the decision of **Sulua –v- The State** [2012] FJCA 33; AAU 93 of 2008, 31 May 2012, this Court established a range of penalties depending on the weight for possession of cannabis. In a case involving cultivation of cannabis that decision may be of some assistance as a guide. The penalty range for possession of cannabis weighing 84kg (a category 4 quantity) was 7 – 14 years. It would appear that a charge for an offence under section 5(a) of the Illicit Drugs Control Act is to be tried in the Magistrates Court unless section 7 of the Criminal Procedure Act requires the matter to be tried in the High Court.

[9] The combined effect of section 5(a) of the Illicit Drugs Control Act, section 5 and section 7 of the Criminal Procedure Act and the decision of this Court in **Sulua –v- The State** (supra) is that there is no right given to an accused charged for an offence under section 5(a) of the Illicit Drugs Control Act to elect the court for trial. Jurisdiction is determined by the provisions and case law to which reference has been made above. This ground lack merit and leave is refused.

[10] In written submissions filed by the Legal Aid Commission the Court is requested to consider the grounds filed in person by the appellant before the Legal Aid Commission was engaged. One issue raised by the appellant is that his plea of guilty was equivocal and therefore the conviction should not stand. However, it is apparent that he had made full admissions to the police from the earliest days of the investigation and with Counsel present in court had formally pleaded guilty. This ground is not likely to succeed. There are lengthy submissions filed by the appellant in person concerning the trial taking place in the High Court. This issue has already been considered. This ground lacks merit and is not likely to succeed.

[11] In relation to the appeal against sentence it is arguable that the trial judge has picked a starting point of 12 years based on the weight of cultivated cannabis seized from the appellant. It is also apparent that the weight has been counted a second time as the principal aggravating factor for which a further 6 years was added. This ground is arguable. The issues of the early guilty plea, the time spent in remand being treated as mitigating factors and the discounts for mitigation in general raise arguable errors in the sentencing discretion.

[12] As a result I refuse the application for an enlargement of time to appeal against conviction and I would grant leave to appeal against sentence.

Orders:

1. *Application for enlargement of time to appeal conviction is refused.*
2. *Leave to appeal sentence is granted.*

COURT OF APPEAL FIJI

W. Calanchini

Hon Mr Justice W.D. Calanchini
PRESIDENT, COURT OF APPEAL