

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 05 of 2016

STATE

V

NAVINESH NIRMAL PRASAD

Counselors: Ms. A. Vavadakua for State
Mr. S. Sharma for the Accused

Date of Application : 12 May 2016
Date of Ruling : 12 May 2016

RULING

- [1] The accused faces three charges in this court. First, possession of 10.6 grammes of cannabis sativa. Secondly cultivation of 7000 grammes of cannabis sativa and thirdly cultivation of 87.9 grammes of cannabis sativa.
- [2] By way of notice of motion and Affidavit, the accused by his Counsel, makes application to have the three charges remitted back to the Magistrates Court for trial.
- [3] He prays in aid of his application section 5 (2) of the Criminal Procedure Code ("CPC") which states as follows:

“5-(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 magistrate prescribed in any law dealing with the administration and jurisdiction of the Magistrates Courts.”

- [4] The offences charging the accused are laid under s.5 (a) of the Illicit Drugs Control Act of 2004 which states:

*“5.(a) Any person who without lawful authority.....possesses.....cultivates...
an illicit drug: or
(b) (irrelevant)
commits an offence and is liable on conviction to a fine not exceeding \$1,000,000 or imprisonment for life.”*

- [5] Quite clearly the section creating the offence does not prescribe any court and it is not stated to be an indictable or summary offence and therefore the offences **may** be tried in the Court below.

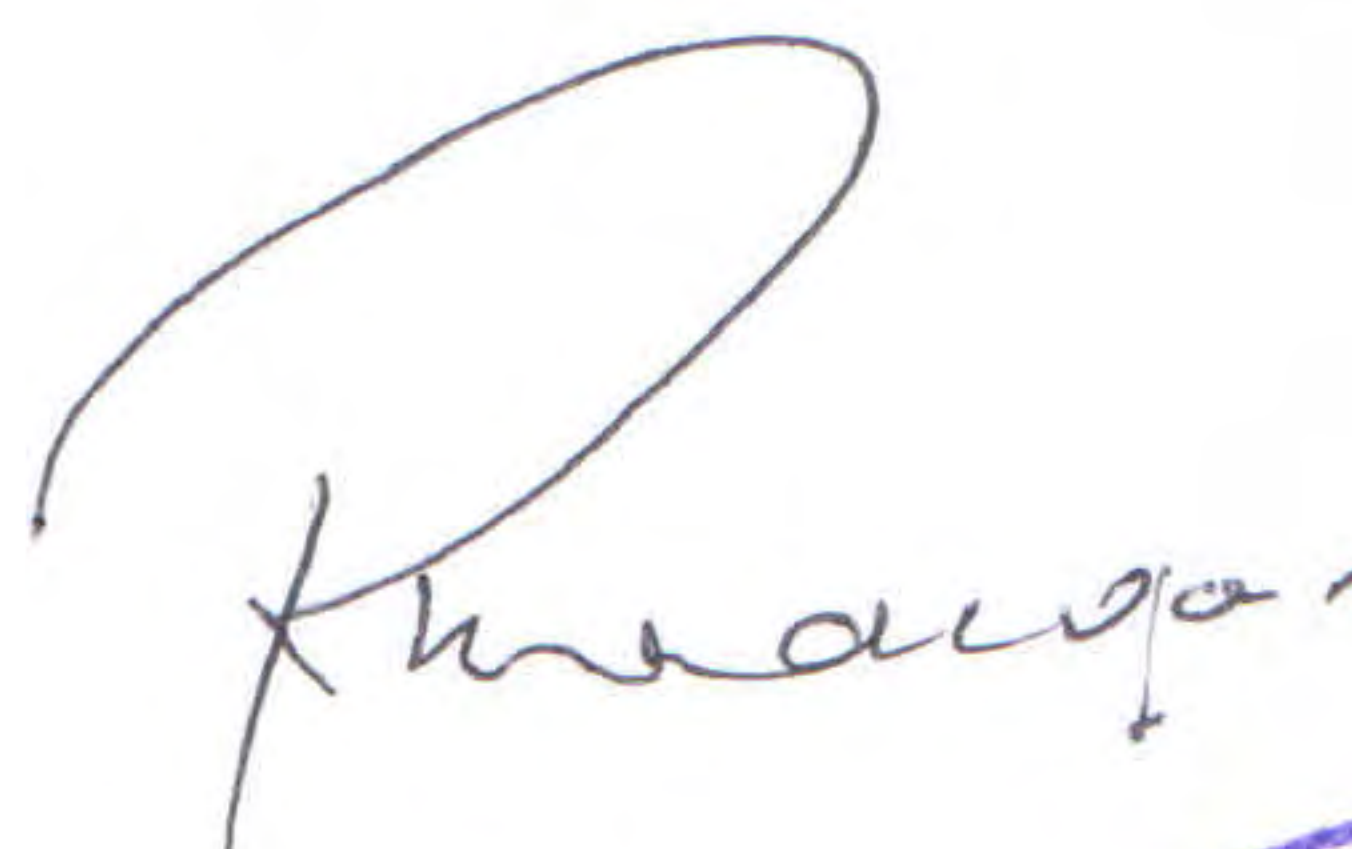
- [6] The Illicit Drug offence section is what William Marshall JA in his dissenting Judgment in **Sulua and Chandra** [2012] FJCA 33, (31 May 2012) referred to as an “omnibus maximum sentence” offence. The same maximum sentence applies to possession of any illicit drug, be it heroin, cocaine or cannabis, without differentiation. This seemingly gross injustice has in many ways been palliated by the Courts in Fiji by passing heavy sentences for “harder” drugs and more moderate sentences for “softer” recreational drugs such as cannabis sativa.

- [7] The Court of Appeal in Sulua (*supra*) with reference to possession of cannabis set out four categories of offending, each category being defined by the weight of the cannabis possessed. Temo J. A. stated that when regarding the weight, it matters not whether the drug was being “possessed”, “cultivated” “supplied” or “manufactured”.
- [8] The four categories are summarized in paragraph 115 of the judgment. It is unnecessary to rehearse that paragraph in the ruling, save as to say that the applicants second count, that is 7000 grammes of cannabis sativa would attract the most severe penalties in that the weight is classed as a Category 4, the most serious. Convictions for weights of over 4,000 grammes can lead to sentences as high as 14 years’ imprisonment.
- [9] It is for this reason undoubtedly that the Magistrate has sent the three offences to this Court to be tried, he having only the authority to pass a maximum sentence of ten years.
- [10] Although any offence under s.5 of the Illicit Drug Act **may** be tried by the Magistrates Court and it can ease the burden on the High Court if they are there tried, the High Court must try the most serious cases in order to have the unfettered right to pass appropriate sentences.
- [11] Temo J.A. on behalf of the Court of Appeal in fact authorized such a practice at para.119 of his Judgment when he said:

“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 Magistrates 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 Magistrates Courts.”*

[12] Given the likely sentence to be passed on this applicant if convicted, and given the unambiguous direction from the Court of Appeal, this application is refused. The three counts will remain in this court for trial.



P. K. Madigan

Judge



At Labasa

12 May 2016